STATE OF MICHIGAN

COURT OF APPEALS

THOMAS PERKOWSKI, Plaintiff-Appellant,	UNPUBLISHED February 22, 2018
v	No. 336386 Michigan Compensation Appellate Commission
CHRYSLER GROUP, LLC, Defendant-Appellee.	LC No. 13-000024

Before: CAVANAGH, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

In this worker's compensation case, plaintiff appeals by leave granted[1] the opinion and order of the Michigan Compensation Appellate Commission (MCAC) reversing the magistrate's open award of disability benefits. We affirm.

In either 1997 or 1998, plaintiff began his employment with defendant as a maintenance supervisor. Plaintiff originally worked at the Mound Road Engine Plant without incident. However, when that plant shut down, plaintiff transferred to the Sterling Heights Assembly Plant in December 2002. Sensing he would have problems at this plant, plaintiff requested a transfer within two weeks. Plaintiff did not obtain a transfer and eventually problems arose with the plant's central manger, Joe DeKnuckle. Plaintiff claimed that DeKnuckle "continually would rant and rave about the machines being down" and make statements to him such as "you don't know what you're doing, you're F-ed up." Plaintiff recalled a meeting where DeKnuckle was so upset with plaintiff that he leaned over the table and plaintiff "thought he was going to grab me." Plaintiff indicated that he was greatly disturbed by the event which led him to seek counseling. Plaintiff took off "about four months" from work on the advice of his doctor and was denied his request for a less stressful position that would only have required working 40 hours a week.

Plaintiff also had issues with John Saari, his direct supervisor from September 2003 to July 2004. Plaintiff said that Saari would call him "a GD liar" and tell him that he was "F-ed up." Plaintiff said Saari would inaccurately blame him for problems and that he would yell at

[1] *Perkowski v Chrysler Group LLC*, unpublished order of the Court of Appeals, entered April 28, 2017 (Docket No. 336386).

him every day. Saari testified that he only yelled at plaintiff once. Plaintiff began experiencing an increasing amount of stress and anxiety from his job, and ailments such as chest pains and headaches. Plaintiff explained that the harassment continued with his next direct supervisor, Sam Ricardi, who plaintiff first met in January 2005. Plaintiff said Ricardi called him "nothing but an f-ing dinosaur" 10 to 12 times and threatened that "he was going to do whatever he could to get rid of me," such as forcing him to retire or transfer. Plaintiff's condition deteriorated after Ricardi became his supervisor. Plaintiff testified that he "started feeling like I wasn't worth anything." Plaintiff said that in March 2005 he began having suicidal thoughts. He also indicated that he was having thoughts of murdering his supervisors. Plaintiff eventually began seeing Dr. Jeannette Heasley, a psychiatrist, who diagnosed him as having "major depression." Plaintiff took a scheduled one-week vacation in April 2005 and did not return to work.

Plaintiff was voluntarily hospitalized for having suicidal thoughts in May, June, and July of 2005. His stays ranged from a couple of days to a couple of weeks. He received medication and also electroconvulsive therapy. He was hospitalized again in February 2006. Shortly thereafter, he filed a claim for worker's compensation benefits. He attempted to return to work in November 2006, and Dr. Heasley wrote a letter stating that he could, but defendant terminated his employment after it determined that plaintiff had failed to provide requested documentation regarding his absence.

A trial was held before a magistrate over the course of July, August, and October 2009. Deposition testimony from plaintiff's treating psychiatrist, Dr. Heasley, was admitted into evidence. Dr. Heasley diagnosed plaintiff as having major depression and believed his employment was the primary cause. Dr. Elliott Wolf examined plaintiff four times after plaintiff's last day of work at the request of defendant. In Dr. Wolf's opinion, plaintiff was malingering. Dr. Wolf believed that plaintiff was fit for duty and had no psychiatric disorder related to his workplace experience; rather, plaintiff was simply incapable of performing his job. Plaintiff was also examined once by Dr. J. Barry Rubin at the request of plaintiff's attorney. Dr. Rubin concurred with Dr. Heasley's diagnosis. Some of plaintiff's medical records were admitted into evidence.

In January 2010, the magistrate issued an opinion and order denying plaintiff worker's compensation benefits. The magistrate observed that, according to *Martin v City of Pontiac Sch Dist*, 2001 ACO 118, she was to consider the following factors in determining whether the claimant's employment was a "significant" cause of a mental disability under MCL 418.301(2):

> The factors to be considered are 1) the number of occupational and non-occupational contributors, 2) the relative amount of contribution of each contributor, 3) the duration of each contribution, and 4) the extent of permanent effect that resulted from each contributor.

The magistrate determined that Dr. Heasley and Dr. Rubin failed to take into account the numerous non-occupational stressors in plaintiff's life; thus, plaintiff failed to carry his burden of proving a compensable mental injury and benefits were denied.

In March 2011, the Worker's Compensation Appellate Commission (WCAC)[2] reversed, reasoning that the non-occupational stressors referred to by the magistrate occurred after plaintiff's last day of work and therefore were not relevant to whether plaintiff was suffering from a work-related injury in April 2005. The WCAC also noted that plaintiff's argument that Dr. Heasley and Dr. Rubin did, in fact, consider non-occupational stressors "has merit." The WCAC remanded to the magistrate for further analysis, including the weighing of the medical witness testimony, and retained jurisdiction.

On remand, the magistrate concluded that plaintiff was entitled to benefits. The magistrate gave greater weight to Dr. Heasley's testimony as plaintiff's treating psychiatrist and also found Dr. Rubin's testimony credible.

In June 2012, the MCAC reversed the magistrate's supplemental opinion. The MCAC concluded that Dr. Heasley's and Dr. Rubin's observations of plaintiff amounted to "conclusory opinions," inadequate to satisfy the second *Martin* factor noted above. The MCAC found numerous other inadequacies in the magistrate's supplemental opinion and remanded for further analysis.[3]

On remand, the magistrate again determined that plaintiff was entitled to benefits. The magistrate reviewed plaintiff's and Saari's testimonies and found plaintiff to be the more credible witness. Specifically, the magistrate found that Saari "yelled many times and used profanity when he yelled at plaintiff." The magistrate again gave "significant weight" to the testimonies of Dr. Heasley and Dr. Rubin that plaintiff had "major depression." The magistrate concluded that plaintiff had carried his burden of proving a compensable injury.

In December 2016, the MCAC reversed the magistrate and essentially reinstated the magistrate's original opinion denying benefits to plaintiff. The MCAC found that the magistrate failed to properly apply the "test" for the second *Martin* factor, reasoning in part that the testimony of Drs. Heasley and Rubin were clearly conclusions and not the result of a balancing. The MCAC noted that Dr. Heasley barely mentioned any other contributors and then only vaguely, saying they were not important because plaintiff did not wish to discuss them, referring to his mother's death, his father's illness, and problems that arose after his mother-in-law passed away. The MCAC also found more broadly that the magistrate's credibility determination regarding the doctors was not supported by a review of the whole record. The MCAC noted that Dr. Heasley's testimony was undermined by the fact that she was not board certified (contrary to the magistrate's statement that she was) and because of her inconsistency regarding whether plaintiff could return to work. The MCAC set forth numerous excerpts from Dr. Heasley's testimony and again found that her testimony amounted to conclusory opinions. The MCAC concluded that the magistrate's decision was not supported by substantial evidence and that

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[2] Effective August 1, 2011, the WCAC was replaced by the MCAC. Executive Order 2011-6.

[3] In this case, we are reviewing the MCAC's "final order," MCL 418.861a(14), i.e. its second opinion. Accordingly, any mistake the MCAC made in its first opinion, including its position that the magistrate lacked authority to revisit the disability determination on remand because the WCAC retained jurisdiction, is irrelevant to this appeal.

plaintiff failed to carry his burden of proving a compensable injury. Plaintiff's application for leave to appeal that decision followed, and the application was granted.

Our review of the MCAC's decision is very limited. In the absence of fraud, we must affirm the MCAC's factual findings if they are supported by any competent evidence. *Schmaltz v Troy Metal Concepts, Inc*, 469 Mich 467, 471; 673 NW2d 95 (2003); see also MCL 418.861a(14). Our primary function is to ensure that the MCAC "did not misapprehend its administrative appellate role (e.g., engage in de novo review; apply the wrong rule of law) . . . ." *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 703-704; 614 NW2d 607 (2000). The MCAC, on the other hand, reviews the magistrate's factual findings for "competent, material, and substantial evidence on the whole record." MCL 418.861a(3). The MCAC is required to perform "both a qualitative and quantitative analysis of that evidence in order to ensure a full, thorough, and fair review." MCL 418.861a(13). If the MCAC finds that the magistrate's decision was not supported by substantial evidence, it may make independent factual findings. *Mudel*, 462 Mich at 699-700.

The Workers' Disability Compensation Act provides in part that "[a]n employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act." MCL 418.301(1). "[A]n employee must establish the existence of a work-related injury by a preponderance of the evidence in order to establish entitlement to benefits under § 301(1)." *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220, 230; 666 NW2d 199 (2003). An injury arises from the " 'course of employment' . . . if it 'results from the work itself, or from the stresses, the tensions, the associations, of the working environments, human as well as material[.]" *Calovecchi v State*, 461 Mich 616, 625; 611 NW2d 300 (2000), quoting *Crilly v Ballou*, 353 Mich 303, 326; 91 NW2d 493 (1958).

At the time of plaintiff's alleged injury, MCL 418.301(2) provided as follows:

> Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof. [MCL 418.301(2), as enacted by 1987 PA 28.]

In *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 752-753; 641 NW2d 567 (2002), our Supreme Court explained that under MCL 418.301(2)

> a claimant must demonstrate: (a) that there has been an actual employment event leading to his disability, that is, that the event in question occurred in connection with employment and actually took place; and (b) that the claimant's perception of such actual employment event was not unfounded, that is, that such perception

> or apprehension was grounded in fact or reality, not in the delusion or the imagination of an impaired mind.[4]

The Court also advised "that in determining whether actual events occurred and whether a claimant's perceptions were 'founded,' the factfinder must assess the factual circumstances in terms of how a reasonable person would have viewed them." *Id*. at 754-755.

Plaintiff argues that the MCAC misapprehended its appellate role by substituting its findings for the magistrate's and that it violated the law of the case doctrine. These arguments primarily center on the "four-factor" guide adopted in *Martin* for determining whether a claimant's employment contributed to his or her mental disability "in a significant manner." Again, those factors are as follows:

> The factors to consider are 1) the number of occupational and non-occupational contributors, 2) the relative amount of contribution of each contributor, 3) the duration of each contributor, and 4) the extent of permanent effect that resulted from each contributor. [*Martin v City of Pontiac Sch Dist*, 2001 ACO 118 at 16.]

Plaintiff's arguments specifically pertain to the second factor. The WCAC provided the following guidance for evaluating that factor:

> The second factor for quantifying the contributors requires relative comparison of the contributors: find which contributors contribute the most. To accomplish this, medical opinions are critical. They assist the magistrate's attempt to establish a hierarchy of contributors. The magistrate may adopt a medical assessment that any contributor minimally, moderately or maximally influenced the progression of the condition. Alternatively, albeit rarely, a magistrate may accept a medical professional's assignment of a mathematical percentage for the contributors, if the professional expresses the opinion in mathematical percentages. In either case, assignment of relative weight must occur. [*Id*. at 12 (footnote omitted).]

The WCAC also "offer[ed] a note of caution about the form of medical opinion currently prevalent" in "significant manner" cases:

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[4] Effective December 19, 2011, the Legislature amended MCL 418.301(2) in an apparent effort to codify *Robertson*. The statutory section now provides:

> Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions and degenerative arthritis, are compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities are compensable if arising out of actual events of employment, not unfounded perceptions thereof, *and if the employee's perception of the actual events is reasonably grounded in fact or reality*. [MCL 418.301(2), as amended by 2011 PA 266 (emphasis added).]

> Too often, the opinions conclude that a contributor is or is not significant. We view such opinions as mere conclusory statements, not sufficient to comply with the multi-factor test. For a medical opinion to be supportive of the magistrate's legal conclusion that contribution is significant, it must clearly express relative contribution in light of all the contributors. Thus, it is imperative for the expert to be accurately informed of all applicable factors. [*Id*. at 12 n 14.]

Plaintiff argues that the MCAC violated the law of the case doctrine by ruling that the magistrate's finding—that Dr. Heasley and Dr. Rubin properly balanced plaintiff's occupational and non-occupational stressors—was not supported by substantial evidence.

> "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *New Props, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 132; 762 NW2d 178 (2009) (quotation marks and citation omitted). "[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Id.* (quotation marks and citation omitted; alteration in original). The doctrine is applicable "only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). "The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). [*Lenawee Co v Wagley*, 301 Mich App 134, 149-150; 836 NW2d 193 (2013).]

In the first appeal, the WCAC agreed with plaintiff that the magistrate erred by considering stressors that occurred after plaintiff's last day of work. The WCAC also concluded "that plaintiff's argument that Dr. Heasley and Dr. Rubin did, in fact, consider non-work and work factors has merit," and reviewed the testimony supporting that position. But the WCAC did not decide, "explicitly or implicitly," *Grievance Administrator*, 462 Mich at 260, that Dr. Heasley and Dr. Rubin properly balanced work and non-work stressors when evaluating plaintiff's disability. Although the WCAC noted that Dr. Heasley and Dr. Rubin were aware of other stressors in plaintiff's life, it said nothing about how the doctors weighed those stressors. Stated differently, the WCAC did not indicate whether the doctors' opinions were "mere conclusory statements, not sufficient to comply with the multi-factor test." *Martin*, 2001 ACO 118 at 12 n 14. Indeed, the WCAC noted that the magistrate had not made credibility determinations regarding the physicians and directed her to do so on remand. It follows that the WCAC was not deciding whether any of the physicians adequately weighed the stressors in plaintiff's life. For those reasons, the MCAC was not precluded under the law of the case doctrine from finding that Dr. Heasley and Dr. Rubin offered conclusory opinions regarding the cause of plaintiff's purported mental disability.

Plaintiff also argues that the MCAC failed to properly analyze the second *Martin* factor because it considered irrelevant factors—the fact that Dr. Heasley was not board certified and

her inconsistent recommendations regarding whether plaintiff could return to work. However, it is apparent to us that the MCAC found Dr. Heasley not credible and was relying on those matters in support of its conclusion. Further, the MCAC found Dr. Heasley's testimony on those issues indicative of her conclusory and vague testimony. Thus, the testimony supported the MCAC's conclusion that Dr. Heasley's testimony was inadequate to satisfy the second *Martin* factor and therefore was not irrelevant to that inquiry.

Next, plaintiff contends that the MCAC violated the law of the case doctrine by complaining that Dr. Heasley "barely mentioned" other possible stressors in plaintiff's life, such as the death of family members and related problems. It appears those stressors were mostly the non-occupational stressors that the WCAC ruled were not relevant because they arose after plaintiff's last day of work. To the extent the MCAC was suggesting that the stressors were relevant to the four-factor *Martin* guide, it violated the law of the case doctrine in doing so. However, we note that Dr. Heasley's vague testimony on other stressors in plaintiff's life may have informed the MCAC's overall credibility determination. Whether or not the stressors were legally relevant, one would expect his treating physician to be able to discuss how those events may have contributed to plaintiff's mental state.

In any event, as plaintiff acknowledges, the *Martin* factors are only a guide, not a definitive test.

> We repeat our previous caution that the factors enumerated in *Martin* should act as merely guides, aiding the fact finder in their often difficult task of weighing the evidence before them, and not as a Bright-Line test. In the final analysis, we must keep in mind the Legislature placed the responsibility and power to determine what is significant in the hands of the magistrate. If the Legislature had wanted a more detailed definition of "significant," we believe they would have included it within the language of the statute. [*Dortch v Yellow Transp, Inc*, 2007 ACO 21 at 4.]

Regardless of whether the second *Martin* factor was met in this case, the ultimate inquiry was whether plaintiff proved that his employment significantly contributed to a mental disability. MCL 418.301(2). In this case, that inquiry hinged on how much weight the fact-finder gave to the competing opinions of Dr. Heasley and Dr. Wolf. The MCAC may "attach[] more or different weight or credibility to the evidence than that given by the magistrate." See *Mudel*, 462 Mich at 724. The MCAC plainly found that the magistrate's credibility determination regarding Dr. Heasley was not supported by substantial evidence. Further, the MCAC's credibility determination was supported by at least some "competent" evidence. See *Schmaltz*, 469 Mich at 471. Specifically, Dr. Heasley's conflicting recommendations regarding whether plaintiff could return to work, her lack of board certification, and her testimony "full of little more than naked conclusions" and "colloquial language," supports the MCAC's finding.

Plaintiff acknowledges that the MCAC is free to attach different weight and credibility to the evidence but maintains that the MCAC improperly substituted its findings for the magistrate's. As discussed, the MCAC is free to make independent factual findings so long as there is not substantial evidence on the whole record supporting the decision of the magistrate. *Mudel*, 462 Mich at 700. In this case, the MCAC found that the magistrate's decision was not

supported by competent, material, and substantial evidence. We "review the [M]CAC's decision, not the magistrate's decision," and therefore review of the whole record to see whether the magistrate's decision was supported by substantial evidence is unwarranted. See *Mudel*, 462 Mich at 723.

Plaintiff also notes that the MCAC found Dr. Rubin's testimony to be not credible with "no actual or express analysis" on that matter. Plaintiff is correct that MCAC did not separately analyze the credibility of Dr. Rubin. However, Dr. Rubin saw plaintiff once at the request of plaintiff's attorney in 2008. In contrast, Dr. Heasley had been plaintiff's treating psychiatrist since April 2005 and Dr. Wolf saw plaintiff three times in 2005 and once in 2008. Thus, Dr. Heasley and Dr. Wolf had the most knowledge of plaintiff and his condition, and it was essentially a credibility contest between those two physicians. The MCAC plainly found Dr. Wolf's testimony credible and plaintiff does not explain how that finding was erroneous. In contrast to Dr. Heasley's vague testimony, Dr. Wolf provided specific examples in support of his position that plaintiff was malingering. Additionally, Dr. Wolf's reports of his four examinations of plaintiff were read into the record. We also note that plaintiff does not challenge the MCAC's finding that Saari was a credible witness, and that plaintiff's perception of his employment events was unreasonable. See *Robertson*, 465 Mich at 754-755. In sum, there was at least some competent evidence supporting the MCAC's factual findings and its ultimate decision that plaintiff did not carry his burden of proving a compensable injury.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering