

STATE OF MICHIGAN
COURT OF APPEALS

FAYE E. COTTONGIM, Personal Representative of
the ESTATE OF JAMES N. COTTONGIM,
deceased,

UNPUBLISHED

Plaintiff- Appellant,

v

No. 208725

WCAC

WALTER TOEBE CONSTRUCTION COMPANY
and TRANSPORTATION INSURANCE
COMPANY,

WCAC No. 91-000708

Defendants- Appellees.

ON REMAND

Before: Murphy, P.J., and Griffin and Smolenski, JJ.

SMOLENSKI, J. (concurring in part and dissenting in part).

I respectfully concur in part and dissent in part.

I concur in the majority's rejection of plaintiff's argument that the WCAC panel that decided this case was not fair and impartial due to demonstrated pro-employer bias.

However, I dissent from majority's holding that the WCAC did not exceed its authority in reversing the magistrate's decision. The critical issue in this case was not whether plaintiff's decedent, James N. Cottongim, was disabled, but rather was whether Cottongim's disability was caused by a work-related event on May 27, 1987. The magistrate found that Cottongim's disability was caused by a work-related event on May 27, 1987. Specifically, in his opinion, the magistrate relied on Cottongim's testimony indicating that Cottongim's employment with defendant Walter Toebe Construction Company generally involved heavy manual labor, including bending and lifting up to 150 pound forms and that on May 27, 1987, Cottongim was dismantling some forms when he felt a snap and severe pain on the right side of his body. The magistrate noted that Cottongim had initially complained to a doctor of heat exhaustion, but shortly thereafter complained to this doctor of pain in his right lower back and leg. The magistrate noted that the medical proofs indicated that plaintiff had a previous and subsequent history of cardiovascular problems. The magistrate noted that Cottongim was subject to differing medical diagnoses concerning the source of his disability, including disc herniation or,

alternatively, vascular problems. The magistrate also noted that plaintiff was eventually diagnosed as having a large disc fragment and subsequently underwent a lumbar laminectomy. Although the magistrate's reasoning is not a model of clarity, it is clear that the magistrate was aware of the conflicting evidence presented in the case and based his finding of work-related causation on Cottongim's testimony concerning the nature of his work and the specific event of May 27, 1987, as well as the objective medical evidence presented in the case. In accepting Cottongim's testimony, the magistrate implicitly found Cottongim credible.

In reversing the magistrate's decision, the WCAC stated that whether Cottongim's disability was work related depended entirely on Cottongim's representations. The WCAC did not find that Cottongim's testimony was suspect or incredible. Rather, the WCAC found that Cottongim's testimony that he had sustained a "snap" to his back on the day in question was simply not sufficient to constitute competent, material and substantial evidence of work related causation in light of the conflicting evidence in this case, i.e., Cottongim's prior history of vascular and back problems, his contemporaneous explanation of the May 27, 1987, incident as involving heat exhaustion or his chest and arm, and the equivocal nature of Cottongim's subsequent medical diagnoses.

I would conclude that the WCAC exceeded the scope of its statutory review power and erred in reversing the magistrate's finding of work related causation. *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 533; 563 NW2d 214 (1997). Applying the four-part test enunciated in *Goff*, I first note that there is no indication in its opinion that the WCAC was cognizant of the deference due the magistrate. *Id.* at 517. Second, the magistrate acknowledged the conflicting evidence in this case and nevertheless reasonably found that Cottongim's testimony constituted competent, material and substantial evidence of work-related causation. *Id.* at 514. The WCAC did not find Cottongim's testimony incredible or suspect. The WCAC likewise acknowledged the conflicting evidence in this case but, unlike the magistrate, determined that in light of this conflicting evidence Cottongim's testimony did not constitute competent, material and substantial evidence of work-related causation. In so doing, the WCAC simply reweighed the evidence and improperly substituted its judgment for that of the magistrate. *Id.* at 535. I would conclude that the WCAC misapprehended and misapplied the substantial evidence standard and failed to give an adequate reason grounded in the record for reversing the magistrate. *Id.* at 517.

As stated in *Goff, supra* at 514:

But it is quite possible that a reasonably minded magistrate could interpret a record differently than a reasonably minded WCAC. However, if the magistrate's conclusion is derived from competent, material, and substantial evidence, then the WCAC may not substitute its judgment for that of the magistrate notwithstanding either the reasonableness or the adequacy of the commission's conclusion.

Because the WCAC did not act in a manner consistent with the concept of administrative appellate review that is less than de novo in finding that the magistrate's decision was not supported by competent, material and substantial evidence, I would reverse the WCAC's decision and reinstate the magistrate's decision. *Id.* at 511.

/s/ Michael R. Smolenski