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UNPUBLISHED
August 15, 2000

No. 202878
WCAC
WCAC No. 93-000572

AFTER REMAND

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

PER CURIAM.

After remand, we consider plaintiff's appeal from the decision of a worker's compensation magistrate denying his claim for benefits under the Worker's Disability Compensation Act ("WDCA"). We reverse and remand for entry of an order awarding plaintiff benefits.

I Factual Background

Plaintiff worked as a journeyman bricklayer from 1956 to 1990, for various employers. In his last employment as a bricklayer, plaintiff worked for defendant Kopp Masonry Construction Company ("Kopp"), from October, 1989, until April 17, 1990. He left defendant's employment on that date, complaining of shortness of breath. Plaintiff later filed a worker's compensation claim against Kopp, alleging the following disabilities:

> Shortness of breath; chronic obstructive pulmonary disease[;] heart, back, and right upper extremity [sic]; prolonged and continuous exposure to dust and other

atmospheric pollutants; repetitive bending[,] lifting and twisting of cement block and brick.[1]

A magistrate initially denied plaintiff's claim for benefits. Plaintiff appealed to the Worker's Compensation Appellate Commission ("WCAC"), which affirmed the magistrate's decision. Although this Court initially denied plaintiff's application for leave to appeal from the WCAC's decision, our Supreme Court directed us to consider plaintiff's claim as on leave granted.[2] This Court then issued an unpublished per curiam opinion reversing the WCAC's decision and remanding the case for additional findings of fact.[3] We retained jurisdiction.

The WCAC referred the case to the Board of Magistrates, and Magistrate Wierzbicki issued an opinion dated February 12, 1999, denying plaintiff's claim for benefits. The WCAC did not subsequently review the magistrate's decision, but simply returned the file to this Court by order dated July 19, 1999. Having reviewed the parties' supplemental briefs after remand, we now reverse the magistrate's decision and remand for entry of an order awarding plaintiff worker's compensation benefits.

II Standard of Review

In this case, we are reviewing a magistrate's decision on remand which has not been reviewed by the WCAC. The standard of review applicable to a magistrate's findings of fact is the "competent, material, and substantial evidence" standard. MCL 418.861a(3); MSA 17.237(861a)(3); *Mudel v Great Atlantic & Pacific Tea Co*, __ Mich __; __ NW2d __; 2000 WL 1023039 (2000); *Holden v Ford Motor Co*, 439 Mich 257, 261; 484 NW2d 227 (1992).[4] "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); MSA 17.237(861a)(3).

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[1] The first magistrate to review plaintiff's claim for benefits found that plaintiff was not disabled with respect to his upper extremities. The WCAC affirmed this finding. On appeal to this Court, plaintiff did not challenge the decision on that issue. Therefore, we do not consider plaintiff's claim of disability related to his upper extremities.

[2] *Livingston v Kopp Masonry Co*, 454 Mich 903; 562 NW2d 788 (1997).

[3] Unpublished opinion per curiam, issued June 30, 1998 (Docket No. 202878).

[4] If we were reviewing a decision of the WCAC, we would employ a different standard of review. In that context, we would consider whether the WCAC misapprehended its "administrative appellate role in reviewing decisions of the magistrate." *Mudel*, *supra*, slip op at 12. In other words, we would consider "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." *Holden*, *supra* at 267-268. Ordinarily, this Court would not review the decision of a worker's compensation magistrate. However, this case presents unique circumstances. On remand from our Supreme Court, this Court reversed a decision of the WCAC and remanded for further findings of fact, retaining jurisdiction. The magistrate then issued a second opinion, which the WCAC forwarded to this Court, without conducting its own review. Therefore, there is no intervening opinion of the WCAC which this Court may review.

III Personal Injury

Plaintiff first argues that the magistrate erroneously denied his claim for benefits under the personal injury provision of the WDCA, MCL 418.301(1); MSA 17.237(301)(1). We disagree.

The magistrate made a factual finding that plaintiff suffered from chronic obstructive pulmonary disease. However, the magistrate determined that plaintiff was not entitled to benefits for a personal injury because his employment with Kopp neither caused nor aggravated his pulmonary condition. The two medical experts who testified in this case, Dr. Helen Winkler and Dr. Thomas Petz, agreed that plaintiff suffered from chronic obstructive pulmonary disease, but expressed contradictory opinions regarding aggravation. While Winkler testified that plaintiff's exposure to brick and block dust at Kopp played a significant factor in aggravating his disease, Petz testified that plaintiff's exposure at Kopp did not aggravate his condition. The magistrate adopted Petz's conclusion. Because the record reveals that both experts understood plaintiff's exposures to brick dust and other atmospheric irritants while working for Kopp, we cannot say that the magistrate's decision to adopt Petz's medical opinion was unsupported by competent, material, and substantial evidence on the whole record.

IV Occupational Disease

Plaintiff next argues that the magistrate erroneously denied his claim for benefits under the occupational disease provision of the WDCA, MCL 418.401(2)(b); MSA 17.237(401)(2)(b), which provides compensation for "a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment." We agree.

Plaintiff argued before the magistrate that his pulmonary condition was caused by his long-term exposure to brick dust and other atmospheric pollutants during his lengthy career as a bricklayer, before going to work for Kopp. Plaintiff testified that his previous employment involved brick and block repair work inside blast furnaces and coke ovens, and that this previous employment involved substantial exposure to silica, asbestos, brick dust, and a large quantity of other atmospheric irritants.

The magistrate rejected plaintiff's argument, concluding that plaintiff's previous employment as a bricklayer did not cause his pulmonary condition. While the magistrate did not identify the testimony on which he relied, only Winkler and Petz testified regarding this issue, and the two experts expressed contradictory opinions regarding the occupational nature of plaintiff's disease. Winkler testified that "occupational exposure to respiratory irritants and atmospheric pollutants," including "substantial exposure to various dust, smoke and fumes" during plaintiff's previous employment as a bricklayer played a significant role in his development of chronic obstructive pulmonary disease. In contrast, Petz testified that plaintiff's pulmonary disease was not related to his previous employment as a bricklayer. The magistrate necessarily relied on Petz's testimony to conclude that plaintiff's pulmonary condition was not caused by his previous employment as a bricklayer. We believe this reliance was erroneous.

The record reveals that Winkler's opinion was based on plaintiff's history of long-term exposure to brick dust and other atmospheric irritants during his previous employment. However, Petz testified that he was unaware of plaintiff's exposures to respiratory irritants in his previous employment. Petz

knew only of plaintiff's exposures while working for Kopp. Because Petz's testimony was uninformed by plaintiff's actual exposures in his previous employment, we believe the magistrate could not have reasonably relied on that testimony to determine whether plaintiff's previous employment caused his pulmonary disease. The only remaining medical testimony in the record, Winkler's, established that plaintiff's pulmonary condition was caused by occupational exposure to atmospheric irritants, over the course of plaintiff's previous career as a bricklayer. Therefore, we do not believe the magistrate's decision that plaintiff did not suffer from an occupational disease is supported by competent, material, and substantial evidence on the whole record.

When a plaintiff develops an occupational disease and that plaintiff has worked for multiple employers over a period of time, the WDCA imposes liability for worker's compensation benefits on the plaintiff's last employer in the line of work which gave rise to the plaintiff's disease:

> 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(435), emphasis added.]

In *Hudson v Jackson Plating Co*, 105 Mich App 572, 577-578; 307 NW2d 96 (1981), this Court explained the proper application of § 435:

> In cases involving disability because of occupational diseases incurred while working for multiple employers . . . 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. [Emphasis in original, footnote omitted.]

The *Hudson* test applies in this case because plaintiff worked as a bricklayer for multiple employers over the course of many years, and Kopp was his last employer.

Plaintiff argues that the magistrate erroneously applied the *Hudson* test to determine Kopp's potential liability, by requiring that plaintiff prove his employment with Kopp aggravated his pulmonary condition. The last employer in a line of successive employers may be held liable for worker's compensation benefits if *either* the plaintiff's work for the last employer aggravated the plaintiff's underlying condition, *or* if the last employment was simply of the same nature as the employment which caused the underlying condition. *Hudson*, *supra* at 577-578. As explained above, the magistrate made a factual determination that plaintiff's employment with Kopp did not aggravate his underlying condition. That finding was supported by competent, material, and substantial evidence on the whole record. Therefore, the magistrate did not err in denying plaintiff's claim under the first prong of the *Hudson* test.

Plaintiff also argues that the magistrate erred in applying the second prong of the *Hudson* test, because the magistrate erroneously determined that plaintiff's employment with Kopp was not of the same nature as plaintiff's previous employment:

> Further, the employment at Kopp was not shown to have been of the same nature as in Plaintiff's earlier career as a bricklayer, per MCL 418.435 [MSA 17.237(435)]. It is noted that Dr. Winkler had been presented with a hypothetical which included the Plaintiff actually cutting bricks at Kopp. This, however, was not the case. In any event, the *Hudson* test is nondeterminative here, as it has not been established that Plaintiff has a disability resulting from an occupational disease.

Plaintiff provided the only testimony regarding the working conditions which he experienced. He testified that his previous employment as a bricklayer involved substantial exposure to brick and block dust created when co-employees operated a brick saw. He testified that the atmosphere was "awful dusty," such that dust floating in the air was clearly visible. Plaintiff further testified that his employment at Kopp included exposure to substantial amounts of brick dust. Although plaintiff did not personally operate the brick saw, he worked on scaffolds nearby other workers who did operate the brick saw. Plaintiff testified that the brick dust built up on the scaffolds, that the wind would blow the brick dust in his face and up under his glasses, and that he "would be eating all the dust." Plaintiff was the only witness with personal knowledge regarding the working conditions at Kopp and at his previous employment. Given his unrebutted testimony that he was exposed to substantial amounts of brick dust in both settings, the magistrate's decision that plaintiff's employment at Kopp was not of the same nature as his previous employment was not supported by competent, material and substantial evidence on the whole record.[5] Therefore, the magistrate erred in denying plaintiff's claim under the second prong of the *Hudson* test.

V Conclusion

At trial, the parties stipulated that plaintiff's gross average weekly wage was $552.86 and that plaintiff's weekly benefit rate, should he be entitled to benefits, would be $316.15. Because we believe the magistrate erred in finding that plaintiff did not suffer from an occupational disease and erred in finding that plaintiff's employment with Kopp was not of the same nature as his previous employment, the magistrate's decision denying plaintiff's claim for benefits must be reversed.

We therefore reverse and remand for entry of an order awarding plaintiff worker's compensation benefits in the amount stipulated by the parties. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Michael R. Smolenski

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[5] We believe the fact that plaintiff did not personally cut brick while working for Kopp is irrelevant, given plaintiff's unrebutted testimony that he was continually exposed to substantial amounts of brick and block dust while other workers operated a brick saw nearby.