

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GAIL E. WILLIAMSON LEPO,

Plaintiff-Appellant,

v

SUPREME DISTRIBUTORS COMPANY INC,  
and RELIANCE INSURANCE COMPANY,

Defendants-Appellees.

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UNPUBLISHED

December 20, 2002

No. 240019

WCAC

LC No. 00-000228

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals, by leave granted, the WCAC's February 7, 2002 order which, among other things, affirmed the magistrate's denial of plaintiff's claim for benefits relating to an alleged closed head injury sustained while working for defendant Supreme Distributors Company Inc. We vacate the WCAC's order, in part, and remand for further proceedings.

In September 1987, plaintiff was involved in a serious automobile accident. As a result, she suffered from severe headaches, sleeplessness, dizziness, and blurred vision. Plaintiff underwent a full psychological evaluation, and was treated for her symptoms. Plaintiff's symptoms and treatment ended by June 1989. There was no evidence that plaintiff suffered a closed head injury in the 1987 automobile accident.

In September 1994, plaintiff began working for defendant Supreme Distributors as an assistant to a warehouse supervisor. Plaintiff's duties included answering the telephone, filling orders, and data entry.

It is not in dispute that on October 2, 1995, plaintiff fell at work. However, the circumstances surrounding the fall are unclear. According to plaintiff, she got up from her desk and began to walk across the room; the next thing she remembers is sitting in her chair, and being surrounded by coworkers. From the testimony of coworkers it appears as if plaintiff tripped over an open drawer in her desk. This testimony is supported by the fact that plaintiff suffered a serious cut to her shin.

In 1996, plaintiff filed a claim for benefits for injuries to her wrist and leg resulting from the October 1995 fall. The parties entered into a voluntary payment agreement. In March 1999,

plaintiff filed the instant, amended, claim for benefits. In this claim, plaintiff sought benefits for a closed head injury allegedly sustained in the October 1995 fall<sup>1</sup>. In regard to the alleged closed head injury, plaintiff concedes that immediately following the October 1995 fall, she began to suffer daily, dull, headaches which got progressively worse. However, plaintiff contends that she initially attributed the headaches to the 1987 automobile accident, as they were similar to the headaches she previously suffered. According to plaintiff, she did not know until early 1999 that she had suffered a closed head injury in the October 1995 fall. Plaintiff did not miss any work as a result of the headaches, or other effects of the alleged closed head injury, at any point prior to her last day of work, October 13, 1996, which was the date defendant Supreme Distributors went out of business.

In late 1998, plaintiff's headaches became severe, and she sought treatment from Dr. Barbara Fisher. In January 1999, Fisher began to suspect that plaintiff had suffered a closed head injury during the October 1995 fall. A "Spect Scan" of plaintiff's brain, conducted in January 1999, indicated that plaintiff had suffered an injury to the frontal lobe. Subsequently, several experts opined that plaintiff is permanently disabled as a result of a closed head injury.

In an April 2000 opinion, the magistrate denied plaintiff's claim for benefits for a closed head injury. The magistrate concluded that plaintiff's claim was procedurally barred by MCL 418.381(1), which requires, among other things, that a claim for benefits be filed within two years from the date of the injury, the date the disability manifests itself, or the last day of employment, whichever is later. The magistrate found that because the symptoms of a closed head injury manifested themselves immediately after the October 1995 fall, the two-year time period began to run from plaintiff's last day of work (October 1996). The magistrate concluded that because plaintiff's claim was filed in March 1999, it was time-barred.

Plaintiff then appealed to the WCAC, which affirmed the magistrate's decision. The WCAC stated that the magistrate's finding that plaintiff's symptoms manifested themselves soon after the October 1995 fall was supported by competent evidence, and that that finding established plaintiff's last day at work as the latest time from which the two-year filing period could be measured. The WCAC went on to conclude that because plaintiff's claim for benefits for the closed head injury was not filed within two years of her last day at work, it was barred.

This Court granted plaintiff's application for leave to appeal the WCAC's decision. In this appeal, plaintiff contends that her claim for benefits was not untimely because she did not know until January 1999 that she had suffered a disabling closed head injury in the October 1995 fall. Plaintiff argues that although she exhibited symptoms of a closed head injury soon after the fall, she was not "disabled" from the injury until well after her last day of work. Therefore, the two-year time period for filing her claim did not even begin to run until January 1999, when the disability manifested itself.<sup>2</sup>

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<sup>1</sup>Plaintiff also sought additional benefits for her wrist injury. Because plaintiff was awarded the additional benefits for her wrist claim, that claim is not an issue in the instant appeal.

<sup>2</sup> Plaintiff also contends that because she did not know she suffered a closed head injury until January 1999, and she filed her claim for benefits in March 1999, her notice of injury to her  
(continued...)

The WCAC must review the magistrate's decision under the "substantial evidence" standard, while this Court reviews the WCAC's decision under the "any evidence" standard. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). Review by this Court begins with the WCAC's decision, not the magistrate's. *Id.* If there is any evidence supporting the WCAC's factual findings, and if the WCAC did not misapprehend its administrative appellate role in reviewing the magistrate's decision, then this Court should treat the WCAC's factual findings as conclusive. *Id.* at 709-710. This Court reviews questions of law in any WCAC order under a de novo standard. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000). A decision of the WCAC is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework. *Id.* at 401-402.

The question that must be addressed in this case is whether plaintiff's claim for benefits was timely filed with the bureau. Resolving this question requires the application of MCL 418.381(1), which provides that a claim for worker's compensation benefits is not valid unless made within two years of the date of injury, the date the disability manifests itself, or the last date of employment. See also *Colbert v Conybeare Law Office*, 239 Mich App 608, 614; 609 NW2d 208 (2000).

The magistrate concluded that because the symptoms of plaintiff's alleged closed head injury manifested themselves shortly after the October 1995 fall, plaintiff's last day of work was the latest time from which the two-year period for filing a claim could be measured. The WCAC affirmed this conclusion, stating:

We hold the magistrate met the substantial evidence threshold when she held that symptoms of plaintiff's alleged closed head injury manifested themselves shortly after her injury, establishing her last day of work as the latest time from which the two year notice period should be measured. Plaintiff testified that she began to get daily dull headaches immediately after her fall at work and that the headaches had gotten progressively worse. Furthermore, plaintiff's husband, Michael Lepo, testified that he found it difficult to comb plaintiff's hair with a "knot" on her head. He also indicated that plaintiff had trouble laying the left side of her head on a pillow the night after her fall at work. In addition, Mr. Lepo asserted his wife complained that she had a headache the Sunday after the fall at work.

It is not disputed that the plaintiff suffered a fall at work on October 2, 1995. Based on the testimony of numerous witnesses, including the plaintiff and the plaintiff's husband, evidence shows that the plaintiff struck her head as a result of her fall. In addition, evidence shows that plaintiff suffered pain as a

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employer was within the statutorily mandated 90 days. However, although the magistrate and the WCAC concluded that plaintiff did not timely provide notice of her injury to defendants, the magistrate and WCAC also concluded that plaintiff's failure in this regard was excused because defendants failed to show they were prejudiced by plaintiff's untimely notice. Therefore, plaintiff's argument that she timely filed her notice is moot.

result of striking her head. With this knowledge it was plaintiff's duty to discover whether or not her injury was be [sic] work related. Failure to do so does not toll the claim provision. [*Williamson-Lepo v Supreme Distributors Company Inc*, 2002 ACO 26, p 5.]

We agree with the WCAC that there was evidence to support the magistrate's factual finding that the symptoms of plaintiff's closed head injury manifested themselves shortly after the fall and well before plaintiff's last day of work. However, this does not necessarily render plaintiff's claim untimely.

As previously mentioned, a claim for benefits is not valid "unless made within 2 years after the later of the date of injury, the date disability manifests itself, or the last day of employment with the employer against whom a claim is made." MCL 418.381(1). In this case, the magistrate and WCAC concluded that because symptoms of plaintiff's alleged closed head injury manifested themselves prior to the last day of work, the latest point from which to begin the two year filing period was plaintiff's last day of work. However, it is not the manifestation of "symptoms" that is relevant, it is the manifestation of "disability," and the word "disability" is specifically defined in the act to mean:

a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. [MCL 418.301(4).]

Here, although plaintiff began to suffer from symptoms of an alleged closed head injury prior to her last day of work, she claims that she was not "disabled" as a result of that injury at that time, because she could, and did, continue to work despite those symptoms, and therefore did not suffer a limitation in her wage earning capacity. According to plaintiff, it was not until those symptoms got progressively worse, in 1998 and 1999, that the symptoms became "disabling." In other words, if plaintiff's contention is correct, then her "disability" did not manifest itself until after her last day of employment. In such a case, plaintiff's last day of work was not the latest point from which to time the two year filing period, and the magistrate and WCAC committed an error of law in concluding otherwise.

Plaintiff contends that the magistrate and WCAC have found that plaintiff suffered from a work related, disabling, closed head injury, and therefore, a remand by this Court for such a finding would be unnecessary. However, neither the magistrate nor the WCAC specifically found that plaintiff was "disabled" as a result of a work related closed head injury. The magistrate and WCAC essentially found that, even assuming plaintiff did suffer from such a condition, she could not recover on her claim for benefits because she did not timely file her benefits claim. Therefore, a remand for further proceedings, in particular findings of a work related disability, and the date of any such disability, are necessary.

The WCAC's order is vacated to the extent that it affirmed the denial of benefits for an alleged closed head injury. In all other respects, the order is affirmed. This matter is remanded to the WCAC for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Pat M. Donofrio