

STATE OF MICHIGAN  
COURT OF APPEALS

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JOSEPH A. BARNOWSKY,

Plaintiff-Appellant,

V

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

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UNPUBLISHED

December 21, 2001

No. 231169

WCAC

LC No. 00-000183

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

ZAHRA, J. (*dissenting*).

I respectfully dissent. I conclude that plaintiff is barred recovery on his second petition for payment in connection with treatment for his mental disability because he failed to timely appeal the magistrate's initial order.

Plaintiff's original petition sought payment for treatment in connection with a wrist condition and a mental disability. The magistrate's order was silent in regard to payment in connection with the mental disability.<sup>1</sup> Plaintiff failed to timely appeal that order. As such, plaintiff's cross-appeal to the WCAC on the issue was denied. Thereafter, plaintiff filed a second petition, which was heard by the same magistrate that ruled on the original petition.

The procedure followed by plaintiff resulted in the magistrate reviewing itself. I conclude that such a result is untenable. Plaintiff was afforded the opportunity to appeal the magistrate's original ruling to the WCAC, but failed to do so in a timely manner. As a result, I

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<sup>1</sup> I disagree with the majority's characterization of the magistrate's failure to provide for payment relative to plaintiff's mental disability as a mere "clerical error," "clerical mistake," or "oversight." The definition of the term "clerical error" found in Black's Law Dictionary (7<sup>th</sup> ed) limits such error to mistakes in writing or copying and specifically excludes inadvertence in judicial reasoning or determination. In ruling on plaintiff's second petition, the magistrate indicated that the issue of costs associated with plaintiff's mental disability was previously inadvertently not decided. The magistrate's failure to decide the specific issue of costs is distinguishable from entry of an erroneous amount of the costs as the result of a clerical error. In this case, there was no clerical submission in regard to costs associated with plaintiff's mental disability. Thus, any error committed by the magistrate was a legal error rather than a clerical error, review of which is limited to timely appeals before the WCAC.

conclude that plaintiff's issue was forfeited.<sup>2</sup> To hold otherwise would allow a party that lacks diligence in pursuit of an appeal to avoid the WCAC rule barring untimely appeals, R 418.4(3), simply by refiling the case before the magistrate. Moreover, it is clear in this case that plaintiff recognized the need to appeal the magistrate's initial ruling to the WCAC given that he filed a cross-appeal to the WCAC, albeit untimely. I would affirm the WCAC's decision in this case.

/s/ Brian K. Zahra

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<sup>2</sup> I flatly disagree with the majority's statement that "Nothing in the record remotely suggests that a lack of due diligence caused plaintiff's untimely filing in the case *sub judice*." It is disingenuous to suggest that plaintiff was not aware of the magistrate's failure to make any provision for costs associated with plaintiff's mental disability until the filing of the second petition before the magistrate. Plaintiff's prior cross-appeal specifically challenged the magistrate's failure to grant benefits for his mental condition. Thus, it is patently clear that plaintiff had prior knowledge of the magistrate's error and simply failed to timely pursue an appeal.