STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE A. BALDWIN,

Plaintiff-Appellant,

v

AMERICAN AXLE & MANUFACTURING HOLDINGS and ZURICH-AMERICAN INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
August 12, 2010

No. 291117
WCAC
LC No. 07-000056

Before: WILDER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

This matter returns to this Court on remand from our Supreme Court for consideration as on leave granted. *Baldwin v American Axle & Mfg Holdings*, 485 Mich 966; 774 NW2d 685 (2009). Plaintiff is appealing an order issued by the Workers' Compensation Appellate Commission (WCAC) on February 24, 2009, which reversed the magistrate's open award of benefits. We affirm.

Plaintiff claims to have suffered a disabling injury to her lower back on June 8, 2004, while working for her employer, defendant American Axle & Manufacturing Holdings, as an "ID" (inside diameter) grinder. In June 2006, plaintiff filed a petition for workers' compensation benefits. Hearings on her petition were held before a magistrate, in November and December 2006. At the hearing, plaintiff offered deposition testimony from Dr. Henry Tong, a physiatrist who saw plaintiff on two occasions, and defendants offered deposition testimony from Dr. Maynard Buszek, a physiatrist who examined plaintiff on two occasions and reviewed her medical records in preparation for his deposition.

One of the primary issues to be resolved was whether plaintiff's current back condition was the result of a work-related injury on June 8, 2004. Plaintiff testified that she felt a strain in her lower back, groin, and left leg while working on June 8, 2004. Plaintiff claimed that she reported the incident to her supervisor, and then worked the rest of her shift. Plaintiff also worked for two days following the incident, but while driving to work on June 11, 2004, she stopped at Oakwood Hospital for treatment for her pain. Plaintiff had surgery on her lower back on August 2, 2004, and December 14, 2004. She returned to work in September 2005, and after being transferred to the ID grinder position, she worked for three weeks until her doctor took her off work due to the pain.

The magistrate found that plaintiff met her burden to prove by a preponderance of the evidence that she suffered an injury at work on June 8, 2004, and found that the events on June 8, 2004, were the cause of plaintiff's injury:

> Based on the medical records, medical and lay testimony in this case, I find that Plaintiff has met her burden to prove by a preponderance of the evidence that she suffered an injury at work on June 8, 2004. I accept Plaintiff's credible and unrebutted testimony that she felt a pull in her back while working as an ID grinder on June 8, 2004, that she reported it that day and subsequently on June 11, 2004, and that she worked the rest of the day and for two more days until she sought medical treatment. I find that Plaintiff was straightforward, spontaneous and sincere in her testimony and I accept her explanation of what happened. Plaintiff stood up, moved around the witness chair area, and sat down again, during trial, and this was done quickly, in a matter-of-fact manner without exaggeration, and only once or twice. I did not feel that Plaintiff was attempting to gain the sympathy of the court. I also note that Plaintiff is now disabled from playing softball, working out, bowling and riding horses. Plaintiff obviously enjoyed an active, healthy lifestyle as well as working full-time and raising a child. I find that she was a highly motivated, responsible individual with a career, family and enviable good health, with no predisposition or incentive to feign disability. [Mag Op, p 10.]
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> I find credible Dr. Tong's testimony that he believes the June 8, 2004 events were the cause of Plaintiff's injury. I find that he had the proper foundation and the expertise to make such a statement. He reviewed Dr. Johnson's records, which would have included the first three MRIs. I find that the doctor's careful phrasing of his opinion as a "belief" enhances his credibility, because he is not overstating a cause about which he can only speculate. Dr. Buszek, the Defense examiner, testified that causation was not clear, but did not rule out the possibility that Plaintiff's injury was work-related. I am also troubled by the fact that he found the 1997 and 2004 MRIs to be "similar," apparently because they both referred to L4-L5. In fact that 1997 MRI result was "mild" herniation, while the 2004 MRI showed "severe" herniation combined with stenosis. Similarly, I find questionable Dr. Buszek's reliance on a CT Scan without contrast, as this type of test does not distinguish bone and soft tissue as accurately as MRI. I find that Dr. Buszek's failure to note these critical differences diminishes the value of his opinion. [Mag Op, p 13-14.]

As for whether plaintiff's current back condition was "medically distinguishable" from her pre-existing non-work related back problems, the magistrate stated:

> I find as fact that Plaintiff had a pre-existing spine condition since at least 1997, when she had an MRI demonstrating a mild degree of L4-L5 focal disc herniation. An abnormal spine condition is documented again in 2001 in an MRI showing L3-L4 and L4-L5 nerve root clumping (arachnoiditis). I find that these incidents in Plaintiff's history are "medically distinguishable" from the 2004 injury, first

> because the 2004 MRI shows paracentral herniation, second because it shows severe stenosis, and third because the stenosis appears in the spine and foramina. None of these observations were noted on the 1997 and 2001 MRIs. I find that this is objective evidence that establishes a medically distinguishable condition. I find that Plaintiff's medical and personal history substantiate this conclusion, in that she never had surgery before 2003, and she was able to carry on work, family and athletic activities before 2004. While I recognize that Plaintiff took a two-month medical leave of absence in 2001, it was a temporary leave. She regained her health, returned to work, and continued with strenuous outside activities. None of Plaintiff's previous back problems were serious enough to require surgery. [Mag Op, p 14.]

Accordingly, the magistrate granted plaintiff an open award of benefits.

Defendants appealed the award to the WCAC. Among other issues, defendants claimed that the magistrate's finding of a compensable injury was not supported by competent, material, and substantial evidence on the whole record, and that plaintiff failed to meet her burden of proof in showing a work-related injury by a preponderance of the evidence. Plaintiff countered that the magistrate's analysis was fully supported by competent, material, and substantial evidence on the whole record, and thus, should be affirmed.

In its February 24, 2009 opinion and order, the WCAC acknowledged that it was obligated to accept findings of fact by a magistrate as conclusive if those findings are supported by competent, material, and substantial evidence, citing MCL 418.861a(3) and *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). After setting forth the applicable law and standard of review, the WCAC prefaced its legal analysis as follows:

> We reverse the magistrate's finding that what she found occurred on June 8, 2004, constitutes an injury that is compensable under the Act because the information provided does not meet the legal requirements. And, to the extent that the information does point in the direction of an injury, it does not prove the date of injury upon which plaintiff relies. There is a paucity of medical information presented to establish an injury, much less an injury that is causally related to the performance of work. There is some evidence (mostly presented by plaintiff, or derived from her) that plaintiff sustained an incident in the course of her employment with this employer on June 8, but there is virtually no (and, certainly, not substantial, MCL 418.861a(3)) evidence that the injury arose out of her employment. Both requirements must be met. MCL 418.301(1), first sentence. *Appleford v Kimmel*, 297 Mich 8, 12 (1941). [WCAC Op, p 5.]

The WCAC first focused on the testimony of Dr. Tong, upon whom the magistrate relied in finding a causal connection, and noted the following deficiencies:

> Dr. Henry Tong appears to be the last treating doctor in a lengthy line of doctors who have treated plaintiff since the incident at work. He did not see plaintiff until some 20 months after the incident at work when an orthopedic surgeon, who had performed two surgeries on plaintiff, referred her to him. Though he had the records of the orthopedic surgeon, the hallmark of his

testimony was that he could not say specifically what happened to plaintiff at any point in time prior to his first visit with her [Dr. Tong's deposition, p 6] and he did not have the details or specifics. [*Id*., pp 6, 7, 8, 9, 10, 14, 16, 18, 19.]

The proof that plaintiff sustained an injury revolves around three answers the doctor gave. First, he acknowledged that he did not get a detailed history from plaintiff:

Q. Did Ms. Baldwin indicate what happened on or about June 8th 2004, the initial date of claim?

A. I did not get a detailed history. I just had a history that she had a work related injury that caused her pain. [Dr. Tong's deposition, p 8.]

A hypothetical question was posed to the doctor as follows:

Q. Okay. Again, doctor, assuming that the history again is correct along with the findings that you made in the course of your treatment, do you have an opinion within a reasonable degree of medical certainty as to whether there is a relationship by way of causation, aggravation or acceleration in a significant manager [sic] between the injuries to Ms. Baldwin and Ms. Baldwin's employment with American Axle? [Dr. Tong's deposition, p 11.]

An objection was lodged to the hypothetical question that it was "so vague that I don't think he could possibly render a viable legal opinion. [*Id*.] The objection has sufficient merit that it should either have been granted or at least the conclusion made that the answer would not be legally sufficient.

A. Just based on the history I got from her I would say, yes, it is work related. [*Id*.]

A further attempt was made but, recognizing that plaintiff continued to perform repetitive tasks after June 8, 2004, was insufficient to establish that date as an injury date:

Q. Doctor, assuming that the history that was given to you is correct with regards to Mrs. Baldwin's duties at work and how much the parts weighed and the repetitive nature of the job, assuming that's correct, is that the type of movement or trauma that could cause a disc to herniated?

A. Yes. [Dr. Tong's deposition, pp 20-21.]

* * *

Q. Doctor, people do that work all the time and don't herniated a disc, correct.

A. Some people do, correct, yes.

Q. And you can herniate a disc sneezing or bending down to tie your shoe, can't you?

A. You are correct . . . [Dr. Tong's deposition, p 21.]

Dr. Tong's statements are not substantial evidence in support of a finding that plaintiff sustained an injury causally related to the performance of work. At no point in time was Dr. Tong given sufficient information to allow him to express a medical opinion which the magistrate could reasonably accept. Because of this lack of information, the magistrate could not reasonably discern a causal connection between work and injury. [*Miklik*, *supra* at 370.] ("There must be enough detail about that which precipitated the heart damage to enable the factfinder to establish the legal connection by a preponderance of the evidence.") [WCAC op, pp 5-7; footnotes omitted.]

The WCAC further found that the magistrate's analysis of the MRI evidence was not confirmed by any medical testimony, and that while the magistrate recited differences in them, "this is not sufficient to establish that the differences constitute pathological changes that could constitute evidence of an injury that could be related to work activities and not, for example, activities in a gymnasium.[1]" WCAC op, p 7. The WCAC concluded:

While plaintiff has no obligation to exclude non-work related causes of her injury, she does have an obligation to present a coherent and cohesive picture of what occurred to provide a foundation for the conclusion that what occurred at work (here, on a particular date) constitutes an injury for which benefits are owed. We see no logical basis for accepting parts of plaintiff's testimony upon which the magistrate relied while rejecting all of what went on before in the belief that something happened in June of 2004 that rendered the past *tabula rasa*. We cannot conclude that Dr. Tong had sufficient information upon which to premise a conclusion that plaintiff's injury was causally related to the performance of work. His reliance only upon the history --- not shown to be accurate or even consistent with the magistrate's own findings --- does not provide a medical conclusion causally relating the condition to work.

We recognize that the magistrate found plaintiff's condition in 2004 to be "medically distinguishable" from what went on before. [Magistrate's opinion, p 14.] This finding is premised in large part by the magistrate's interpretation of the

[1] The WCAC also noted that the testimony "most supportive" of the magistrate's result, which she failed to reference, was the testimony of Dr. Buszek whereby he was asked if it was possible that plaintiff herniated on the 8th and her work of bending, twisting, and lifting made it worse on the 9th, and Dr. Buszek replied that there was "some change in the pathology or a new pathology that occurred at some point after the initial onset of symptoms." The WCAC indicated that his testimony, however, did not substantiate plaintiff's claim of an injury on, or attributable to events that last occurred at work on June 8, 2004, but rather indicated an injury date of June 10, 2004, which was plaintiff's last day of work. The WCAC further noted that the medical records referenced her attendance at a gymnasium sometime during the week.

> MRI's, unconfirmed by Dr. Tong and contradicted by Dr. Buszek, but none of this establishes an injury date of June 8, 2004, causally related to the employment. If the incident she described at trial that occurred at work on June 8, 2004, "was substantially more painful and debilitating than anything she had experienced before, erasing all her previous back complaints from her memory," it does not explain how plaintiff continued to work at her same job and it does not respond to Dr. Buszek's assertion that, if plaintiff herniated a disc in her back on June 8, plaintiff "wouldn't have been able to function for those days in the workplace." [Dr. Buszek's deposition, p 24.]
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> The only injury date asserted by plaintiff is June 8, 2004. The record does not establish that what plaintiff says occurred at work on June 8 constitutes an injury causally related to work. Accordingly, the magistrate's order must be reversed. [WCAC Op, p 8-9; footnotes omitted.]

Plaintiff subsequently filed an application for leave to appeal the WCAC's order, which this Court denied for lack of merit in the grounds presented. *Baldwin v American Axle & Mfg Holdings*, unpublished order of the Court of Appeals, issued June 25, 2009 (Docket No. 291117) (Judge Stephens would have granted the application). As previously noted, the Supreme Court remanded the matter to this Court for consideration as if on leave granted.

This Court's review of the WCAC's decision is solely limited to ensuring the integrity of the administrative process. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). "As long as there exists in the record any evidence supporting the WCAC's decision, and as long as the WCAC did not misapprehend its administrative appellate role (e.g., engage in de novo review; apply the wrong rule of law), then the judiciary must treat the WCAC's factual decisions as conclusive." *Id*. at 703-704.

On appeal, plaintiff challenges the propriety of the WCAC's review of the magistrate's decision. The WCAC must review the magistrate's decision under the "substantial evidence" standard. *Id*. at 701. "Substantial evidence" means "such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion." MCL 418.861a(3). The "whole record" means "the entire record of the hearing including all of the evidence in favor and all the evidence against a certain determination." MCL 418.861a(4). The WCAC's review "shall include both a qualitative and quantitative analysis of that evidence in order to ensure a full, thorough and fair review." MCL 418.861a(13). If the magistrate's findings were supported by competent, material, and substantial evidence, the WCAC must consider them conclusive. MCL 418.861a(3). If the WCAC finds that the magistrate did not rely on competent evidence, it may then make its own independent findings of fact. However, the WCAC may not substitute its judgment for that of the magistrate if substantial evidence exists to support the magistrate's decision. *Mudel*, 462 Mich at 699-700.

Specifically, plaintiff asserts that the WCAC misapprehended its administrative appellate role by conducting a de novo review of the magistrate's decision, rather than applying its more "limited substantial evidence review." In making this argument, plaintiff quotes extensively from the WCAC's opinion (which was discussed and quoted earlier in this opinion), and then summarily declares that the WCAC's analysis "is clearly nothing short of a full-blown de novo review of the magistrate's decision." Notably, plaintiff's brief does not otherwise set forth any

explanation as to why the WCAC erred in ruling that the magistrate's opinion was not supported by competent, material, and substantial evidence. Instead, plaintiff presents a very narrow issue of whether the WCAC engaged in a de novo review.

We believe that the WCAC properly reviewed the matter within the confines of its statutory standard of review. It is clear to us from the WCAC decision that the WCAC was duly cognizant of the deference to be given to the magistrate's decision. However, the WCAC is required to review the magistrate's decision under the "substantial evidence" standard, which permits the WCAC to consider the entire record of the hearing, including all of the evidence in favor and all of the evidence against a certain determination. The WCAC thoroughly explained how Dr. Tong's testimony, plaintiff's testimony, Dr. Buszek's testimony, and the MRI evidence did not provide competent or credible support for the findings for which the magistrate cited the particular evidence. It is apparent to us that the WCAC properly engaged in the requisite comprehensive review of the "whole record" and explained why the record was inadequate to justify the magistrate's findings and why, consequently, deference to those findings was not warranted.

Therefore, we find there is no basis for plaintiff's argument that the WCAC improperly engaged in a de novo review. Given plaintiff's failure to present any further argument with respect to the WCAC's analysis or reasons for reversing the magistrate, we further find there is no basis for this Court to overturn the WCAC's decision. See *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad