STATE OF MICHIGAN

COURT OF APPEALS

LOREN D. MOHNEY,

Plaintiff-Appellant,

v

AMERICAN INTERNATIONAL GROUP, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, and SECOND INJURY FUND,

Defendant-Appellees.

UNPUBLISHED
January 31, 2013

No. 303797
Worker's Compensation
Appellate Commission
LC No. 06-000101

AFTER REMAND

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

This Court previously remanded this case to the Workers Compensation Appellate Commission (WCAC) for the WCAC to review the supplemented record and the second opinion from the magistrate. We retained jurisdiction. On remand, the WCAC found that "the supplemented record does provide the support that plaintiff's fall on February 18, 2005, occurred under such circumstances that it arose out of and in the course of plaintiff's employment with AIG," and it affirmed the magistrate's order. The matter now returns to us pursuant to our retention of jurisdiction. We affirm the WCAC's finding and order. However, we are sufficiently troubled by the findings made by the dissenting commissioner that we must briefly address them.

Our first concern is that the dissenting commissioner appears to have misread or misapprehended our remand opinion. At no point did this Court state that plaintiff failed to address whether his injury arose out of and in the course of his employment. Rather, we found that the magistrate failed to address the issue. The additional proofs were allowed not to give plaintiff a second chance, but rather to give the *magistrate* a *first* chance to consider the issue and

make findings thereon.[1] It appears to be undisputed that the record made at the first hearing before the magistrate was very nearly silent on this point, and we have not been able to find in the record that has been submitted to us any indication that the issue was seriously argued at that time. It is therefore hardly surprising that the magistrate would have regarded the issue as not worthy of consideration, let alone explicitly addressing it, until the WCAC instructed him to do so.

Next, the dissenting commissioner "concurs" with the WCAC majority that the supplemented record supported the magistrate's finding that plaintiff was injured "out of and in the course of" his employment. Therefore, the dissenting commissioner really only objects to the propriety of the remand and its scope. However, that procedural issue was clearly within the authority of the original panel. Even if the WCAC had initially been wrong to remand the matter, permitting post-remand panels to upend its own conclusions would cause chaos. The WCAC is not its own appellate body.

Furthermore, the dissenting commissioner's assertion that "all three commissioners agreed with defendant on [the] issue [of the sufficiency of plaintiff's proofs]" is incorrect. The first WCAC majority opinion signed by Commissioners Ries and Will in fact opined that Commissioner Przybylo "ma[d]e a finding that the magistrate did not make." Ries and Will noted that the parking lot had been "described, without contradiction, as 'the company parking lot'" and the place where all of the employer's employees parked. They found that under the relevant case law, the fact that the employer did not own, maintain, or control the parking lot was not dispositive. They further found that the "scanty information the record provides" did not obviously support *defendant's* position, and the magistrate had erred by simply failing to address the matter. By implication, the original majority's opinion suggests that plaintiff *did* offer proofs that at least *could* have been considered sufficient had the magistrate addressed them. As we held previously, the necessary conclusion drawn by the majority was that the record was insufficient for the WCAC to perform its function as an appellate body. Consequently, the dissenting commissioner is simply wrong in asserting that "four commissioners have decided that plaintiff's original proofs were insufficient." Only two commissioners, the dissenter and Commissioner Wyatt in the order after remand, so held.

Finally, it appears that the dissenting commissioner deems "the critical issue" to be "whether the majority was correct to find that the law does not allow plaintiff a second opportunity to present proofs." Again, at no point was the plaintiff offered a second opportunity to present proofs, but rather, the magistrate was ordered to consider the proofs plaintiff previously presented, and *both* parties were given the opportunity to expand the record on that point. Nothing in the remand order necessarily favored plaintiff to the detriment of defendant regarding the parking lot. Indeed, a strong implication from the remand order is that *defendant* was being given the opportunity to present proofs that would have *refuted* plaintiff's otherwise

[1] As we note *infra*, both parties received an equal opportunity to expand the record on remand for the magistrate's consideration, and at the time of the remand order, it was unclear which of the parties, if either, would benefit from doing so.

undisputed evidence that the parking lot was "the company parking lot." The dissenting commissioner's concern is misplaced and reflects a misunderstanding of what this Court has held. We held only that the WCAC cannot disregard a decision it previously made on the merits after remand, irrespective of whether the prior decision was erroneous—so whether the original remand was proper, something neither party challenged at the time,[2] is beside the point.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause

[2] The dissenting commissioner observes that the remand order was not appealable to this Court. This is only partially accurate—the remand order would not have been appealable as of right, but either party could have sought leave to appeal or moved for reconsideration. Consequently, neither party was without any conceivable recourse had they believed the remand order was improper or unwise.