STATE OF MICHIGAN

COURT OF APPEALS

DENNIS G. LIVINGSTON,

Plaintiff-Appellant,

v

KOPP MASONRY CONSTRUCTION COMPANY, INCORPORATED, STATE FARM FIRE & CASUALTY COMPANY, and SILICOSIS, DUST DISEASE & LOGGING INDUSTRY FUND,

Defendants-Appellees.

UNPUBLISHED
June 30, 1998

No. 202878
WCAC
WCAC No. 93-000572

ON REMAND

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Pursuant to our Supreme Court's order of remand,[1] plaintiff Dennis Livingston appeals by leave granted from the Worker's Compensation Appellate Commission's (WCAC) decision affirming the magistrate's denial of benefits. We reverse and remand.

Plaintiff, a journeyman bricklayer since 1956, worked for defendant Kopp Masonry Construction Company in this capacity from October, 1989, until April 17, 1990, when he left work suffering from shortness of breath and incontinence. Plaintiff subsequently filed a petition for worker's compensation disability benefits. Plaintiff described the nature of his disabilities and the manner in which these disabilities occurred as follows:

> Shortness of breath; chronic obstructive pulmonary disease heart, back, and right upper extremity; prolonged and continuous exposure to dust and other atmospheric pollutants; repetitive bending, lifting and twisting of cement block and brick.

Following a hearing, the magistrate issued a written opinion in which it denied plaintiff's claim for benefits in all respects.[2] Concerning plaintiff's lung problems, the magistrate's opinion stated as follows:

> The only issue to be decided now is the issue of plaintiff's claim based upon his lung problem. I conclude from Dr. Winkler's testimony that plaintiff perhaps did have a

> pulmonary problem, but I find from the testimony that his problems were based upon plaintiff's employment with prior employers other than the defendant. I conclude from the medical testimony that the plaintiff has a non-occupational induced asthma. The medical testimony convinces me that his condition became symptomatic when exposed to everyday dust and cold air. The medical testimony convinces me that there was a mere aggravation of the plaintiff's symptoms of a lung problem, without any aggravation or acceleration of the underlying pathology. I find that with this finding, it is insufficient to establish a new date of injury with the defendant.

Plaintiff construed the magistrate's decision as a finding that plaintiff had an occupational lung disease subject to chapter four of the Worker's Disability Compensation Act (WDCA), MCL 418.401 *et seq.*; MSA 17.237(401) *et seq*. Plaintiff appealed the magistrate's decision to the WCAC on the ground that the magistrate had erroneously applied a chapter three analysis, MCL 418.301 *et seq.*; MSA 17.237(301) *et seq*., to a chapter four claim. Specifically, plaintiff argued that pursuant to § 435 of the WDCA, MCL 418.435; MSA 17.237(435), and *Hudson v Jackson Plating Co*, 105 Mich App 572; 307 NW2d 96 (1981), after remand 161 Mich App 162 (1987), he did not have to show that his last employment aggravated his lung condition, but only had to show that his last employment was of the same nature and type in which the disease was first contracted.[3] Plaintiff argued that his employment with defendant Kopp was of the same nature as the employments in which his lung disease was first contracted.

Defendant Kopp urged the WCAC to affirm the magistrate's decision. Defendant Kopp construed the magistrate's decision as finding that plaintiff suffered from two separate and distinct lung problems—a pulmonary problem caused by his prior employments and nonoccupational induced asthma. With respect to plaintiff's work-related pulmonary problem, defendant Kopp construed the magistrate's finding that "plaintiff perhaps did have a pulmonary problem, but I find from the testimony that his problems were based upon plaintiff's employment with prior employers other than the defendant" as a finding that plaintiff's employment with defendant Kopp was not of the same nature and type as his previous employments. Defendant Kopp further contended that the only condition the magistrate found to have been symptomatically aggravated by plaintiff's employment with defendant Kopp was plaintiff's nonoccupational induced asthma. Defendant Kopp contended that § 435 was thus inapplicable where the magistrate found that plaintiff's employment with defendant Kopp was not of the same nature and type as his previous employments and did not actually aggravate plaintiff's work-related pulmonary condition.

The WCAC held as follows:

> The first question is not quite so easily dealt with. Magistrate Trentacosta's opinion simply concludes that plaintiff suffered no work related aggravation to his lung pathology. Plaintiff argues that under Chapter 4 no aggravation is necessary for a finding of liability on the part of the last employer. We agree. [*Hudson, supra*.] However, further inquiry is warranted to ensure that, (a) the exposure complained of resulted in disability and, (b) the last employment was indeed of the same nature as the earlier employment(s) which caused the disability.

Magistrate Trentacosta stated:

"The only issued to be decided now is the issue of plaintiff's claim based upon his lung problem. I conclude from Dr. Winkler's testimony that plaintiff perhaps did have a pulmonary problem, but I find from the testimony that his problems were based upon plaintiff's employment with prior employers other than the defendant. I conclude from the medical testimony that the plaintiff has a non-occupational induced asthma. The medical testimony convinces me that his condition became symptomatic when exposed to everyday dust and cold air. The medical testimony convinces me that there was a mere aggravation of the plaintiff's symptoms of a lung problem, without any aggravation or acceleration of the underlying pathology. I find that with this finding, it is insufficient to establish a new date of injury with the defendant."

Upon initial review, it appears the magistrate's choice of words could result in contradictory interpretations. However, upon further study, it is clear that he stated nothing which could be interpreted as sufficient for the basing of an award.

Plaintiff would have us focus on the statement ". . . I find from the testimony that his problems were based upon plaintiff's employment with prior employers other than the defendant." However, to do so would require us to ignore the preceding portion of the same sentence where the magistrate took away with the left hand even before he appeared to give with the right. He wrote, "I conclude from Dr. Winkler's testimony that plaintiff perhaps did have a pulmonary problem, but . . ." (emphasis added). After reading the entire record, including the testimony of Dr. Petz who concluded plaintiff was not suffering from a disabling lung condition, we believe that the magistrate was simply stating that even if plaintiff was disabled by a pulmonary problem it was attributable to earlier employers, Ignoring Section 435 implications for the moment, we note that the magistrate clearly did not conclude as a matter of fact that plaintiff indeed had a disabling work related lung condition.

Although we believe the above to be dispositive, we now address the question of attribution per section 435. We hold that even if the magistrate had found plaintiff suffered a work related lung disability, the last employment was so different from the earlier employments as to render MCL 418.435 inapplicable.

Plaintiff's earlier employments took him into coke ovens where he encountered dusts from asbestos, mortar, coal and firebricks, etc. His last employment, however, merely involved laying block and brick in an outside environment which included apparently heavy winds off Lake St. Clair. He did not mix the mortar. It was brought to him already mixed and in a tub. He did testify that the dust from a brick saw bothered him, but he also stated that he stayed away from it.

Clearly, the only similarity between this and plaintiff's earlier employments was the fact that he was using mortar and brick of one sort or another. That similarity is not

> enough to trigger Chapter 4 applications. Two men might be farmers, but the one who works in the hay mow is going to encounter a great deal more dust than the one who is throwing the bales off the wagon. So it is with plaintiff in the instant case.
>
> Magistrate Trentacosta clearly placed a great deal more emphasis on plaintiff's non-work related asthma than he did on plaintiff's other pulmonary complaints. The record justifies both his differentiation and a finding that Section 435 is not applicable to these facts.
>
> The decision is affirmed.

On appeal, plaintiff relies on *Woody v Cello-Foil Products (After Remand)*, 450 Mich 588; 546 NW2d 226 (1996), to request that this Court reverse the orders below and remand this case to the magistrate "for findings of fact and conclusions of law that admit of only one interpretation."

Defendant Kopp urges this Court to affirm the WCAC. Defendant Kopp now interprets the magistrate's opinion as a finding that plaintiff suffered only nonoccupational induced asthma. Defendant Kopp contends that because the magistrate found that only plaintiff's symptoms, not his asthma, was aggravated by his employment with defendant Kopp, plaintiff's asthma does not therefore constitute an occupational disease within chapter four of the WDCA. Defendant Kopp contends that the magistrate did not err in failing to apply § 435 and the WCAC did not err "by affirming that nonapplication." Defendant Kopp now contends that the magistrate correctly applied a chapter three analysis to plaintiff's claim and the WCAC properly adopted this analysis as its own. Finally, defendant Kopp contends that both the magistrate and the WCAC properly found that plaintiff's employment with defendant Kopp was not of the same nature and type as his previous employments. Defendant Kopp contends that § 435 is therefore inapplicable on this ground also.

The WDCA requires a magistrate to file a written opinion stating his reasoning for the order, including any findings of fact and conclusions of law. MCL 418.847(2); MSA 17.237(847)(2); *Woody, supra* at 594. Conclusory findings by magistrate are inadequate. *Woody, supra* at 594-595. Findings of fact by a magistrate must be sufficiently detailed so that the reviewing body can separate the facts found from the law applied. *Id*. The reviewing body must know the path taken by the magistrate through the conflicting evidence, the testimony adopted by the magistrate, and the standards followed and reasoning used by the magistrate to reach its conclusion. *Id*. The findings must include as much of the subsidiary facts as is necessary to disclose the steps by which the magistrate reached its ultimate conclusion on each factual issue. *Id*. at 595. The findings should be made at a level of specificity which will disclose to the reviewing body the choices made as between competing factual premises at the critical point that controls the ultimate conclusion of fact. *Id*.

In this case, the magistrate's opinion contains more than the single conclusory finding at issue in *Woody*. See *id*. at 595. However, we nevertheless conclude that the magistrate failed to make sufficiently detailed findings concerning plaintiff's lung problem or problems. Specifically, we cannot conclusively determine whether the magistrate found that plaintiff suffered from one lung problem, i.e., nonoccupational induced asthma, or two lung problems, i.e., a pulmonary problem attributable to his

previous employments and nonoccupational induced asthma. Moreover, because the magistrate did not explain the law that he applied in reaching his decision, we are unable to ascertain the standards followed and the reasoning used in reaching his decision to deny plaintiff benefits. Specifically, did the magistrate decide this case as a chapter three or chapter four case? Even if we assume that the magistrate found that plaintiff suffered from an occupational disease subject to chapter four, we cannot conclusively determine whether the magistrate applied the "either/or test" enunciated in *Hudson* to this disease.[4] Thus, because the magistrate did not make findings of fact that were sufficiently detailed for us to separate the facts found from the law applied, we reverse the decisions of the WCAC and magistrate and remand this case to a magistrate for further proceedings and detailed findings of fact regarding plaintiff's lung problems. *Woody*, *supra* at 597.

Reversed and remanded. We retain jurisdiction and hold in abeyance the issue of taxable costs pursuant to MCR 7.219.

/s/ Peter D O'Connell
/s/ Roman S. Gribbs
/s/ Michael R. Smolenski

[1] *Livingston v Kopp Masonry Construction Co*, 454 Mich 903 (1997).

[2] The magistrate found that plaintiff was not disabled in his upper extremities. The WCAC affirmed this finding. Plaintiff raises no issue with respect to this claim on appeal.

[3] Section 435 provides as follows:

> The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If any dispute or controversy arises as to the payment of compensation or as to liability for the compensation, the employee shall make claim upon the last employer only and apply for a hearing against the last employer only. [MCL 418.435; MSA 17.237.]

In *Hudson*, *supra* at 577-578, this Court explained as follows with respect to § 435:

> In cases involving disability because of occupational diseases incurred while working for multiple employers, the Workers' Compensation Appeal Board appears to have developed what, for want of a better term, we call the either/or test. In cases of this type, the last employer is liable either if (a) the employee's work with the last employer caused an aggravation of the prior condition *or* (b) the last employment (no matter how brief) was of the same nature and type in which the disease was first contracted, regardless of whether the last employment aggravated the prior condition. Though decisions of this Court are by no means clear, and only may legitimately question whether liability should be found without aggravation, it appears to us that on

> appeal this Court has approved the test uniformly applied by the Workers' Compensation Appeal Board.

[4] See note 3, *supra*. Specifically, we cannot say that the magistrate's finding that "plaintiff perhaps did have a pulmonary problem, but I find from the testimony that his problems were based upon plaintiff's employment with prior employers other than the defendant" constituted a finding that plaintiff's employment with Kopp was not of the same nature and type as his previous employments. We likewise cannot say that the magistrate's finding that "there was a mere aggravation of the plaintiff's symptoms of a lung problem without any aggravation or acceleration of the underlying pathology," stated as it were in the context of the discussion concerning plaintiff's nonoccupational asthma, constituted a finding that there was no aggravation or acceleration of any occupational disease.