

STATE OF MICHIGAN
COURT OF APPEALS

JOSHUA MORGAN,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED

July 26, 2011

No. 298278

WCAC

LC No. 09-000184

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the April 26, 2010 opinion and order of the Worker's Compensation Appellate Commission (WCAC) reversing the magistrate's open award of disability benefits. We reverse and remand.

Plaintiff filed an application for hearing or mediation, asserting that exposure to compounds, coolants, and carcinogens from his first day of employment in 1976 through his last day of employment on May 9, 2005 caused, aggravated, or accelerated his lung cancer, resulting in disability. Pursuant to MCL 418.301(1), he listed his injury date as his last day of work, May 9, 2005. After a hearing, the magistrate granted plaintiff an open award of benefits, finding that the preponderance of the evidence showed that exposure to the chromium plating process was the most significant factor in the resulting cancer that rendered plaintiff disabled. While plaintiff may have been exposed to other compounds throughout his employment, the magistrate found that the injury date was the last day plaintiff was exposed to the chromium plating process, October 18, 1999.

Defendant appealed to the WCAC, which reversed the magistrate's award, concluding that the magistrate erred in finding an injury date that was not alleged by plaintiff. The WCAC found that there was no evidence that defendant was subject to the worker's compensation act on October 18, 1999, and no evidence that plaintiff gave notice of a 1999 injury date. The WCAC further found that because plaintiff failed to allege an injury date of 1999, a remand would serve no purpose as the magistrate was precluded from receiving evidence associated with an injury date that was not pled. Because the WCAC concluded that defendant "could not possibly have known that it was being called upon to defend a date that was in 1999," the magistrate's holding was reversed.

Findings of fact made or adopted by the WCAC are conclusive on appeal, absent fraud, if there is any competent supporting evidence in the record. *Schmalts v Troy Metal Concepts, Inc.*, 469 Mich 467, 471; 673 NW2d 95 (2003). A decision of the WCAC is subject to reversal if the WCAC operated within the wrong legal framework or if the decision was based on erroneous legal reasoning. *Id.* Questions of law arising in any final order of the WCAC are reviewed by the Court under a de novo standard. *Mudel v Great Atlantic & Pacific Tea Co.*, 462 Mich 691, 701; 614 NW2d 607 (2000).

MCL 418.301(1) provides in part as follows:

Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.

The WCAC erred as a matter of law in finding that plaintiff did not properly allege his injury date. Contrary to the conclusion of the WCAC, defendant was adequately apprised of plaintiff's theory that he was exposed to hazardous products during the entirety of his nearly 30 years of employment. Because the exact date of an occupational illness or repetitive injury can rarely be determined with any precision, the statute uses the last day of work in the employment in which the employee was exposed to the conditions as the injury date. All parties were aware that, while plaintiff was statutorily required to cite a specific "date of injury," he did not contract cancer on May 9, 2005 as he had been diagnosed prior to that date.

Although the date of injury that plaintiff specified was perhaps scientifically inaccurate, it was not legally deficient. MCL 418.383 provides:

A notice of injury or a claim for compensation made under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead, and the employer or the carrier, was in fact misled. Want of written notice shall not be a bar to proceedings under this act if it be shown that the employer had notice or knowledge of the injury.

In determining that the magistrate erred, the WCAC did not determine that plaintiff, through his petition, intended to or actually misled defendant. Rather, the WCAC relied on the opinion in *Richardson v RWC, Inc.*, 2008 ACO 157, in which the WCAC held that it was improper for a magistrate to amend an injury date in a petition because the "defendant had no notice to allow it to defend the injury date." The present case is distinguishable because defendant was aware of plaintiff's theory of causation. Plaintiff's application for hearing or mediation was sufficient to inform defendant that he was claiming an injury based on continuous exposure to carcinogens throughout the time he worked for defendant.

Having concluded that defendant was on notice of plaintiff's theory of liability and that the magistrate was not legally precluded from concluding that there was an injury date of 1999, we must next determine whether the WCAC erred in determining that there was no evidence that defendant was subject to the act at that time. As stated above, the WCAC's findings of fact are

conclusive on appeal unless there is no record evidence supporting the finding. Pursuant to MCL 418.415(a), the Worker's Disability Compensation Act applies to "All private employers, other than agricultural employers, who regularly employ 3 or more employees at 1 time." As this Court explained in *Viele v DCMA Intern, Inc*, 211 Mich App 458, 465; 536 NW2d 276 (1995), the employees need not be in the state of Michigan to render an employer covered by the act. Consequently, the WCAC's ruling amounts to a conclusion that there was no record evidence that, in 1999, defendant General Motors employed a total of three people. We hold that the WCAC's finding is not supported by any record evidence. It is true that the parties' stipulation regarding the applicability of the act to defendant only related to the alleged 2005 injury date. While it certainly appears to be common knowledge that General Motors has employed three or more persons at all times relevant to this case, we recognize that plaintiff had the burden of presenting evidence to establish that fact. When plaintiff testified about the work conditions that existed when he was exposed to the chemicals that caused his injury, he was asked how many workers were generally in his vicinity and he responded "A couple hundred." Plaintiff further described the various departments and types of employees with whom he interacted. That testimony sufficed to establish that defendant employed at least three people at the time in question. As a result, the WCAC erred in concluding that there was no evidence that defendant was subject to the act.

While we conclude that the WCAC erred in opining that the magistrate was precluded from finding an injury date in 1999, we agree with the WCAC's conclusion that the magistrate erred in his finding of plaintiff's average weekly wage. However, although the magistrate erred, we further find that the error can be remedied upon remand.

Reversed and remanded for additional proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens