

STATE OF MICHIGAN
COURT OF APPEALS

ABDON ALVAREZ,

Plaintiff-Appellant,

v

SEALY MATTRESS COMPANY and
LUMBERMENS MUTUAL INSURANCE
COMPANY,

Defendants-Appellees.

UNPUBLISHED

March 19, 2002

No. 233521

WCAC

LC No. 00-000294

Before: Hood, P.J., and Gage and Murray, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order of the Worker's Compensation Appellate Commission (WCAC), which reversed the magistrate and denied plaintiff's claim for benefits. We affirm.

Plaintiff began working for defendant Sealy in March 1995. He was a general laborer. His initial job required him to lift mattresses and load them into a truck. He testified that he loaded 70 to 100 mattresses per day and that each mattress weighed in excess of 100 pounds. In March 1996 plaintiff was transferred to the manufacturing division. He testified that this was a harder job requiring even more exertion.

Plaintiff testified that in February 1998 he suffered a slip and fall accident at work and hurt his back as well as his right knee. He testified that he continues to suffer back pain that causes him considerable distress. Although he was able to work for defendant until May 1, 1998, he has not worked since.

Sue Mosley, who worked in Sealy's department of human resources, testified that she did not believe that plaintiff hurt himself on the job because no work-related injury was reported to her. However, plaintiff's rebuttal witness, Victor McCliment, a fellow worker and shop steward, testified that he brought plaintiff's allegedly work-related injury to the attention of Mosley in 1998.

Jeff Holstad, who runs a detective agency, testified that he performed surveillance on plaintiff at defendants' request. Videotapes of his surveillance were entered into evidence. The tapes apparently show plaintiff doing various sorts of work around the house, including shoveling snow and moving a refrigerator upstairs with the help of another person and a dolly.

The magistrate found plaintiff disabled as a result of a work-related injury and entered an open award of benefits. The magistrate specifically found plaintiff to be a credible witness. The magistrate did not mention the videotape evidence in his analysis, but his description of the contents of the tapes suggests that he found that they showed minimal physical exertion. Although the magistrate found a work-related disability, his analysis does not refer to the medical evidence to support this finding.

Defendants appealed and the WCAC reversed. The WCAC noted that a magistrate's credibility determinations are generally entitled to deference. However, in this case the WCAC found that the magistrate did not resolve significant and troubling aspects of the record reflecting on plaintiff's credibility. The WCAC therefore exercised its own powers as factfinder and came to the opposite conclusion. In particular, the WCAC noted that the videotape evidence directly contradicted plaintiff's testimony, as well as information given to doctors, that he experiences such intense pain in his back that he cannot shovel snow and that his daily activities consist of sitting, watching TV, and sleeping. The WCAC found that the videotapes show the following: Plaintiff can move quickly at all times and never shows any signs of pain or guarding behavior regarding his back. Plaintiff can shovel snow. Although most of the time plaintiff simply pushes the snow, on two occasions he can be seen bending and lifting to throw snow without any indication of difficulty. The tapes also show plaintiff carrying objects while walking, without any sign of guarding behavior or pain. In moving a refrigerator with the help of another person and a dolly, the tapes show plaintiff moving up and down a flight of four steps quickly and without any support. He is seen removing the freezer compartment door from the refrigerator and carrying the door in one hand while walking down the steps without any support or assistance.

The WCAC also noted that defendant's expert, Dr. Mayer, observed a number of inconsistencies in plaintiff's behavior and in his reports of pain during his examination. Plaintiff would complain of pain when there was no medical reason to suspect he should be suffering pain, even supposing that he had some sort of back problem, and conversely would show no evidence of being in pain when he should have, given his alleged condition. The WCAC concluded that the magistrate's finding that plaintiff was a credible witness is not based on competent, material and substantial evidence on the whole record.

The WCAC also found that substantial evidence did not support the magistrate's conclusion that plaintiff's medical condition is related to his employment. The WCAC assumed that the magistrate relied on the testimony of plaintiff's treating doctor, Dr. King. However, the WCAC noted that Dr. King refused to state his opinion whether plaintiff's injury at work caused a herniated or bulging disc, and would not even opine that plaintiff's pain was caused by the disc as opposed to a muscle injury. Moreover, Dr. King's opinion regarding any relationship between plaintiff's employment and his back condition is based on the history given to Dr. King by plaintiff, whose credibility the WCAC rejected. Therefore, the WCAC concluded that Dr. King's testimony did not support plaintiff's claim that any back problem from which he might suffer is related to his employment.

The WCAC reviews the magistrate's findings of fact under the substantial evidence test. The WCAC is required to conduct a review that is both a qualitative and quantitative analysis of the whole record. If the WCAC rejects any of the findings of fact made by the magistrate, or discovers that the magistrate failed to make certain findings, the WCAC is empowered to make its own findings of fact. This Court reviews the decision of the WCAC, not the magistrate. Unless the

WCAC grossly misapplied the substantial evidence test or misapprehended its administrative appellate function, this Court's tendency should be to deny leave to appeal, or if leave is granted to affirm. Facts found by the WCAC are conclusive if supported by any evidence on the record. Legal questions are reviewed de novo. *Mudel v Great Atlantic & Pacific Tea Co.*, 462 Mich 691, 732; 614 NW2d 607 (2000).

Plaintiff argues that the WCAC substituted its own judgment for that of the magistrate and therefore erred in reversing the open award of benefits. We disagree. The WCAC neither misapprehended its appellate function nor grossly misapplied the substantial evidence test. Instead, the WCAC gave reasons grounded in the record for concluding that substantial evidence does not support the magistrate's findings of fact.

The magistrate's decision depends crucially upon plaintiff's credibility. Although defendants introduced significant evidence attacking plaintiff's credibility, the magistrate failed to analyze the evidence carefully or give any reason for concluding that plaintiff is a credible witness in light of the contradictions between his testimony and the history he gave to doctors and the contents of the surveillance videotapes. Moreover, the magistrate failed even to consider the numerous inconsistencies noted by defendants' expert, Dr. Mayer, which bear on the assessment of plaintiff's credibility. In remedying these deficiencies, the WCAC did not simply substitute its judgment for that of the magistrate. Instead, the WCAC carefully reviewed the whole record and concluded that the magistrate's findings regarding plaintiff's credibility and the work-relatedness of any injury were not supported by the evidence. Even if we disagreed, we would be required to affirm because the WCAC did not exceed the scope of its reviewing authority. *Brown v Henkels & McCoy*, 465 Mich 901; ___ NW2d__ (2001).

Affirmed.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ Christopher M. Murray