

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

SUSAN J. HALE,
PLAINTIFF,

V

DOCKET #03-0273

BORGESS MEDICAL CENTER,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE QUIST.

KAREN L. ANDERSON FOR PLAINTIFF,
LEONARD M. HICKEY FOR DEFENDANT.

OPINION

GLASER, COMMISSIONER

Defendant appeals the decision of Magistrate G. Jay Quist, mailed on June 16, 2003, granting plaintiff an open award on a finding of a significant aggravation of a low back condition. We affirm the magistrate's decision.

This case was initiated by plaintiff filing an Application for Mediation or Hearing on October 31, 2002, alleging a back injury as the result of a slip and fall on August 16, 2002 and further aggravation of that back injury through her last day of work, October 4, 2002.

A trial was held in the matter on May 21, 2003, at which time plaintiff appeared and testified on her own behalf. The defendant presented lay testimony from Chris Granaderos, one of plaintiff's supervisors. Dr. Dall and Patty Pfau, P.A. provided medical testimony for plaintiff. Dr. Jakubiak testified on behalf of defendant. The magistrate issued his decision, which was mailed on June 16, 2003, finding that plaintiff had carried her burden of establishing a work related disability. Defendant filed a timely appeal.

The magistrate set forth a detailed summary of the lay and medical testimony in his decision. We adopt that summary as our own pursuant to MCL 418.861a(10) and reprint portions as follows:

Plaintiff Susan Hale testified that she was born on October 22, 1944, making her 58 years old at the time of trial. She began working for the defendant in this matter, Borgess Hospital (aka Ascension Health), in 1997 as a utility person in the cafeteria and food service area. Plaintiff was required to perform a variety of physical tasks in her job including sweeping, cleaning, picking up garbage, mopping, and cleaning pots and pans. The plaintiff was required to be on her feet and perform bending, stooping and lifting. Plaintiff was also required to push carts full of trays, dishes, pots and pans. In

April, 2000, the plaintiff suffered a mild back injury at work while lifting a grate. She reported the injury and missed a couple of days from work. She returned to her full employment duties a few days later. The April 2000 incident is not a subject of this litigation.

This case arises out of an injury which occurred on August 16, 2002. Plaintiff was working the nightshift that day and slipped on water on the floor of the cafeteria which caused her to fall on her right knee. Plaintiff continued to work but filled out an incident report the next day. The pain began in her right knee but then migrated up to the plaintiff's right hip and then into her back. The plaintiff sought medical treatment in September, 2002. The plaintiff continued to work despite her pain until early October, 2002 when she was taken off work by Patty Pfau, a physician's assistant. Plaintiff testified that following the injury to her right knee, she began suffering pain in the right hip and then across her back. She eventually began having pain in her left lower extremity as well. Physician Assistant Pfau eventually referred the plaintiff to Dr. Bruce Dall for low back surgery. Surgery was scheduled but then was canceled due to an infection in the plaintiff's foot.

In addition to work she performed for the defendant, the plaintiff has worked on a part-time basis since 1988 for the Family Independence Agency. The plaintiff has worked directly for a woman named Mildred Hard for the past several years. The plaintiff receives \$321.00 per month. The job involves performing various household tasks for Ms. Hard, who is an elderly lady. After her injury, the plaintiff delegated certain tasks to other people. She can no longer perform the full range of the duties she previously performed for Ms. Hard. However, the plaintiff still cooks and takes Ms. Hard to medical appointments. In 2002, the plaintiff filed her taxes as single, head of household. The plaintiff has one dependent, a grandchild, Ronald DeRyke, who lived with her at all times relevant to this case. She is the sole supporter of her grandchild who was born on February 11, 1993.

* * *

Plaintiff performed her regular job between August 16, 2002 and her last date of work on October 4, 2002. Plaintiff first received restrictions on October 8, 2002 when she was taken off work by Patty Pfau, a physician's assistant. Plaintiff is still working for Mildred Hard in a limited capacity. The plaintiff's back pain has increased since October of 2002 even though the plaintiff has not been working at Borgess Hospital.

* * *

Chris Granaderos was called as a witness by the defendant. In 2002, Ms. Granaderos was one of the plaintiff's supervisors. Between August and October, 2002, Ms. Granaderos did not observe that plaintiff had difficulty walking. She did not

observe the plaintiff sitting more than usual, and the plaintiff did not request any accommodations during this time period.

On cross-examination, Ms. Granaderos acknowledged that she did not always work the same hours the plaintiff worked from August through October, 2002. The plaintiff was a good worker. Plaintiff's job was physical in nature.

* * *

Defendant's Exhibit C are records of James Voigt, M.D. The records from September 5, 2002 indicate that the plaintiff fell on her right knee and was having pain in her right hip as a result of slipping on water. Plaintiff indicated that the hip pain began approximately two days before the treatment on September 5, 2002. Plaintiff indicated that the pain began spontaneously after driving.¹

On appeal defendant makes two arguments:

- I. THE MAGISTRATE'S FINDING THAT PLAINTIFF'S UNDERLYING DEGENERATIVE CONDITION WAS AGGRAVATED BY HER ALLEGED WORK-RELATED INCIDENT IS UNSUPPORTED BY COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD.

- II. ACCORDING TO THE MICHIGAN SUPREME COURT IN *RAKESTRAW V DYNAMICS LAND SYSTEM*, ___ MICH ___; 666 NW2d 199 (DECIDED JULY 30, 2003), THERE IS NO LEGAL BASIS FOR AN AWARD BASED ONLY ON SYMPTOMATIC AGGRAVATION.²

In support of its first argument, defendant states that the medical experts on which the magistrate relied, did not have complete histories of plaintiff's prior back condition. As such, it argues the testimony cannot constitute competent, material and substantial evidence to support the magistrate.

Our duty is to perform a qualitative and quantitative analysis of the evidence in order to ensure a full, thorough and fair review. MCL 418.861a(13). The Workers' Compensation Appellate Commission's review of the magistrate's decision involves reviewing the whole record, analyzing all the evidence presented, and determining whether the magistrate's decision is supported by competent, material and substantial evidence. *Mudel v Great Atlantic and Pacific Tea Co*, 462 Mich 691 (2000).

The magistrate acknowledged plaintiff's pre-existing back condition, as well as an April 2000 back strain. The testifying medical experts were all well aware of plaintiff's underlying degenerative condition. The magistrate found that the April 2000 back strain was not a contributing factor:

¹ Magistrate's opinion, pp 3-5.

² Defendant's brief, pp 10 & 14.

Plaintiff provided a history of her injury and symptoms which was generally consistent with her trial testimony. Based on an examination and review of diagnostic testing, Dr. Dall concluded that the plaintiff had significant stenosis in her lumbar spine. The stenosis was severe at the L3-4 level. The doctor provided the plaintiff with treatment options and the plaintiff elected to pursue decompression surgery. Plaintiff has multiple conditions in her lumbar spine which are congenital or developmental in nature. With respect to the relationship between the plaintiff's fall on August 16, 2002 and her present low back condition, the doctor testified as follows:

A. All right. First of all, the retrolisthesis, the congenital pedicles, the degenerative changes, and the spinal stenosis probably all were there at the time she fell. It is certainly very possible that, and probable, that falling on a knee, the stresses can be transferred to the spine, and take a structural situation like she has and slowly turn it into a symptomatic situation. And three weeks is not too long for something like that to develop over.

Given no other history, besides that fall, and the fact that she related the gradual onset of her symptomatology that she suffers with now stemming from the time of that fall, I would say that the, her current symptoms are related directly to that fall. (Dall deposition, p 14)

* * *

On cross-examination, the doctor testified that the plaintiff has significant degenerative changes at multiple levels in her lumbar spine. These changes were present before her alleged occupational injury. People with degenerative changes in their lumbar spine can have a spontaneous onset of symptoms. The aging process has contributed to some of the conditions in the plaintiff's low back. The history provided to the doctor suggests that the plaintiff's back pain started three weeks after the fall on August 16, 2002.

On May 9, 2003, plaintiff's counsel deposed Patty Pfau, a physician's assistant. Ms. Pfau first treated the plaintiff for back complaints on October 8, 2002. Plaintiff's pain increased from October through December, 2002. Plaintiff had additional evidence of nerve root compression during that time period. Ms. Pfau initially restricted the plaintiff on October 8, 2002 pending further diagnostic studies. Ms. Pfau prescribed muscle relaxers and painkillers to manage the plaintiff's low back complaints. Based on the history she received from the plaintiff, Ms. Pfau related the plaintiff's back condition to the fall she suffered at work.

On cross-examination, Ms. Pfau testified that she did not exactly know when the plaintiff's back pain started in relationship to the fall. Ms. Pfau did not review any treatment records regarding the plaintiff's low back condition before October 8, 2002.

Although Ms. Pfau has prescribed medication for the plaintiff on a consistent basis, she has not examined the plaintiff since the fall of 2002.

On May 16, 2003, defense counsel deposed Ronald J. Jakubiak, M.D. Dr. Jakubiak, a neurosurgeon, examined the plaintiff on March 17, 2003. Based on a history received from the plaintiff, a physical examination and review of objective testing, Dr. Jakubiak concluded that the plaintiff's low back condition is unrelated to her employment. The plaintiff has a congenitally small lumbar spinal canal with superimposed degenerative changes. However, based on his examination, he would return the plaintiff to unrestricted work given that there was no objective abnormalities. The doctor opined that the temporal relationship between the fall on August 16, 2002 and the development of the plaintiff's low back symptoms is too long to make a causal connection between the two events. The multiple age-related conditions which exist in the plaintiff's lumbar spine are unrelated to her employment.

* * *

Although the plaintiff established an August 16, 2002 injury date, she failed to establish an injury date on October 4, 2002, her last date of work. Dr. Dall merely stated that the plaintiff's lumbar condition "could have" been aggravated as a result of her general work duties. This testimony is not strong enough to establish an October 4, 2002 injury date. Moreover, the plaintiff's pain increased after she left work which indicates that her ongoing symptoms are related to the August 16, 2002 fall.

* * *

The plaintiff is 58 years old and does have significant age-related degenerative changes in her low back. Plaintiff had an injury in April, 2000, but only missed a few days of work as a result of that injury. She then returned to work in an unrestricted capacity for over two years without significant problems. Therefore, the April 2000 injury is not a factor which contributed to the plaintiff's condition. Ms. Granaderos also suggested that the plaintiff had back pain as a result of bronchitis. However, this again did not prevent the plaintiff from working. Therefore, when the evidence is reviewed as a whole, the plaintiff has established that the August 16, 2002 event significantly aggravated her low back condition.³

The magistrate is free to accept the medical evidence he finds most persuasive and where, as here, there is a reasonable basis for his findings, we will not displace them. *Miklik v Michigan Special Machine Co*, 415 Mich 364 (1982). He chose to rely on the testimony of Dr. Dall and Patty Pfau, P.A. over that of Dr. Jakubiak.

We believe that defendant is, in fact, asking us to perform a de novo review and accept the testimony which is supportive of its position instead of accepting the testimony which supports plaintiff's

³ Magistrate's opinion, pp 6, 7 & 9.

position and the finding of the magistrate. We do not have that authority. *Holden v Ford Motor Co*, 439 Mich 257 (1992).

The magistrate's finding that plaintiff's work injury on August 16, 2002 significantly aggravated her underlying back condition is supported by competent, material and substantial evidence. We affirm.

Defendant's second argument involves *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003).

Defendant argues:

Following the Court's decision in *Rakestraw*, the magistrate's decision in the present case must be reversed. There is no evidence to support a finding of any work-related injury separate and distinct from Plaintiff's preexisting congenital and degenerative conditions, because Plaintiff clearly did not experience a change in pathology. At most, Plaintiff's work-related incident may have produced a temporary aggravation of symptoms, which is not enough for a compensable disability under *Rakestraw*. The Magistrate relied upon Dr. Dall's opinion in finding that the work-related incident aggravated Plaintiff's condition. *Magistrate at 8* Dr. Dall clearly stated that his opinion was related to Plaintiff's symptomatology, not a change in pathology. He stated that the fall that Plaintiff allegedly experienced could "take a structural situation like she has and slowly turn it into a symptomatic situation." He clarified that, since he was given no other history besides the fall, he believed that her symptoms were related to the fall. *Dall at 14*. Although the Magistrate did not rely upon Dr. Jakubiak's testimony, Dr. Jakubiak completely denied any causative link. He testified that he did not believe Plaintiff's condition was at all related to the alleged work incident. *Jakubiak at 16, 18-20*.

There was no medical evidence presented in this case to support a finding of work-related change in pathology. Accordingly, following the Court's decision in *Rakestraw*, Magistrate Quist's award based on symptomatic aggravation must be reversed.⁴

The *Rakestraw* Court did not specifically define its new term "medically distinguishable". The Court did offer some clues as to what is not a "medically distinguishable" condition. However, a review of the Court's opinion in *Connaway v Welded Construction Co*, a companion case to *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000), gives us some insight into what the Court considered to be evidence of "aggravation" as opposed to a "recurrence" of a preexisting condition.

Plaintiff in that case suffered a severe knee injury while employed in a Michigan location. She was not a resident of Michigan nor was her employer located in Michigan. After surgery and a period of recuperation, she attempted to return to work, this time in New York. She continued to have symptoms from the Michigan injury and within ten days twisted her knee so as to increase those

⁴ Defendant's brief, pp 15-16.

symptoms. She sought to have her worker's compensation benefits reinstated under Michigan law. None of the medical experts, including the defense medical witnesses, felt that the New York incident caused plaintiff's underlying pathology to worsen. Magistrate Wagner found her to be a credible witness and determined that the New York incident simply produced a temporary increase in symptoms, and that her attempt to return to work was a failed attempt.

The WCAC reversed that finding, holding that there was an "aggravation" as a result of the New York incident which constituted a "change in condition".

In affirming, the Supreme Court stated:

The record supports the WCAC's determination that Connaway's New York injury was neither a mere recurrence nor a *temporary* aggravation of her Michigan injury: (1) the plaintiff's physical condition following the New York injury was "subjectively different" than her physical condition before such injury, (2) the plaintiff experienced pain following the New York injury that she had not felt before such injury, (3) following the New York injury, the plaintiff was incapable of engaging in activities that she was capable of performing before such injury, (4) following the New York injury, the plaintiff's treating physician restricted her from participating in any "heavy industry," and (5) an examining physician opined, more than two years following the New York injury, that the plaintiff was incapable of engaging in any prolonged climbing, kneeling, and squatting, and that she would experience difficulty performing any prolonged standing or walking. Further, the WCAC observed that, six years following the New York injury, Connaway had yet to return to work. *Mudel, supra*.

The Court further noted that:

If the New York injury was simply a recurrence of the Michigan injury, or merely temporary in nature, logic would suggest that the plaintiff's ability to return to work would have been restored to the status quo ante once the effects of that injury ameliorated. However, the evidence demonstrates that the New York injury resulted in an "independent contribution," permanent in effect, to the plaintiff's "final condition" (her current disability). *Id.* (emphasis added).

Connaway is instructive in interpreting the term "medically distinguishable" condition. Pain alone is not conclusive evidence. However, an injury producing continuing pain, subjectively dissimilar from her pre-injury condition, and causing impaired performance of pre-injury activities can constitute an "independent contribution" to the "final condition", thus resulting in a "medically distinguishable" condition.

In the instant case, the testimony relied on by the magistrate, that of Dr. Dall, establishes that there was an injury that caused a symptomatic worsening that, in turn, produced a "medically distinguishable" condition. Dr. Dall testified:

All right. First of all, the retrolisthesis, the congenital pedicles, the degenerative changes, and the spinal stenosis probably all were there at the time she fell. It is certainly very possible that, and probable, that falling on a knee, the stresses can be transferred to the spine, and take a structural situation like she has and slowly turn it into a symptomatic situation. And three weeks is not too long for something like that to develop over.

Given no other history, besides that fall, and the fact that she related the gradual onset of her symptomatology that she suffers with now stemming from the time of that fall, I would say that the, her current symptoms are related directly to that fall.

* * *

It's my philosophy that pathology follows -- excuse me, symptomatology follows pathology. So when her pain starts, I make the assumption that pathology begins to change or becomes present.

* * *

A. The only relationship that I can make to the pathology in her spine and her symptoms is through her history. If she fell and that was the onset of the beginning of the symptoms, which gradually got worse, then that intuitively makes sense to me.

But, no, I can't look at her MRI and say this began on such and such a day.

Q. Okay.

A. So the only thing I can say is when her symptoms began, that's when per [sic] pathology began, and that is leading to making recommendations to try to cure her symptoms.

Q. And my question wasn't very clear. Is there a way to describe the pathology that you proposed surgery for? What are you trying to fix?

A. I've already described that she really does not have a good looking spine for lots of different reasons. But the primary pathology that needs to be addressed is the pinching of the nerves, and that's the spinal stenosis. So the spinal canal needs to be opened up to try to get rid of her leg pain.

She is fully aware that she'll probably still have some back pain, because of all the other pathology going on in her back. So I can't guarantee

her that the back pain will go. I can't guarantee her that the leg pain will be gone, but I can give her a 90 percent chance the leg pain will be gone.⁵

We affirm the magistrate's decision in its entirety, finding it is based on competent, material and substantial evidence on the whole record.

Chairperson Reamon and Commissioner Will concur.

Martha M. Glaser Commissioner

William G. Reamon, Jr. Chairperson

Rodger G. Will Commissioner

⁵ Dr. Dall's deposition, pp 14, 16-17.

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This cause came before the Appellate Commission on defendant's appeal from Magistrate G. Jay Quist's decision, mailed June 16, 2003, granting an open award of benefits. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed.

Martha M. Glaser Commissioner

William G. Reamon, Jr. Chairperson

Rodger G. Will Commissioner