STATE OF MICHIGAN

COURT OF APPEALS

EVELYN R. THORNTON,

Plaintiff-Appellant,

v

A & P STORES,

Defendant-Appellee.

UNPUBLISHED
September 7, 1999

No. 208469
WCAC
LC No. 94-000257

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

This case is on remand from the Supreme Court for consideration as on leave granted. 456 Mich 906 (1997). Plaintiff appeals from a decision of the Worker's Compensation Appellate Commission (WCAC) which modified in part a decision of the magistrate. The WCAC awarded plaintiff closed benefits and reduced the amount of her average weekly wage to $309.09. The magistrate had awarded plaintiff open benefits and calculated her average weekly wage as $326.01. We reverse the order of the WCAC and reinstate the magistrate's decision.

Plaintiff began working for defendant in 1975 stocking shelves. This job required plaintiff to lift fifty or more pounds and to reach up to place items on shelves. After six years, plaintiff became a cashier. She rang up and bagged groceries. This job required plaintiff to lift up to twenty pounds. In approximately 1987, plaintiff began having difficulty with asthma. In March of 1991, plaintiff began experiencing pain in her chest. She explained that the repetitive movements of her job brought on the pain, but that the pain subsided when she was not working. Plaintiff sought treatment for her chest pain in July of 1991, and she was prescribed medication for her pain.

Plaintiff stopped working on March 22, 1992, because the pain in her chest became too severe. Plaintiff testified that she stopped working because the pain was not subsiding after she stopped working for the shift. Plaintiff remained off work until June 8, 1992, when she attempted to return to work. She was able to work only two hours before "shooting pains" in her chest prevented her from completing her shift.

Plaintiff's petition was filed on June 22, 1992, alleging injury dates of July 2, 1991, March 2, 1992, and June 13, 1992. She further alleged a disability to her chest and ribs as the result of constant and repetitive lifting and that she was exposed to allergens which significantly contributed to her asthma. At the proceedings held in November 23, 1993, plaintiff testified that the pain is the same as it was while she was working and that she cannot lift anymore.

Three physicians testified by way of deposition. Leonard Schreier, M.D., a board certified internist and allergist, first treated plaintiff on July 28, 1987 and he treated her for bronchial asthma at that time. Later, Dr. Schreier diagnosed plaintiff as having costochondritis, an inflammation of the area where the bone and cartilage part of the rib come together near the sternum. Dr. Schreier testified that plaintiff's pain was aggravated by deep breathing, such as when she would try to lift a grocery bag. Dr. Schreier concluded that plaintiff's work aggravated the costochondritis and prevented her from doing her job. He did not believe that plaintiff would be able to return to her job as a cashier. Dr. Schreier's prognosis for plaintiff was that she will have recurrent problems with her chest wall.

Timothy Laing, M.D., a board certified rheumatologist, saw plaintiff on June 2, 1993 and on subsequent dates until December 1993. Dr. Laing likewise diagnosed plaintiff as having costochondritis. He testified that there had been no significant changes in her condition or her symptoms between June and December of 1993. Dr. Laing agreed that her job might contribute to or aggravate plaintiff's condition in that the extensive use of her upper extremities with repetitive action, particularly lifting and moving heavy weights, could make the pain of the costochondritis to be worse. He specifically stated that plaintiff's job would aggravate her condition. He further testified that plaintiff would be unable to perform her duties as a cashier without experiencing a considerable degree of pain and that she would be disabled from her job and probably would be disabled from other jobs similarly requiring extensive and repetitive use of the upper extremities. His prognosis was that plaintiff would eventually recover.

Steven Gross, D.O., board certified in physical medicine and rehabilitation, examined plaintiff on February 25, 1993. He agreed that plaintiff has costochondritis. Although he did not believe that there was any direct causal relationship between plaintiff's work activities and the costochondritis, he stated that plaintiff's employment activities could have exaggerated her discomfort.

The magistrate, in a decision mailed on April 14, 1994, accepted the testimony of Dr. Schreier and Dr. Laing over the testimony of Dr. Gross. The magistrate was not convinced that plaintiff had proven that her employment caused her costochondritis by a preponderance of the evidence, but did find that plaintiff's condition was aggravated by the repetitive lifting and bending required in her job as a grocery cashier. The magistrate also found, based on Dr. Schreier's testimony, that plaintiff's condition prevented her from returning to work or to any other type of work requiring lifting or repetitive motion involving the upper chest wall and that plaintiff was totally disabled and entitled to an open award of benefits.

Defendant appealed to the WCAC. The WCAC "affirmed" with modification in a decision dated July 5, 1996. The WCAC found that there was no substantial evidence to support the grant of an open award of benefits. The WCAC concluded that plaintiff's inability to return to work was due to her

non-work related costochondritis, not due to any continuing aggravation of her costochondritis caused by her "long since ended work activities." The WCAC stated that plaintiff was entitled to benefits for a closed period, which it determined must be closed as of October 26, 1992. The WCAC also concluded that plaintiff's average weekly wage had been miscalculated because the magistrate erred in including holiday and vacation pay as discontinued fringe benefits. The WCAC reduced plaintiff's average weekly wage to $309.09.

On appeal, plaintiff challenges the WCAC's modification to a closed award and its reduction of her average weekly wage. We agree with plaintiff that the WCAC erred on both grounds. A careful review of both the magistrate's decision and the WCAC's decision reveals that the WCAC's decision is replete with factual misstatements, improper fact finding, and improper review de novo.

We begin with the scope of appellate review. Our role is to evaluate whether the WCAC exceeded its authority. *Goff v Bil-Mar Foods, Inc (After Remand),* 454 Mich 507, 538; 563 NW2d 214 (1997). In other words, we must determine whether the WCAC acted in a manner consistent with the concept of administrative appellate review that is less than de novo review in finding that the magistrate's decision was or was not supported by competent, material, and substantial evidence on the whole record. *Id.,* p 516. In assessing whether the WCAC properly exercised its reviewing power, we are to consider the following: issues of credibility determined by the magistrate; evidence accepted and rejected by both the magistrate and the WCAC; and the care, reasoning, and analysis employed by the magistrate and the WCAC in reaching their conclusions. *Id.* Where a party claims that the WCAC has exceeded its power by reversing the magistrate, meaningful review must begin with the magistrate's decision, because if competent, material, and substantial evidence based on the whole record supports the magistrate's decision, the WCAC need go no further. *Id.*, p 513. If it does go further, the WCAC is exceeding its authority. *Id.*

Plaintiff first argues that the WCAC erred in modifying the award to a closed period only because the magistrate's finding that her continuing total disability was the result of a work-related aggravation of her costochondritis is supported by competent, material, and substantial evidence on the whole record.

The magistrate first accepted the testimony of Dr. Schreier and Dr. Laing over the testimony of Dr. Gross, noting that "even Dr. Gross admitted that plaintiff's activities and employment could have exaggerated her discomfort." The magistrate then found that although she was not convinced that plaintiff had proved that her employment caused her costochondritis by a preponderance of the evidence, the magistrate specifically found that plaintiff's condition was aggravated by the repetitive lifting and bending required in her job as a grocery cashier. Finally, the magistrate stated, "Based upon Dr. Schreier's testimony that plaintiff's condition would prevent her from going back to work or anything requiring any type of lifting or repetitive motion involving the upper chest wall, I find plaintiff to be totally disabled and therefore entitled to benefits under the statute."

This Court has held that a disability based only on increased symptoms is a compensable injury within the meaning of the worker's disability compensation act (WDCA); however, the employee in such a circumstance is entitled only to a closed award of benefits. *McDonald v Meijer, Inc,* 188 Mich

App 210, 215; 469 NW2d 27 (1991). Where the employee's underlying condition has been aggravated by the employment, as opposed to only an increase in symptoms, the employee is entitled to an open award of benefits. *Id.; Cox v Schreiber Corp,* 188 Mich App 252, 259; 469 NW2d 30 (1991); *Maxwell v Procter & Gamble,* 188 Mich App 260, 268; 468 NW2d 921 (1991); *Siders v Gilco, Inc,* 189 Mich App 670, 673; 473 NW2d 802 (1991). Although this Court has noted that this may constitute a distinction without a difference, *Cox, supra,* pp 258-259, we find that the magistrate's decision to award open benefits based on her finding that plaintiff's condition (costochondritis) was aggravated by her job is entirely in accord with the above-stated rule that an employee is entitled to an open award of benefits where the underlying condition has been aggravated by the employment. See also, *Kostamo v Marquette Iron Mining Co,* 405 Mich 105, 116; 274 NW2d 411 (1979).

Moreover, the magistrate's factual findings in this regard are clearly supported by competent, material, and substantial evidence on the whole record since they are based on the findings of Dr. Schreier and Dr. Laing. The WCAC acknowledged this when it stated that "the magistrate found that plaintiff's employment aggravated plaintiff's condition. . . . This latter finding is supported by the explicit testimony of Drs. Schreier and Laing found persuasive by the magistrate, and *we affirm it*." (Emphasis added). The WCAC, however, then went on to state:

> The question that remains in light of these two supported findings [the other finding being that plaintiff's costochondritis was not caused by her work] is whether the workplace aggravation found by the magistrate was 1) pathological, changing the underlying nature of the costochondritis, or 2) merely symptomatic, but productive of continuing increased symptoms at the time of the hearing, or 3) temporary in nature, only increasing plaintiff's discomfort for a limited period of time ending sometime prior to the date of the hearing.

It is clear that the WCAC exceeded its reviewing authority in this case. Having affirmed the magistrate's finding that plaintiff's employment aggravated her condition as being supported by the explicit testimony of Dr. Schreier and Dr. Laing (competent, material, and substantial evidence on the whole record), the WCAC was required to go no further. There were no questions that remained. Because plaintiff's job requirements aggravated her condition to the point of total disability, as found by the magistrate, she was entitled to continuing benefits. *Cox, supra,* p 259. There was no need for the WCAC to go any further once it affirmed the magistrate's finding that plaintiff's employment, requiring repetitive lifting and bending, aggravated her condition and was supported by the medical testimony of Dr. Schreier and Dr. Laing.

Moreover, we note that the WCAC made numerous impermissible fact findings and misstated findings assertedly made by the magistrate. For example, one glaring instance of the WCAC's complete mischaracterization of the magistrate's opinion occurs where the WCAC states that the magistrate concluded that plaintiff's activities merely "exaggerated [plaintiff's] discomfort." The magistrate did *not* conclude that plaintiff's work activities merely exaggerated her discomfort. Rather, Dr. Gross testified at his deposition that he did not believe that plaintiff's employment caused her costochondritis, but that her work requirements could have exaggerated her discomfort. The magistrate, in reality, accepted the testimony of Dr. Schreier and Dr. Laing over the testimony of Dr.

Gross and noted that "even Dr. Gross admitted that plaintiff's activities and employment could have exaggerated her discomfort." At no point did the magistrate find this as a fact however. The WCAC then seized upon this asserted fact finding of the magistrate (which we emphasize the magistrate did not make) to conclude that the magistrate "must have contemplated the third answer," that is, that plaintiff's aggravation was temporary in nature, only increasing plaintiff's discomfort for a limited period of time ending sometime before the date of the hearing. The WCAC then purported to conclude that plaintiff's work activities only temporarily aggravated her preexisting non-work related costochondritis.

This is nothing more than an attempt by the WCAC to engage in review de novo and substitute its judgment for that of the magistrate. It obviously bears repeating that the 1985 amendments to the WDCA eliminated de novo review by the WCAC. *Goff, supra,* p 512; *Farrington v Total Petroleum, Inc,* 442 Mich 201, 212; 501 NW2d 76 (1993); *Holden v Ford Motor Co,* 439 Mich 257, 261; 484 NW2d 227 (1992). Further, to the extent that the WCAC believed that it could engage in fact finding in the absence of such by the magistrate, the WCAC was again incorrect. *Layman v Newkirk Electric Assoc, Inc,* 458 Mich 494, 507; 581 NW2d 244 (1998); *Woody v Cello-Foil Products (After Remand),* 450 Mich 588, 597; 546 NW2d 226 (1996). Additionally, in an attempt to close plaintiff's benefit period to October 1992, the WCAC misstated Dr. Schreier's testimony. Dr. Schreier concluded that plaintiff's work aggravated the costochondritis and prevented her from doing her job, and he did not believe that plaintiff would be able to return to her job as a cashier. Dr. Schreier's prognosis for plaintiff was that she would have recurrent problems with her chest wall. This is contrary to the WCAC's conclusion that "there is no substantial indication that such work-related inflammation was either ongoing at the time of the hearing or that it constitutes a permanent pathological change in plaintiff's underlying condition."

Accordingly, the WCAC exceeded its reviewing authority when it modified the magistrate's award to a closed benefit. The WCAC misstated factual findings made by the magistrate, engaged in improper review de novo, and merely substituted its judgment for that of the magistrate. See *Goff, supra,* p 538. Having initially affirmed the magistrate's finding that plaintiff's employment, requiring repetitive lifting and bending, aggravated plaintiff's condition, the WCAC was required to go no further. Therefore, the WCAC's modification to a closed benefit award is reversed and we reinstate the magistrate's award of open benefits.

Next, the WCAC also reduced plaintiff's average weekly wage, concluding that the magistrate erred in calculating the average weekly wage by including holiday and vacation pay as discontinued fringe benefits because these benefits are "usually" included in the calculation of gross weekly wages. Thus, the WCAC believed that the magistrate erroneously included the holiday and vacation pay a second time as discontinued fringe benefits.

At the hearing, plaintiff testified that she was earning $10.37 an hour when she left her employ. This amount is not disputed by the parties. It was also stipulated that plaintiff's fringe benefits were discontinued on the last day of her employment. The magistrate found that plaintiff's gross weekly wages were $414.80 and that she earned an additional $158.42 a week in fringe benefits, relying on the union contract and other information supplied by plaintiff. Noting that the fringe benefit rate cannot be

included so as to bring the benefit rate to an amount greater than two-thirds of the state average weekly wage, MCL 418.371(2); MSA 17.237(2), the magistrate adjusted plaintiff's benefit rate to $326.01.

On appeal, defendant concedes that the gross weekly wage was correctly calculated by the magistrate. Defendant, however, argues that the magistrate improperly calculated the discontinued fringe benefit rate. Defendant claims that the only benefits terminated were health insurance and the pension contribution on October 1, 1992. Defendant further claims that these benefits totaled $104.75 a week.[1] Thus, it is defendant's contention that the magistrate improperly added vacation and holiday pay to the fringe benefit calculation, when those benefits were already included in plaintiff's gross weekly wage.

Defendant's argument to the WCAC, like its argument to this Court, is without citation to any evidentiary support. Moreover, plaintiff's gross weekly wage was calculated as being $414.80, which is equal to her pay rate of $10.37 an hour times forty hours a week. There is no evidence that the magistrate "double counted" the holiday and vacation pay. Therefore, the WCAC exceeded its authority in reducing plaintiff's average weekly wage where defendant had failed to prove that the magistrate made any error in calculating the average weekly wage. The WCAC's decision regarding the calculation of plaintiff's average weekly wage is reversed and we reinstate the decision of the magistrate.

The decision of the WCAC is reversed and the decision of the magistrate is reinstated.

/s/ Michael J. Kelly
/s/ Kathleen Jansen

[1] Interestingly, in a letter dated February 8, 1994 sent to the magistrate, defendant's counsel contended that the discontinued fringe benefits amounted to $128.82, disputing plaintiff's contention that the fringe benefits amounted to $158.42. Defendant attached a supporting memorandum to the letter indicating that plaintiff's discontinued benefits were "health and welfare" and "pension" benefits. Even those figures are different than those claimed before the WCAC and before this Court. The figures given in the memorandum are that the health and welfare benefits were $367.41 a month (as opposed to the amount of $319.71 a month claimed before the WCAC and this Court) and that the pension benefits were $44.04 a week (as opposed to the amount of $30.40 a week claimed before the WCAC and this Court). Thus, we can only conclude that defendant's proffered figures before the WCAC were highly dubious given the fact that defendant has cited no document to prove its figures stated before the WCAC and this Court.