

STATE OF MICHIGAN
COURT OF APPEALS

LILJANA DJELAJ,

Plaintiff-Appellee,

and

AAA MICHIGAN,

Intervening Plaintiff-Appellee,

v

RGIS INVENTORY SPECIALISTS and
ZURICH-AMERICAN INSURANCE
COMPANY,

Defendants-Appellants.

UNPUBLISHED
October 13, 2011

No. 292090
WCAC
LC No. 08-000247

LILJANA DJELAJ,

Plaintiff-Appellee,

and

AAA MICHIGAN,

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v

RGIS INVENTORY SPECIALISTS and
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COMPANY,

Defendants-Appellants.

No. 292091
WCAC
LC No. 08-000247

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

In Docket No. 292090, defendants RGIS Inventory Specialists and its worker's compensation insurer, Zurich-American Insurance Company, appeal by leave granted from an order of the Workers' Compensation Appellate Commission ("WCAC") affirming a magistrate's award of benefits. In Docket No. 292091, intervening plaintiff AAA Michigan appeals by leave granted from the same order. We affirm.

Plaintiff was involved in a motor vehicle accident while driving her personal vehicle on April 7, 2000. Her vehicle was insured by intervening plaintiff, AAA Michigan. At the time, she was employed by defendant RGIS Inventory Specialists. She did not initially seek worker's compensation benefits, but received no-fault benefits from intervening plaintiff. She stopped working in March 2001. In March 2004, she filed a petition for worker's compensation benefits. She contended that the accident occurred as she was driving from one assigned work location to another. Intervening plaintiff filed an application for reimbursement from defendants in August 2004.

The primary issues at trial concerned whether plaintiff's notice and claim were timely, whether her injury arose from and occurred in the course of her employment, and whether she established that she was disabled. The magistrate granted an open award of benefits beginning March 2, 2001, and granted intervening plaintiff's petition for reimbursement. Defendants appealed the magistrate's decision to the WCAC. In a unanimous decision, the WCAC affirmed the magistrate's decision with a modification that "all benefits ordered paid herein are subject to the two year back rule" The WCAC remanded for clarification regarding the party responsible for payment of attorney fees. After the magistrate resolved that issue, defendants again appealed to the WCAC, which entered an order affirming the magistrate's order.¹

The WCAC reviews the magistrate's decision under the "substantial evidence" standard in accordance with MCL 418.861a(3). "[T]he role of the WCAC is to ensure that factual findings are supported by the requisite evidence[.]" *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). This Court does not independently review whether the magistrate's findings of fact are supported by substantial evidence. *Id.* at 706. "As long as there exists in the record any evidence supporting the WCAC's decision, and as long as the WCAC did not misapprehend its administrative appellate role (e.g., engage in de novo review; apply the wrong rule of law), then the judiciary must treat the WCAC's factual decisions as conclusive." *Id.* at 703-704. This Court reviews de novo questions of law involved in a final order of the WCAC. *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 4; 760 NW2d 586 (2008).

¹ The latter order was accompanied by an opinion in which two commissioners concurred in result only. Although such a decision arguably implicates the "true majority" defect discussed in *Findley v DaimlerChrysler Corp*, 289 Mich App 483, 495-496; 797 NW2d 175 (2010), none of the parties challenge the WCAC's decision on that basis, and the issues raised on appeal all concern matters that were resolved by the WCAC's earlier unanimous decision. Accordingly, we conclude that it is appropriate to consider the issues presented on appeal.

Defendants first argue that plaintiff's claim for worker's compensation benefits was untimely pursuant to MCL 418.381(1), because it was filed more than three years after her last date of work. They contend that the magistrate and the WCAC committed legal error by concluding that plaintiff's receipt of no-fault benefits from her personal insurance carrier tolled the time for filing a claim.

Section 381(1) addresses the time requirements for providing notice of an injury to the employer and for making a claim for compensation. The statute states, in pertinent part:

If an employee claims benefits for a work injury and is thereafter compensated for the disability by worker's compensation or *benefits other than worker's compensation*, or is provided favored work by the employer because of the disability, the period of time within which a claim shall be made for benefits under this act shall be extended by the time during which the benefits are paid or the favored work is provided. [Emphasis added.]

In *Colbert v Conybeare Law Office*, 239 Mich App 608, 618; 609 NW2d 208 (2000), this Court specifically rejected the argument that "benefits other than worker's compensation benefits' must be from the employer." The Court held that the plaintiff's worker's compensation claim was timely filed because the plaintiff's receipt of social security benefits tolled the limitations period in § 381(1). Contrary to what defendants argue, this Court in *Colbert* did not hold in dicta that personal no-fault benefits do not toll the two-year provision. The issue whether tolling could also be based on the receipt of no-fault benefits was not argued by the parties, and this Court did not express any opinion on the correctness of the trial court's determination in that case.

Defendants also offer a grammatical analysis to support their contention that the benefits that trigger tolling must be paid by the employer. They contend that the phrase "by the employer because of the disability," modifies "benefits other than worker's compensation." However, the parallel clauses in the phrase beginning with "If" do not support that construction.

Defendants further argue that even if the receipt of no-fault benefits extended the time for filing a claim, the extension ended when the no-fault benefits ended. However, in explaining the untimeliness of the plaintiff's claim in *Sullivan v Dep't of Corrections*, 185 Mich App 157, 161; 460 NW2d 253 (1990), this Court recognized that the tolling ceased when the plaintiff's sickness or disability benefits ended. See also *Bieber v Keeler Brass Co*, 209 Mich App 597, 603; 531 NW2d 803 (1995) ("[o]nce the other benefits become unavailable, the employee has the same two years in which to claim worker's compensation benefits as does any other injured worker"). Defendants also cite *Girlish v Acme Precision Prod, Inc*, 404 Mich 371; 273 NW2d 62 (1978), and *Ratliff v Gen Motors Corp*, 127 Mich App 410; 339 NW2d 196 (1983). But those decisions do not interpret the pertinent part of MCL 418.381(1). The provision that allows tolling of the two-year period was added by 1980 PA 357, effective January 1, 1982. Although *Ratliff* was decided after that date, this Court based its decision on the version of the statute in effect at the time of the injury in 1972. See *Ratliff*, 127 Mich App at 417.

In summary, defendants' argument does not persuade us that the WCAC committed legal error in its application of the tolling provision of § 381(1).

Defendants next argue that the magistrate committed legal error by failing to consider evidence that contradicted plaintiff's contention that her injury occurred while she was driving between jobs, and that the WCAC committed legal error by ignoring the conflicting evidence and failing to resolve the alleged oversights in the magistrate's opinion.

Whether plaintiff was driving between buildings to complete her assignments, or was driving home after completing her work, was a disputed issue at trial. The magistrate and the WCAC resolved this issue in favor of plaintiff. Defendants do not argue that the WCAC's factual determinations are devoid of "any evidence" to support them. Rather than directly challenging the WCAC's factual findings, defendants frame their challenge as one involving legal error, i.e., failing to consider conflicting evidence and correct purported oversights by the magistrate. They claim that the WCAC should have remanded the case to the magistrate because his analysis of the issue did not specifically address evidence that favored defendants' position. However, the WCAC's role in reviewing a magistrate's decision does not require that it address, or that it require the magistrate to address, each item of evidence that was offered on an issue.

The WCAC's decision that the accident occurred as plaintiff was travelling between work assignments is supported by the record. Defendants' argument concerning the strength of evidence opposing that position does not provide a basis for this Court to interfere with the WCAC's decision.

Defendants next argue that plaintiff did not establish a change in the preexisting pathology that caused her back symptoms as necessary to establish that her injury was work related under *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220; 666 NW2d 199 (2003), and *Fahr v Gen Motors Corp*, 478 Mich 922; 733 NW2d 22 (2007).

Rakestraw and *Fahr* concern claimants who sought benefits on the basis that their employment aggravated a preexisting condition. Aggravation or worsening of the symptoms of a preexisting condition is inadequate to show that work caused an injury that is medically distinct from the preexisting condition. *Rakestraw*, 469 Mich at 231. Rather,

[w]here a claimant experiences symptoms that are consistent with the progression of a preexisting condition, the burden rests on the claimant to differentiate between the preexisting condition, which is *not* compensable, and the work-related injury, which *is* compensable. Where evidence of a medically distinguishable injury is offered, the differentiation is easily made and causation is established. However, where the symptoms complained of are *equally* attributable to the progression of a preexisting condition or a work-related injury, a plaintiff will fail to meet his burden of proving by a preponderance of the evidence that the injury arose "out of and in the course of employment"; stated otherwise, plaintiff will have failed to establish causation. [*Id.*]

A claimant who suffers from a preexisting condition must demonstrate a medically distinguishable change in the underlying condition by showing that the pathology of that condition has changed. *Fahr*, 478 Mich 922. "[T]here must be record evidence from which a legitimate inference may be drawn that the plaintiff's underlying condition has pathologically

changed as a result of a work event or work activity in order to meet the legal test for a personal injury under MCL 418.301(1) and *Rakestraw*.” *Fahr*, 478 Mich 922.

The WCAC relied on Dr. Nikpour’s testimony that when he treated plaintiff in 1995, her spinal pathology did not involve any instability, but when he operated on her after the accident, he saw “quite a lot of motion of the med (ph) joint” The WCAC cited testimony in which Dr. Nikpour attributed the “ligamentous issue” he saw during surgery to the motor vehicle accident. Defendants quote other portions of Dr. Nikpour’s testimony in which he acknowledged the unavailability of diagnostic tests conducted five years before the accident. But Dr. Nikpour’s testimony satisfies the “any evidence” standard that this Court applies for reviewing the factual determination that plaintiff suffered a medically distinct injury that was not present in 1995.

Defendants also argue that plaintiff did not satisfy MCL 418.301(2), which states:

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.

The WCAC explained that this provision was inapplicable because there was no evidence that plaintiff’s back condition was part of the aging process. On appeal, defendants do not cite any evidence that the condition was part of the aging process. Accordingly, defendants have not shown legal or factual error for this Court to interfere with the WCAC’s decision.

Defendants also argue that even if plaintiff was travelling from one assignment to another, the travel was not work-related pursuant to *Thomas v Staff Builders Health Care*, 168 Mich App 127, 129; 424 NW2d 13 (1988). Defendants contend that the WCAC committed legal error in its interpretation of that decision. We disagree. The plaintiff in *Thomas*, like plaintiff in this case, was required to travel to multiple sites to perform her job duties and used her private vehicle for transportation. Unlike in this case, however, the plaintiff in *Thomas* was injured while traveling from her home to her first work assignment. This Court rejected her argument that her work began when she left her home because she was required to provide her own transportation. *Id.* at 130-131. This Court stated:

We agree with plaintiff that the unique nature of defendant’s business required plaintiff to report for various locations for work. Nevertheless, we do not see how defendant, as contrasted to any other employer, derived a special benefit from plaintiff’s providing her own transportation to her first place of assignment when she did not leave from the employer’s office. . . . [P]laintiff was only on her way to work, and the general rule should apply. [*Id.* at 131.]

Here, having found that plaintiff was injured while driving from one job assignment to the next, rather than while driving to or home from work, the WCAC correctly distinguished *Thomas* and refused to apply the general rule that injuries sustained as an employee goes to and from work are not compensable.

Finally, defendants argue that the WCAC committed legal error by failing to apply the one-year-back rule, MCL 418.833(1), to plaintiff's benefits and to intervening plaintiff's claim for reimbursement of wage loss and medical expenses, in a manner consistent with its interpretation of the tolling provision of MCL 418.381(1).

The "one-year-back" rule of MCL 418.833(1) states:

If payment of compensation is made, other than medical expenses, and an application for further compensation is later filed with the bureau, no compensation shall be ordered for any period which is more than 1 year prior to the date of filing of such application.

The WCAC held that this rule was not applicable because the pending application was not for "further compensation."

The WCAC did not commit legal error in this regard. Plaintiff's application for worker's compensation benefits was not for "*further* compensation" because it was not a claim for the same type of benefits previously received. "The one-year-back rule applies only if the compensation previously paid was for the same category of benefits." Welch, *Worker's Compensation in Michigan: Law & Practice*, § 16.13, p 16-9; *Feldbauer v Cooney Engineering Co*, 205 Mich App 284, 292-293; 517 NW2d 298 (1994). *Feldbauer* discusses different categories of benefits under the WDCA. The present case does not involve a claim for different categories of worker's compensation benefits. Instead, it involves a first claim for worker's compensation benefits. However, because a claim for benefits under the WDCA is not a claim for "further compensation" under § 833(1) so long as it involves a different category of worker's compensation benefits, an initial claim for benefits under the WDCA is not a claim for "further compensation" when the previous benefits were not under the WDCA at all.

In Docket No. 292091, intervening plaintiff AAA Michigan first argues that the WCAC erred by applying MCL 418.381(2), the two-year-back rule, because defendants did not adequately raise and present that issue below. Waiver of the two-year back rule may occur where a party fails to raise the issue on appeal to the WCAC. See *Jones v Dee Cramer, Inc*, 166 Mich App 410, 415; 420 NW2d 843 (1988). In this case, however, defendants' brief to the WCAC raised the issue of the two-year-back rule. The adequacy of the briefing was a matter for the WCAC and does not implicate the type of legal or factual error that is reviewable by this Court.

Intervening plaintiff also argues that the WCAC erred because the rule does not apply to claims of one insurance carrier against another. However, the WCAC's application of the two-year-back rule is consistent with this Court's decision in *Beverly v Reynolds Metals Co*, 197 Mich App 436; 496 NW2d 307 (1992), in which this Court held that the insurer's liability for reimbursement to the insurer that voluntarily paid benefits extended only to two years before the plaintiff filed her petition. *Beverly* refutes intervening plaintiff's contention that the two-year-back rule does not apply to claims between insurers. *Id.* at 438-439. Accordingly, the WCAC did not commit legal error in applying the two-year-back rule.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter