STATE OF MICHIGAN

COURT OF APPEALS

GERALD W. CURRY, Plaintiff-Appellee,	UNPUBLISHED July 8, 2010
v	No. 292403 WCAC
AMERICAN AXLE & MANUFACTURING COMPANY and PACIFIC EMPLOYERS INSURANCE COMPANY, Defendants-Appellants.	LC No. 08-000203

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendants, American Axle & Manufacturing Company and Pacific Employers Insurance Company, appeal by leave granted an order of the Workers' Compensation Appellate Commission (WCAC), affirming the magistrate's decision to grant plaintiff Gerald Curry's request for attendant care benefits and home modifications. Because the magistrate and the WCAC failed to specifically identify a reasonable hourly rate for attendant care services and for the cost of specific home modifications, we vacate the prior orders in part and remand for the magistrate to conduct a hearing to determine a reasonable rate for the attendant care services provided by plaintiff's wife and to determine the amount of reasonable home modifications necessary to accommodate plaintiff's current condition. We affirm in part, vacate in part, and remand.

I. Basic Facts and Procedural History

In 1994, plaintiff was injured in a work-related motor vehicle accident and has been diagnosed with failed back syndrome. In 1997, he was granted an open award of worker's compensation disability benefits. Defendants were ordered to pay for attendant care services provided by plaintiff's wife from February 21, 1996 (the day after one of plaintiff's back surgeries) to October 31, 1997. Defendants were to pay plaintiff's wife for up to three hours of attendant care per day, at a rate of $6.00 per hour.

Plaintiff initiated the instant proceedings in 2006, seeking home modifications and the renewal of attendant care benefits. Plaintiff was the only witness to testify at the hearing in 2008. Plaintiff introduced the deposition testimony and medical records of his treating physician, Dr. Michael W. Loes, M.D. Defendants introduced the deposition testimony of Dr.

James H. Maxwell, M.D., who conducted an independent medical examination. Defendants also introduced video surveillance of plaintiff taken in April 2008 entering and exiting a vehicle and buildings.

Plaintiff testified that his condition has deteriorated and his wife's assistance consequently has increased, particularly in recent years. Plaintiff stated that he has lower back and leg issues, bowel incontinence, and depression. He also experiences frequent falls, difficulty sleeping, and urinary incontinence. Plaintiff's mobility is limited and he uses a back brace and canes. Plaintiff stated that his wife supervises him most of the time and provides him assistance. For example, his wife helps him in cleaning up his bowel accidents, massages his legs and back, applies medicated creams and patches to his back, helps him shower and dress, helps him walk, and makes sure he does not fall.

The magistrate found that plaintiff was a credible witness and stated that plaintiff appeared to be more distraught and depressed than he had been previously. The magistrate added:

> Dr. Loes' opinion was similar. He stated that "[plaintiff] presents in such a straightforward manner that there doesn't seem to be anything that's not clear when he talks to you, and that's validated by his wife." Because of the time he has spent with plaintiff since 2001, he asserted: "I know Mr. Curry very well."
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> Defendants' attorney asked the following question: "If the history is different than you've been led to believe, in significant manners, regarding his ability to walk, stand, drive, carry objects, would that have any bearing on your opinions?" He testified: "Well, of course it would. But I would be flabbergasted if such information existed." Neither the video surveillance nor the rest of the record in the present hearing revealed anything significantly different than the picture seen by Dr. Loes. Seeing "no reason" to question plaintiff's trustworthiness, Dr. Loes has always felt "that he's honest and appropriate."
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> Both Dr. Maxwell and Dr. Loes diagnosed failed back syndrome. Both attested to the presence of psychological complications. Dr. Maxwell spoke of a significant overlay while Dr. Loes noted depression, anxiety, and "associated psychosocial stress." He documented the intensity of plaintiff's pain, which he alternately referred to as extreme, intractable, complex, chronic, refractory, advanced, and horrific. Lumbar radiculopathy was part of Dr. Loes' diagnostic impression too. His testimony and records confirm the presence of exquisite tenderness, severe muscle spasm, which he described as board-like or rock-hard, flattened lumbar lordosis, and extremely reduced lumbar motion.
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> On a single occasion, Dr. Maxwell performed an independent medical examination on behalf of defendants. PX2 indicates that Dr. Loes treated plaintiff on ninety-two occasions from 2001 through May 21, 2008. With the unanimous diagnosis of failed back syndrome, this is a case in which greater weight deserves to be accorded to the treating physician. Consequently, where their opinions differ, it is found that the findings and opinions of Dr. Loes are more credible and persuasive than those of Dr. Maxwell.

> Dr. Loes has concluded that the various forms of assistance rendered by plaintiff's wife are justified for four hours per day. That parallels the testimony of plaintiff. It is found that defendants are liable for payment to plaintiff's wife for attendant care for four hours per day. Her services, conveniently summarized in Dr. Loes' Progress Note for May 21, 2008, are reasonable and necessary and are necessitated by the injury sustained on August 19, 1994.
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> Subsection (3) of Section 381 of the Act provides: "Payment for nursing or attendant care shall not be made for any period which is more than 1 year before the date an application for hearing is filed with the bureau." This provision bars an award of attendant care prior to October 19, 2005. Defendants' liability for attendant care shall commence on that date and continue until further order.
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> The record does not establish an appropriate hourly rate for the attendant care services performed by plaintiff's wife. If the parties are unable to agree to a reasonable rate, either or both of them shall have a right to a hearing to establish that rate upon the filing of an Application.
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> Plaintiff did not testify about home modifications. The testimony of Dr. Loes and Dr. Maxwell supports the need for home modifications such as railings and bars to facilitate plaintiff's movements at home and to prevent further falls. Should the parties be unable to reach agreement concerning what is reasonable with reference to home modifications, either or both of them may apply for a further hearing thereon.

Defendants appealed to the WCAC, claiming that plaintiff had failed to establish that attendant care and home modifications were reasonable and necessary. Defendants also argued that res judicata barred the award of attendant care benefits, and that, even assuming attendant care benefits are proper, there is no evidence that they were reasonable and necessary as far back as October 2005. Defendants finally contended that any such benefits must be set off against plaintiff's wife's recovery in a third-party tort action for loss of consortium.

The WCAC found defendants' claims to be without merit. The WCAC concluded that res judicata did not apply to the attendant care benefits where plaintiff established that his condition had deteriorated and he now requires attendant care. The WCAC found that the 1997 attendant care rate of $6.00 per hour controlled given the lack of evidence that the rate for such care as provided by plaintiff's wife has changed. As for defendants' argument that they were entitled to a set off against plaintiff's wife's recovery in the third-party tort action, the WCAC concluded that the argument was without merit because the damages received by plaintiff's wife for loss of consortium in the third-party action were fundamentally different than her compensation for providing attendant care services. We agree and a set off would be improper. See *Hearns v Ujkaj*, 180 Mich App 363, 370-371; 446 NW2d 657 (1989); *Lone v Esco Elevators, Inc*, 78 Mich App 97, 107-108; 259 NW2d 869 (1977).

Regarding home modifications, the WCAC noted that both medical experts believed that plaintiff's home should have assistive railings and bars. However, the WCAC also found that "there is a difficulty in determining the precise modification and the precise cost of those modifications" since "the passage of time makes it all but impossible for the proofs in 2008 to

have any bearing on the costs a year later when the modifications are actually undertaken." But the WCAC concluded that any ambiguity in the award of home modifications did not warrant relief, as "the magistrate's order is as specific as the circumstances can reasonably require."

II. Standard Of Review

Review under the WDCA is limited. *Rakestraw v General Dynamics Land Systems*, 469 Mich 220, 224; 666 NW2d 199 (2003). In the absence of fraud, the appellate courts consider the WCAC's findings of fact conclusive if any competent evidence in the record exists in support. MCL 418.861a(3). Where substantial evidence on the whole record does not exist to support the magistrate's factual finding, the WCAC may substitute its own finding of fact for that of the magistrate. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 698-699; 614 NW2d 607 (2000). In contrast, in the absence of fraud, this Court must treat findings of fact made by the WCAC acting within its powers as conclusive. MCL 418.861a(14).

This Court, however, does not independently review whether the magistrate's findings of fact are supported by substantial evidence. *Mudel*, *supra*, at 698-699. Rather, this Court's review is complete once it is satisfied that the WCAC has understood and properly applied its own standard of review. *Id*. at 700-702. As long as the WCAC did not "misapprehend or grossly misapply" the standard of substantial evidence and the record reflects evidence supporting the WCAC's decision, then this Court must treat the WCAC's factual decisions as conclusive. *Id*. at 703 (citation omitted).

III. Attendant Care Rate

Defendants claim that the evidence did not support the award of attendant care of benefits. Defendants argue that no evidence supported the WCAC's finding that those benefits are to be paid at $6.00 per hour. MCL 418.315(1), provides, in part:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed.

The burden of proof is on the plaintiff to establish entitlement to benefits. *Stokes v Chrysler LLC*, 481 Mich 266, 274; 750 NW2d 129 (2008).

Here, the magistrate found that plaintiff was entitled to attendant care benefits for four hours per day. The record establishes by competent evidence the need for attendant care services and we do not disturb that determination. However, the magistrate noted that the "record does not establish an appropriate hourly rate for the attendant care services" and consequently left it up to the parties "to agree to a reasonable rate" or request a hearing on the issue. On appeal, the WCAC disagreed with the magistrate's decision to leave the rate issue to the parties, and went on to state:

> The rate question is, in our view, easily resolved. It was determined in the prior litigation that the value of plaintiff's wife's services as attendant care was

> $6.00 per hour. When Magistrate Smith terminated the attendant care in 1997, she did not establish that the value of plaintiff's wife's services was less and plaintiff has not established in the instant litigation that they are worth more. Defendants, also, have not established that the services are worth less. The record in the current litigation is silent, which does not bode well for the burden-bearing plaintiff, except that the prior order does establish that the value is $6.00 per hour. Because nothing has changed, the prior order controls.

Therefore, the WCAC conceded that the record was silent on the proper rate for the attendant care services, but went on to make the finding that $6.00 per hour was appropriate. The WCAC may only make independent fact findings, however, when the commission "is presented with a record that allows it to intelligently" do so. *Mudel, supra* at 711. In light of the admitted silence in the record on the issue, the WCAC did not have record support to make a finding that the proper rate for plaintiff's attendant care services $6.00 per hour.

We reject the WCAC's reliance on the prior order to establish the $6.00 hourly rate because that prior order determined the value of the attendant care services as of 1996 and 1997. It is unreasonable to presume that the hourly rate or value of a service provided in 1996 or 1997 remains the same over a decade later. The rate of the attendant care services in 1996 or 1997 has limited bearing on the rate of such services in 2005 and beyond.

Pursuant to MCL 418.315(1), plaintiff is eligible to receive "reasonable" attendant care services. The term "reasonable" includes the compensation to be paid for such services, *Sokolek v General Motors Corp,* 450 Mich 133, 144-145; 538 NW2d 369 (1995) (Brickley, C.J.), citing *Kosiel v Arrow Liquores Corp,* 446 Mich 374, 383; 521 NW2d 531 (1994). Plaintiff had the burden to establish the rate to be paid to his wife for the attendant care services. Where the record is silent on the current rate for such services, we vacate that portion of the award and remand the case for the magistrate to take proofs regarding the rate to be paid to plaintiff's wife for reasonable attendant care. This is so where the proceedings eliminated the opportunity to present the evidence at a hearing to complete the record.

IV. Home Modifications

In regard to home modifications, the magistrate found:

> Plaintiff did not testify about home modifications. The testimony of Dr. Loes and Dr. Maxwell supports the need for home modifications such as railings and bars to facilitate plaintiff's movements at home and to prevent further falls. Should the parties be unable to reach agreement concerning what is reasonable with reference to home modifications, either or both of them may apply for a further hearing thereon.

There is record support by competent evidence for the entitlement to home modifications and we do not disturb that determination. On appeal, the WCAC acknowledged that "there is a difficulty in determining the precise modification and the precise cost of those modifications," but that "the magistrate's order is as specific as the circumstances can reasonably require."

As previously mentioned, the burden of proof is on plaintiff to establish entitlement to benefits. *Stokes, supra*. Therefore, the burden was on plaintiff to establish what modifications

were reasonable and it was improper for the magistrate and WCAC to invite the parties to resolve the reasonableness issue. Where the record clearly supports that home modifications are necessary, the matter is remanded for the magistrate to take proofs regarding specific modifications and the anticipated cost.

V. Conclusion

We vacate the orders of the magistrate and the WCAC in part for the failure to specifically identify a reasonable hourly rate for attendant care services and for the cost of specific home modifications. We remand to the magistrate for the taking of further proofs on those issues.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction. Costs to neither party.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio