STATE OF MICHIGAN

COURT OF APPEALS

EVELYN R. THORNTON, Plaintiff-Appellant,	UNPUBLISHED March 9, 2001
v	No. 208469 WCAC
A & P STORES, Defendant-Appellee.	LC No. 94-000257 ON REMAND

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

WHITE, J. (*dissenting).*

I must dissent. The petition to stop benefits addressed the questions whether there had been a change in condition, and whether the condition had ceased to be work-related. The magistrate answered these questions in the negative. Plaintiff focuses on the latter determination. However, a predicate assumption of the proceedings was that the original disability from the costochondritis was work related in that although the work had not caused the costochondritis, it had aggravated the condition to the extent that an open award of benefits was appropriate nearly two-years after plaintiff's last day of work. Against this backdrop, the magistrate concluded that

> defendant has failed to establish that the plaintiff's condition has improved or changed to the extent that she no longer suffers from a work related disability. My findings are based on the testimony of Dr. Schreier. He has seen the plaintiff for many years. He testified the plaintiff's condition *remained the same*, as it pertains to disability and causal relationship. . . . It was evident during the plaintiff's visits with Dr. Schreier that she still has localized complaints at the 4th rib area that are frequently accompanied by chest pain. It is obvious the plaintiff's activities of daily living contribute to her symptoms. There has been no showing of a subsequent injury that affected the underlying pathology. [Emphasis added.]

I do not agree that this determination that defendant has not established the requisite change in condition to justify granting the petition to stop is res judicata or collaterally estops defendant from continuing to litigate the underlying question whether the original disability was work related beyond October of 1992. The magistrate's decision on the petition to stop did not decide the question by implication, rather it accepted as res judicata the premise that the disability *was* work-related through the date of the first decision. The focal inquiry in the petition to stop was whether there was a change. The finding of no change, and therefore an continued entitlement to

benefits, does not preclude a later determination that the underlying decision awarding benefits was erroneous.

In my previous opinion, I concluded that the WCAC had not erred in determining that the magistrate had not clearly determined whether the aggravation was of the underlying condition, or only the pain associated with it, and whether the aggravation, as opposed to the disability, was temporary. Relying on *Layman v Newkirk Electric Assoc, Inc*, 458 Mich 494; 581 NW2d 244 1998), I also concluded that the WCAC erred in making its own findings of fact, rather than remanding to the magistrate. The Supreme Court overruled this aspect of *Layman* in *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 697; 614 NW2d 607 (2000). *Mudel* also overruled the standard of review set forth in *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507; 563 NW2d 214 (1997), and declared that this Court reviews the WCAC's decision only, not the magistrate's decision, and that the WCAC's decision must be affirmed if supported by *any* evidence, and if the WCAC did not misapprehend its administrative appellate role. *Mudel* at 705-710. Upon reconsideration in light of *Mudel*, I would affirm the WCAC's decision, except that portion that modifies the rate of benefits. Because there was no evidence at all regarding whether fringe benefits had been included, the WCAC was obliged to remand on that issue.

/s/ Helene N. White