

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH A. BARNOWSKY,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED

December 21, 2001

No. 231169

WCAC

LC No. 00-000183

Before: K. F. Kelly, P.J. and Hood and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order of the Worker's Compensation Appellate Commission (WCAC), which reversed the magistrate and held that res judicata bars plaintiff's attempt to obtain payment for reasonable and necessary treatment in connection with his mental disability. We reverse.

FACTS

Plaintiff claimed benefits on the basis of carpal tunnel syndrome and a mental disability. In an opinion and order mailed December 16, 1996, the magistrate found that plaintiff suffers from mental and physical disabilities and ordered weekly wage loss benefits to be paid from the day after his last day of work until further order. The magistrate also ordered payment for reasonable and necessary treatment of plaintiff's right wrist condition subject to certain cost containment rules. The magistrate's opinion and order was silent as to payment for treatment connected with plaintiff's mental disability.

Defendant appealed, and plaintiff filed a cross appeal. In an opinion and order dated January 6, 1999, the WCAC modified the magistrate's decision regarding the amount of weekly wage loss benefits and otherwise affirmed. The WCAC held that it could not address the issues raised in plaintiff's cross appeal, which included the claim that the magistrate erred in not ordering reimbursement for medical treatment in connection with the mental disability, because plaintiff's cross appeal was not timely and because the WCAC's rules explicitly state that there "shall be no delayed cross appeal." 1991 AACRS, R 418.4(3).

Plaintiff claims that he did not seek leave to appeal from this Court because defendant represented that it would pay for treatment in connection with his mental disability if he did not file an application. Plaintiff also claims that although defendant has paid or reimbursed plaintiff for the fees of a psychologist, defendant has refused to pay the fees of plaintiff's psychiatrist.

Plaintiff filed a petition with the Bureau of Worker's Disability Compensation seeking a penalty for nonpayment of medical expenses necessitated by his mental disability. In an opinion and order mailed March 30, 2000, the same magistrate denied the request for a penalty but ordered defendant to pay for the reasonable and necessary treatment of plaintiff's mental disability subject to cost containment rules. The magistrate stated that although she was initially inclined to agree with defendant that *res judicata* prevents her from revisiting an issue which was inadvertently not decided in her previous opinion and order, she was ultimately convinced by plaintiff's citation to a 1999 decision of the WCAC, *Hinton v Jonesville Video Connection*, 1999 ACO 258. In that case the WCAC held that the magistrate could issue a subsequent order regarding medical treatment when it was clear that the magistrate inadvertently failed to address the issue in her previous opinion and order.

On appeal, the WCAC reversed because it found *Hinton* to be distinguishable and *res judicata* to apply for the following reasons:

In *Hinton*, a magistrate found that plaintiff had suffered from a compensable work-related hernia condition and she explicitly recognized that plaintiff received surgical treatment for it. However, the magistrate neglected to order payment of the surgical bills on the "green sheet" order form. The "green sheet" was silent. When defendants thereafter failed to pay the medical benefits at issue, plaintiff returned to the magistrate and was granted the benefits on the second go-around. The Commission affirmed, noting that the magistrate's failure to explicitly grant the medical benefits on the "green sheet" of her first decision was a mere oversight and that a medical award was implicit from the magistrate's decision as a whole, including the analysis provided in her opinion. In effect, the magistrate's second decision was a mere clarification of her first, not a new, *different* order.

We believe that the instant facts are distinguishable. Here, in contrast to *Hinton*, the "green sheet" was not left blank. Instead, the magistrate very explicitly and precisely ordered the payment of particular medical benefits (those related to treatment of plaintiff's right wrist) in both the opinion and on the "green sheet" order form. The magistrate specifically delineated which medical benefits were to be paid by defendant. Under such circumstances, plaintiff had an obligation to appeal the narrowness of the medical award to the Commission, and plaintiff's counsel realized as much, albeit too late, by filing the late cross-appeal. By specifically stating which benefits were payable, the magistrate established a concrete, explicit award which became final 30 days after the Commission issued its decision at 1999 ACO #2. *Res judicata* therefore bars plaintiff from

relitigating a matter covered by the earlier final judgment. *Gose v Monroe Auto Equipment Co*, 409 Mich 147 (1980).

ARGUMENTS

Plaintiff argues that the WCAC erred in reversing the magistrate because, as noted in *Hinton*, a finding of a work-related injury automatically triggers an employer's obligation to furnish or pay for medical care under § 315(1) of the act, MCL 418.315(1).

Defendant argues that the WCAC reached the correct result. Defendant notes that under § 851 parties may stipulate to the correction or modification of a magistrate's decision within 30 days, and thereafter an aggrieved party must address its concerns to the WCAC. Because plaintiff did not seek to modify the first magistrate decision in this case, and failed timely to claim a cross appeal with the WCAC, defendant argues that the WCAC in its second opinion properly concluded that res judicata prevents modification of the original award.

ANALYSIS

Res judicata applies to workers compensation proceedings, and prevents the relitigation of an issue in a second action which was, or which could have been with reasonable diligence, litigated in a previous action. *Gose v Monroe Auto Equipment Co*, 409 Mich 147; 294 NW2d 165 (1980); *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 378; 521 NW2d 531 (1994).

The WCAC held that res judicata prevents the magistrate from ordering payment for mental disability medical treatments in a subsequent order because the magistrate failed to order payment for such treatments in her first order. We disagree. The issue was not litigated and decided against plaintiff in the first action, nor did plaintiff fail to raise the issue in the first action. Plaintiff argued that he suffered a work-related medical disability, and the magistrate agreed. Because there were no outstanding and separate disputes about the amount or reasonableness of medical treatment for plaintiff's mental disability, the medical treatment issue as such was not raised. Moreover, the issue did not need to be raised because a finding that an employee suffered a work-related injury triggers an employer's obligation to furnish or pay for medical treatment. § 315(1) provides in part:

The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by this state as legal, when they are needed. . . . After 10 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician. The employer or the employer's carrier may file a petition objecting to the named physician selected by the employee and setting forth reasons for the objection. If the employer or carrier can show cause why the employee should not continue treatment with the named physician of the employee's choice, after notice to all parties and a prompt hearing by a worker's compensation magistrate, the worker's

compensation magistrate may order that the employee discontinue treatment with the named physician or pay for the treatment received from the physician from the date the order is mailed.

In *Kosiel*, *supra*, the Supreme Court held that res judicata did not prevent modification of an order with respect to the rate of nursing care compensation because res judicata only applies when the previous order is a final decision. Because the order at issue provided in part for payment of nursing care benefits “until the further order of the Department,” the Court concluded that the nursing care portion of the order was not “final” for purposes of res judicata. *Id.* at 380-381. Moreover, the Court found that this conclusion comported with the language of § 315(1), quoted above, which in the first sentence requires an employer to furnish or cause to be furnished to an injured employee medical and other services “when they are needed.” The Court also noted that the statute requires the employer to bear the cost of “reasonable” medical services, which may change over time. *Id.* at 382-383.

We hold that once the magistrate found that plaintiff suffered a work-related mental disability, this triggered defendant’s obligation to provide or pay for medical treatment in connection with that disability under § 315(1). Because the magistrate did not affirmatively find or hold that medical treatment in connection with the medical disability was not required for some reason, the failure to include language to that effect in the magistrate’s first order was in the nature of a clerical mistake or oversight, and res judicata does not prevent the magistrate’s correction of that error.

We disagree with the position taken by the dissent. To deny plaintiff payment in conjunction with treatment for his mental disabilities because of a mere oversight or clerical error in the order exalts form over substance¹ and unjustly prejudices an individual legitimately entitled to the benefit.

It is undisputed that the magistrate originally granted plaintiff an open benefits award for a work related wrist injury as well as certain emotional conditions. It is also undisputed that due to a clerical error or oversight, the order mailed by the magistrate did not provide for payment relative to treatment for plaintiff’s mental disability and neither party requested the magistrate to correct the order within the requisite thirty day time period delineated

¹ The law in Michigan is replete with instances where courts were simply unwilling to subjugate form in favor of substance or otherwise allow a mere oversight or inadvertence to sanction an unjust result. See e.g., *People v Barkley*, 225 Mich App 539, 545; 571 NW2d 561 (1997) (where the court refused to exalt form over substance to invalidate a search warrant for lack of a signature where evidence indicated that the judge or magistrate intended that the warrant should issue); *Pankey v Bigard/Drillers, Inc*, 222 Mich App 15, 19; 564 NW2d 464 (1997) (where the court vacated an order issued by the WCAC denying plaintiff’s motion for a delayed appeal holding that the delay in filing “was caused solely by inadvertence, and . . . defendant was in no way prejudiced.”); *Westfield Companies v Grand Valley Health Plan*, 224 Mich App 385, 389-90; 568 NW2d 854 (1997) (where the court refused to “put[] form over substance” to deny coverage under a contract.)

in MCL 418.851 and R 418.54(2). As a result, the order containing the error became the final order of the bureau.

Because plaintiff failed to file or otherwise seek to correct the oversight in a timely fashion, the dissent would hold that plaintiff forfeited the issue. The dissent further opines that to sanction an untimely appeal would “allow a party that lacks diligence in pursuit of an appeal to avoid the WCAC rule barring untimely appeals simply by refiling the case before the magistrate.”

We disagree. Nothing in the record remotely suggests that a lack of due diligence caused plaintiff’s untimely filing in the case *sub judice*. Accordingly, the dissent’s concern that the procedure followed by plaintiff will permit future dilatory plaintiffs to circumvent the rule barring untimely appeals with impunity, would not at all obtain on the facts herein presented. Indeed, the clerical error did not become evident until plaintiff sought a penalty for nonpayment of medical expenses in conjunction with treatment for his mental disability. At this juncture, everyone became aware of the clerical error contained in the magistrate’s order well after the thirty-day time period lapsed. When plaintiff filed his second petition he did not do so to avoid the time constraints imposed by the WCAC or otherwise invite the magistrate to substantively alter her prior benefits determination. Plaintiff merely sought to have the order corrected to comport with the magistrate’s initial determination and thus obtain benefits to which he was rightfully entitled.

The notion that a court may correct clerical errors in its orders is not an alien concept. In fact, a review of the Michigan Court Rules governing both criminal and civil practice contain mechanisms whereby the court, sua sponte, and at any time, may correct clerical errors arising from oversight or omission. See MCR 2.612(A)(1); MCR 6.435(A). In the administrative law area, caselaw at least suggests that even after mailing a decision, hearing referees retain jurisdiction to correct mistakes contained in their original decisions to ensure that the decision aligns with the facts. *Viele v DCMA*, 167 Mich App 571, 577-78; 423 NW2d 270 (1988) modified in part 431 Mich 898; 432 NW2d 171 (1989).

In *Viele*, the hearing referee issued a decision that failed to identify two of the defendants in the caption. The hearing referee became aware of the error and issued a corrected decision *after* the initial decision containing the error became final. The Worker’s Compensation Appeal Board (WCAB) held that the corrected decision was null and void because the hearing referee did not have jurisdiction to issue the corrected decision. Accordingly, the WCAB dismissed plaintiff’s claim for disability benefits against the two omitted defendants finding that the doctrine of res judicata barred plaintiff’s claim.

On appeal, this Court reversed the WCAB’s decision and upheld the validity of the corrected decision which altered the caption to reflect the actual parties to the proceeding. The court reasoned that the hearing referee retained jurisdiction even after the initial decision became final to make a correction which was but procedural in nature. Akin to the correction at issue in *Viele*, the correction required in the instant matter is procedural in nature and necessary to give effect to the magistrate’s intent by harmonizing the magistrate’s actual findings with the ultimate order issued. *Id.*

While we appreciate the need for finality in judgments, we remain unwilling to exalt form over substance in this case and allow an error to dictate a patently unjust result and thereby strip plaintiff of a benefit to which he is rightfully entitled under the law.

Reversed.

/s/Kirsten Frank Kelly

/s/ Harold Hood