

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

BELINDA (HARTLINE) IRONSIDE,
PLAINTIFF,

V

DOCKET #02-0528

DANA CORPORATION,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE KIELTON.

KEVIN S. ANDERSON FOR PLAINTIFF,
ALBERT T. NELSON, JR. FOR DEFENDANT.

OPINION

REAMON, CHAIRPERSON

Defendant appeals from a decision of Magistrate Bernard S. Kielton, Jr., mailed November 18, 2002 granting plaintiff's claims for further compensation benefits based on a change of condition and for attorney fees granted for certain unpaid medical expenses. Defendant claims on appeal that the magistrate erred as a matter of law in six respects:

Argument I

MAGISTRATE KIELTON ERRED AS A MATTER OF LAW IN ADDRESSING PLAINTIFF'S ALLEGATION OF A CHANGE IN CONDITION WHERE THE RECORD ESTABLISHES THAT HER LEFT-SIDED COMPLAINTS PREDATED THE PRIOR HEARING AND SHOULD HAVE BEEN ADJUDICATED DURING THE FIRST PROCEEDING.

Argument II

MAGISTRATE KIELTON ERRED AS A MATTER OF LAW IN FINDING A CHANGE OF CONDITION IN THE ABSENCE OF ANY EVIDENCE OF A WORSENING OF PLAINTIFF'S PERTINENT COMPLAINTS.

Argument III

MAGISTRATE KIELTON ERRED AS A MATTER OF LAW IN FINDING THE TREATMENT OF THE TESTIFYING PHYSICIANS REASONABLE AND NECESSARY.

Argument IV

MAGISTRATE KIELTON ERRED AS A MATTER OF LAW IN SHIFTING THE BURDEN OF PROOF TO THE DEFENDANTS AFTER APPARENTLY REALIZING TH[A]T PLAINTIFF HAD FAILED TO PROPERLY SUPPORT HER CLAIM.

Argument V

MAGISTRATE KIELTON ERRED AS A MATTER OF LAW IN FAILING TO PROVIDE FOR A REDUCTION IN ATTORNEY FEES BASED UPON CREDITS FOR PREVIOUS PAYMENTS.

Argument VI

MAGISTRATE KEILTON'S [sic] ERRED AS A MATTER OF LAW IN PROVIDING FOR AN AWARD OF ATTORNEY FEES.¹

Plaintiff denies any error in the magistrate's determination. We affirm.

The procedural history of this case is extensive and is summarized accurately at pages 1-2 of the magistrate's opinion which is the subject of this appeal. We incorporate and adopt his statement concerning the procedural background of this matter.

The crux of this appeal centers on whether plaintiff's condition has changed from that found compensable by Magistrate Kielton in his first decision in this case, a result previously affirmed by this Commission.² Plaintiff was found to have sustained compensable injuries resulting from the consequences of an electric shock injury. In his initial decision, Magistrate Kielton found that plaintiff sustained "very serious residuals from the electrical shock injury."³ He further found the preponderance of medical testimony supportive of the fact that plaintiff's symptoms were progressive in nature which was "totally consistent" with residuals of a shock injury.⁴ He awarded medical care for those injuries for physical and psychological sequelae.⁵

In the prior affirmance of this matter by the Commission, the following findings and observations were recorded by Commissioner Leslie:

¹ Defendant's brief, pp i-ii.

² See 1999 ACO #627.

³ Magistrate's first opinion, pp 7-8.

⁴ *Id.* p 8.

⁵ Magistrate's order, mailed June 22, 1998.

As compelling as defendant's arguments might be were we the trier of fact, they do not demonstrate that the findings the magistrate actually made are not based on competent, material and substantial evidence on the whole record. The magistrate accepted plaintiff's testimony as credible. This, in and of itself, renders plaintiff's subjective complaints significant and substantial. The magistrate accepted the testimony of plaintiff's experts that electrical injuries lead to gradual development of symptoms which plaintiff had described. In passing, defendant comments that the magistrate did not explain the path he took through highly inconsistent medical testimony. We disagree. The magistrate clearly was impressed with the credentials of Dr. See and the other treating medical providers. In addition, Dr. Russo, who testified favorably for plaintiff, examined plaintiff at defendant's request. This, too, was of great significance to the magistrate. That he could have accepted the countervailing testimony of defendant's experts does not establish reversible error. The magistrate also explained that plaintiff's prior problems, including headaches, facial numbness, and back complaints were caused by different conditions. As a result, the magistrate's decision to award benefits is based on competent, material and substantial evidence.

We do not find defendant's extensive recitation of conflicts in the testimony sufficient to compel reversal. There is no requirement that a magistrate's award be based on absolutely certain medical testimony and totally objective findings. All of plaintiff's experts provided opinions based on an accurate rendition of plaintiff's trial testimony and their own findings. All of the experts conceded, however, that an electrical injury does not produce clearly defined medical consequences. We find no error in the magistrate's factual findings resulting in the open award of benefits.⁶

The present claim involves left-sided complaints alleged to be related to the shock injury. Defendant argues that plaintiff's left-sided complaints clearly pre-dated the time of the first magistrate's decision. As a result, defendant claims that plaintiff's failure to bring a claim for left-sided complaints by the time of the first hearing mandates application of res judicata. The effect of that application would be to bar plaintiff from making the second claim when she had the opportunity to do it at the time of the first hearing.

Magistrate Kielton's opinion accurately sets out in some detail the facts concerning plaintiff's testimony and the supporting medical expert testimony which we adopt and set forth as follows:

Plaintiff testified at trial that she received surgery [sic] Dr. Dellon on June 29, 1998, for a right carpal tunnel release, right cubital tunnel release and radial sensory nerve release on the right. She testified that she received further surgery for nerve decompression for right and left-sided complaints and symptoms on March 3, 1999, and on May 24, 1999, when her left upper extremity and right leg nerves were decompressed.

⁶ 1999 ACO #627 at pp 3-4, footnote omitted.

* * *

She testified credibly how her condition has changed over the last two years as a direct result of the electrical shock injury she sustained. She testified that she can no longer differentiate between the right and left side of her body and that pain has spread throughout her entire body and become severe.

* * *

Dr. Igor Kaps, examined and evaluated plaintiff on January 8, 1999, and authored a report upon referral from Dr. See. Dr. Kaps impression was status post electrical injury in April 1995, chronic neck pain, low back pain, thoracic and hip pain, depression and headaches. Dr. Kaps recommendations included fitting plaintiff with a better fitting thoracic brace and neck collar to manage chronic pain, purchase of whirlpool tub and heating pads, pain management and Depakote for headaches. Dr. Kaps felt plaintiff needed close follow-up with a psychiatrist as well. On April 23, 1999, Dr. Kaps authored a follow-up letter to Dr. See. Dr. Kaps reported that plaintiff was unable to purchase a better fitting brace and soft cervical collar and recommended that plaintiff be evaluated by a pain clinic-anesthesiologist. Dr. Kaps continued to recommend a whirlpool tub and heating packs and increased the dosage of Depakote with a follow-up appointment in 3-4 months or sooner if needed. Following the Director's Compliance Hearing Dr. Kaps authored a letter on September 18, 2000. Dr. Kaps reported and testified that within a reasonable degree of medical certainty and probability, that plaintiff's multiple problems are related to the electrical shock injury that she sustained in April 1995. In addition to what Dr. Kaps recommended in his January 8, 1999, letter to Dr. See, Dr. Kaps recommended occupational therapy, psychological and psychiatric counseling as necessary and reasonably related to the electrical shock injury. Dr. Kaps testified that the electrical shock produced diffuse pathology in the peripheral nerves as well as musculoskeletal injuries. Dr. Kaps testified that his treatment was reasonable and necessary but that his bills had not been paid as of the date of his deposition.

On cross-examination, Dr. Kaps testified that he referred plaintiff for an MR angiography due to double vision, headaches, balance problems and right facial numbness as well as nausea. Dr. Kaps testified that headaches could be related to neck pain and radiation of pain from the neck to the hand. Dr. Kaps was aware of the fact that on August 6, 1999, an MRI of the brain was performed at the University of Michigan Occupational Health Clinic and that a January 5, 1999, CT scan of the brain and that both were normal.

* * *

Dr. Nelson Hendler, M.D., examined and evaluated plaintiff on September 22, 1997, and January 5, 1998. On September 22, 1997, Dr. Hendler diagnosed a disrupted disc at C2-C3, C2-C4 facet syndrome, disrupted disc at C5-C6, disrupted

disc at C6-7, radiculopathy at C6-C7, radiculopathy at C5-C6, carpal tunnel syndrome bilaterally, thoracic outlet syndrome bilaterally, degenerative disc disease, C5-C6, neural foraminal stenosis on the right at C5-C6, degenerative disc disease, L4-L5, neural foraminal stenosis on the right L4-L5, left sided neural foraminal stenosis L5-S1, spondylosis at L5-S1, spondylolysis at L5-S1, [sic] diffuse peripheral nerve damage, secondary to electrical injury, reactive depression, rule out organic brain syndrome, secondary to electrical injury pending results of neuropsychological testing. Dr. Hendler made various recommendations including surgical interventions and referral to other professionals. Dr. Hendler testified that plaintiff needs an epidural morphine pump and testified regarding the carrier's refusal of authorization for surgical intervention. Dr. Hendler testified that electrical shock results in global difficulties that take years to manifest themselves and do not follow a prescribed course. Dr. Hendler testified that the right sided and left sided symptoms are causally related. Dr. Hendler testified cognitive therapy is warranted and cognitive impairments are causally related. Dr. Hendler referred plaintiff to Dr. Dellon.

Dr. Dellon first saw plaintiff on or about September 25, 1997, and began treating plaintiff on October 9, 1997. Dr. Dellon performed surgery on the right carpal tunnel, right cubital tunnel and right radial sensory nerve on June 24, 1998. The same nerves were done on the left upper extremity and March 3, 1999. Nerves in the right leg were decompressed on May 24, 1999. Dr. Dellon intended to perform further procedures regarding the left leg and each brachial plexus. Dr. Dellon testified that within a reasonable degree of medical certainty and probability, as a direct result of electrical injury that occurred on April 13, 1995, plaintiff developed peripheral nerve compression in both upper and lower extremities requiring surgery that has already been done for her and that surgery that is still required for the left lower extremity. Dr. Dellon testified that plaintiff also requires the compression of the brachial plexus where it passes through the thoracic inlet. Dr. Dellon testified the longer the nerves remain compressed without decompression, the less likelihood that plaintiff can have a good function restored. Dr. Dellon testified surgical procedures on upper extremities and left upper legs are causally related. Dr. Dellon testified that time of his deposition \$7,840.00 remained unpaid. Dr. Dellon testified that Medicaid and plaintiff's group insurance carrier made some payments. Dr. Dellon described and explained why and how electrical shock would affect the right and left side of the body. Dr. Dellon testified that fibromyalgia does not lead to the kind of symptoms and complaints which plaintiff expressed. Dr. Dellon discontinued care due to unpaid medical bills.

Dr. See is plaintiff's primary care physician. Dr. See treats plaintiff at least once a month for general care and coordinates care of the physicians treating plaintiff for the electrical shock injury. Dr. See testified that plaintiff essentially hurts all over. Dr. See testified that plaintiff has gained relief from pain using the morphine pump and that he has prescribed Prilosec as a result of the electroshock injury. Dr. See referred plaintiff to Dr. Edwards, an orthopedic surgeon for evaluation and care of the right shoulder symptoms associated with the electrical shock injury but this has not been accomplished due to unrelated cardiac problems. While plaintiff was not aware if there is an

outstanding balance due to Dr. See's office Medicare and the defendant have paid his bills.

Dr. Byung Rhee, M.D., began treating plaintiff on May 2, 2000. Plaintiff complained of constant, sharp and stabbing pain and numbness in the legs, throbbing pain in the shoulders, aching throbbing pain in the head, profound stiffness all over the body, sleep disruption and chronic fatigue, pain in the bilateral buttocks and severe pain all over the body. Dr. Rhee conducted an evaluation for fibromyalgia syndrome and discovered 18 positive trigger points. Dr. Rhee did not associate with the fibromyalgia to the electrical shock injury. Dr. Rhee testified that plaintiff's entire pain presentation bilaterally is associated with the electrical shock injury. Dr. Rhee testified as to the reasonableness and necessity of his treatment and the fact that there is an \$8014.13 balance on the account.

Dr. Lucius C. Tripp, M.D., MPH, examined, evaluated and authored a report on February 5, 2001. Dr. Tripp felt that new complaints were not related to the original injury nor were carpal tunnel syndrome or fibromyalgia. Dr. Tripp did not feel the nerve root decompressions and entrapments were necessary or that the contact with the wall on April 13, 1995, caused a myofascial injury, which neither transiently or permanently aggravated plaintiff's degenerative spine. Dr. Tripp testified that the effects of the strain were purely myofascial in nature and resolved enough for plaintiff return to work in April, May and June 1995. Dr. Tripp then outlined what medications he felt were related to the electrical injury.⁷

After this detailed and accurate review of the medical evidence, the magistrate issued the following findings:

Plaintiff testified credibly that she has sustained a change in condition since the open award was issued on July 20, 1998. I found at the testimony of Dr. Kaps, Dr. Hendler, Dr. Dellon, Dr. See and Dr. Rhee more neutral, persuasive and objective as plaintiff's treating and evaluating physicians than the independent medical examination of Dr. Tripp. I find as fact that there has been a change in plaintiff's condition arising out of the electrical shock injury. Symptoms have become bilateral/global and she required and continues to require further medical care, prescriptions and medical devices as recommended by her physicians in this case.⁸

While defendant labels this issue as a matter of law, to apply the rule defendant urges requires us to fundamentally alter the magistrate's above findings. Commissioner Kent recently articulated the Commission's proper role in reviewing the fact findings of a magistrate:

In *Mudel v Great Atlantic & Pacific Tea Company*, 462 Mich 691 (2000), the Michigan Supreme Court went to great lengths to clarify our role in reviewing the

⁷ Magistrate's opinion, pp 6-9.

⁸ *Id.*, p 9.

magistrate's fact finding. At the outset, I would take a minute to review what *Mudel* did and did not do.

To begin with, it did not present a new standard of review, or give us the power to disregard the weight given testimony by the magistrate in his or her fact-finding, or allow us to engage in de novo review.¹ What *Mudel* did do, was return us to the proper statement of our powers on review, in the oft cited *Holden* decision, rejecting the so-called "any" evidence standard promulgated in *Goff*:

¹ Every member of this Commission has at one time or the other indicated in opinions that we will not on appeal "weigh" evidence contradictory to a magistrate's decision and then reverse on a theory of "the great weight of the evidence". (See for instance *Butler v General Motors Corp*, 1992 ACO #691; *Pitts v General Motors Corp*, 1989 ACO #189. We have all indicated we will adhere to our statutory review standard and affirm the magistrate so long as his or her decision is supported by competent, material, and substantial evidence on the whole record. Stated differently, we have often explained that when on appeal a defendant or plaintiff challenges the magistrate's factual determinations in such a way that their arguments in support said challenge, merely proffer a reinterpretation of the evidence presented at trial, asking us to weigh certain key positions of the record differently, we will decline as such action would not comport with our standard of review. *Jamison v General Foods Corp*, 1997 ACO #598. We have long stated we cannot substitute our assessment of the record for that of the magistrate, as long as the latter's interpretation of the record is supported by the competent, material and substantial evidence.

The decision in *Goff* also contains language that improperly directs the WCAC to review a magistrate's decision under the "any evidence" standard, rather than the "substantial evidence" standard. In *Goff, supra*, 454 Mich 538, the majority stated:

If the magistrate's decision is reasonably supported in the record by *any* competent, material, and substantial evidence, then it is conclusive and the WCAC must affirm. If it does not, it is exceeding the scope of its reviewing power and impermissibly substituting its judgment for the magistrate's. [Emphasis added.]

Therefore, unlike the unstated but effective overruling of *Holden* in *Goff*, we expressly overrule *Goff*, insofar as it contradicts the statutory language and departs from our decision in *Holden*.

* * *

The Legislature has created two very distinct standards of review for worker's compensation cases. The "substantial evidence" standard governs the WCAC's review of the magistrate's findings of

fact, while the “any evidence” standard governs the judiciary’s review of the WCAC’s findings of fact. The WCAC enjoys statutory authority to make independent findings of fact, regarding issues that have been addressed or overlooked by the magistrate, as long as the record is sufficient for administrative review and does not prevent the WCAC from reasonably exercising its reviewing function without resort to speculation. The role of the WCAC is to ensure that the factual findings in worker’s compensation cases are supported by the requisite evidence. The role of the judiciary is to ensure that the WCAC properly recognized and exercised its administrative appellate role.

We expressly reaffirm our decision in *Holden, supra*, and we overrule *Goff, supra*, in that it contradicted our decision in *Holden*. Furthermore, we overrule *Layman, supra*, to the extent that it clearly misstated the law with regard to the WCAC's authority to make independent factual findings.

In rejecting *Goff* and *Layman*, the Supreme Court perceptively returned us to the *Holden* standard, instructing us to perform a quantitative and qualitative review of the evidence to see if the requisite competent, material, and substantial evidence is present on the record to support the magistrate’s fact findings:

The dissent would reverse the WCAC’s decision on the “legal basis” that it violated the “legislative command” of MCL 418.861a(3); MSA 17.237(861a(3), by “fail[ing] to give the appropriate deference to the properly supported factual findings of the magistrate.” Slip op t 16, n 10. However, the dissent ignores the WCAC’s authority, provided by MCL 418.861a(14); MSA 17.237(861a)(14), to conduct a “qualitative and quantitative” analysis of the “whole record” in determining whether the magistrate’s factual findings are supported by competent, material, and substantial evidence. Thus, the WCAC cannot be accused of “violat[ing] . . . legislative command” when it attaches more or different weight or credibility to the evidence than that given by the magistrate.

Thus, we are not to blatantly disregard the Legislature’s directive in MCL 418.861(a)(3) to give deference to the magistrate’s fact-findings, but instead, we are to review these fact-findings in a qualitative and quantitative fashion to discern if in fact they are supported by competent, material, and substantial evidence, as required by MCL 418.861(a)(3). Only if after that quantitative and qualitative review we determine the fact-finding is not supported by the requisite evidence may we substitute our finding for that of the magistrate.⁹

⁹ *Stolk v Statler Ready Mixed Concrete*, 2003 ACO #109, pp 8-10.

We find the magistrate's findings concerning plaintiff's change in condition well supported in this record. We, therefore, decline to apply a res judicata theory to the plaintiff's claim. There is abundantly ample evidence to support the proposition that plaintiff's condition is progressive in nature, which is totally consistent with the electrical injury she sustained and the prior award. That this progression has now involved her left side is quite understandable in light of the medical testimony cited by the magistrate in support of his findings. We have no basis to disturb those findings and adopt them as our own.

We view defendant's second issue as having been addressed in our discussion of Issue I and once again point out that what defendant really is raising relates to the factual sufficiency of the magistrate's findings. For the reasons stated above, we find the magistrate had competent, material and substantial evidence on which to base that finding.

As to defendant's third issue, once again defendant urges a different analysis of the facts from that chosen by the magistrate. The testimony of defense expert, Dr. Tripp, is extensively cited in defendant's brief in support of a version of the facts that disagrees with positions taken by plaintiff's medical experts, which ultimately were accepted by the magistrate. Defendant is simply offering a reinterpretation of the trial evidence and asking the Commission to see things differently in the record than did the magistrate. This is not the function of the Commission, as Commissioner Kent pointed out in *Stolk, supra*. We have found the magistrate's findings granting medical care to be grounded upon competent, material and substantial evidence and find no reason to alter them.

Defendant alleges in its fourth issue raised on this appeal that Magistrate's Kielton committed additional legal error, by shifting the burden of proof to defendant "after apparently realizing that plaintiff had failed to properly support her claim."¹⁰ However, defendant's brief then reverts once again to a dispute with Magistrate's Kielton's fact-finding, where it argues:

Defendant's respectfully differ from the magistrate's conclusion and submit that they demonstrated by a clear showing of competent, material and substantial evidence on the whole record that bills that were due and owing had been paid, and even more important that the alleged changes of condition, a change which obviously did not occur, had nothing to do with the original injury.¹¹

In essence, defendant is once again asking us to accept a version of the facts which is the polar opposite from that found by the magistrate. We see no evidence that Magistrate Kielton misapplied the burden of proof, as it was applied in this case. We find defendant's arguments unpersuasive.

¹⁰ The plaintiff had submitted sufficient evidence of the unpaid medical bills by means of Exhibit #6 and testimony of the treating physicians. In addition, defendant had already been ordered to pay for certain medical treatment by the Board of Magistrates as well as the director. The magistrate properly placed the burden of proof on the defendant to show that those medical bills had been paid.

¹¹ Defendant's brief, p 19.

Defendant's fifth and sixth issues on appeal both concern the magistrate's granting of attorney fees on unpaid medical expenses for treatment of plaintiff's work injuries. We combine our discussion of both issues as one.

On the attorney fee question, the magistrate wrote:

The plaintiff claims that despite the fact plaintiff's treatment with Mensana Clinic predated the magistrate's award benefits and then Director Petersen's characterization that out of state medical care providers must be paid, that none of these bills have been paid.

Plaintiff claims \$7,840.00 remains due to Dr. Dellon, that there is a balance due to Dr. Rhee in the amount of \$8014.13 and a balance due to Dr. Kaps in the amount of \$92.00. In addition plaintiff's mileage for treatment and prescriptions remain unpaid.

At this trial defendant testified that all medical bills had been paid except for the March 3, 1999, left side nerve decompression. No proof was offered other than a spreadsheet which at best is difficult to decipher because you cannot ascertain what has been paid or unpaid and for what services.

CONCLUSION

The defendant has not established satisfactory proof that the bills have been paid subject to my original order and the Director's Compliance Hearing Order nor that treatment was not related to the sequelae of the original injury or subsequent change in condition.

ORDER

The defendant is ordered to pay any outstanding medical bills or prescriptions and in addition the bill for \$7,840.00 to Dr. Dellon, the balance due to Dr. Rhee in the amount of \$8014.13 and Dr. Kaps balance of \$92.00 totaling \$15,946.13 and in addition pay plaintiff's counsel a contingency fee of 30 percent (30%) in the amount of \$4,783.84.¹²

The Commission has in past cases addressed the issue of attorney fees on unpaid medical expenses. In one such case, former Commissioner Wyszynski approvingly cited the magistrate's discussion of Sec. 315 of the Act, as it applies to the ordering of attorney fees:

Plaintiff also seeks attorney fees incurred as a consequence of Defendant's failure to provide medical care. Section 418.315 of the Act provides that the employer shall furnish, or cause to be furnished, reasonable and necessary medical care for work related injury, together with such prosthetic devices as are necessary to relieve the

¹² Magistrate Kielton's opinion, pp 10-11.

employee from affects of the injury. The consequences of failing to provide or to pay for the care follow:

If the employer fails, neglects, or refuses to do so, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made on behalf of the employee to persons to whom [sic] the unpaid expenses may be owing, by order of the hearing referee or worker's compensation magistrate, as applicable. The hearing referee or worker's compensation magistrate, may prorate attorney fees at the contingent fee rate paid by the employee.

That Section has been construed to mean that the employer or carrier may be responsible for attorney fees incurred in collecting unpaid medical bills. The discussion of this issue in *Watkins v Chrysler Corporation*, 167 Mich App 122 (1988) is pertinent. The *Watkins* Court denied an attorney fee to Plaintiff's counsel because Chrysler had provided timely medical coverage through its group health insurance policy with Blue Cross/Blue Shield. The fact that Chrysler had met its medical benefits obligation, albeit through a program other than workman's compensation, distinguishes it from the situation in which no benefits had been provided. In making that distinction, the Court referred to dictum related to that issue in *Boyce v Grand Rapids Asphalt Paving Company*, 117 Mich App 546; 324 NW2d 28 (1982):

Boyce says, in dictum, that where the employer or its insurance carrier is guilty of a breach of statutory duty to provide medical care or to pay for medical care in a timely fashion then the employer or its carrier, and not the employee, should bear the burden of the attorney fees. *Watkins v Chrysler [Corp]*, 167 Mich App 122, 131-132 (1988).

In this case, Defendant has refused to pay the cost of Dr. Kremer's care. Therefore, Defendant shall pay Plaintiff's attorney fee incurred in securing payment of all charges owed Dr. Kremer, subject to the medical cost containment rule of the Act.

The entitlement to fees under the provisions of §315 is by no means automatic in every case where medical benefits are awarded. *Burnett v St. Joseph Hospital*, 1992 ACO #720. Indeed, the awarding of attorney fees is a matter of discretion on the part of the magistrate in cases where the employer or carrier has failed, neglected, or refused to pay for medical services a claimant is clearly entitled to. *Scheland v Jet Box Co*, 1995 ACO #252.

Based upon our review of the record, we find no abuse of discretion nor legal error in the magistrate's award of attorney fees.¹³

¹³ *Gessner v Keeler Brass*, 1997 ACO #548, pp 4-5.

The awarding of attorney fees under Sec. 315 is clearly a matter for the magistrate's discretion. We find no abuse of discretion on the part of the magistrate in this particular issue. Nor do we find that he committed legal error in the award of attorney fees. We also agree with his calculation of those fees. While defendant argues with the accuracy of his calculations, claiming bills were paid that the magistrate found were not paid, we are in no better position than the magistrate as to whether payment of those charges had, or had not, occurred. He found defendant's proofs lacking on the issue of proof of payment. We agree and adopt his findings in that regard as well.

The decision of the magistrate is affirmed.

Commissioner Glaser concurs.

William G. Reamon, Jr.

Chairperson

Martha M. Glaser

Commissioner

LESLIE, COMMISSIONER, CONCURRING

I fully agree with my colleagues with respect to defendant's first four issues. I also agree with the result reached on defendant's issues five and six regarding fees on unpaid medical benefits. I write separately to reiterate the views I expressed in my concurring opinion in *Stankovic v Kasle Steel Corp*, 2000 ACO #124, taking issue with what I believe is a clearly erroneous course of interpretation of the attorney fee provision of MCL 418.315(1) by the Court of Appeals and the Commission.

In *Stankovic* I addressed the plain meaning of §315(1) regarding attorney fees together with the problems arising from the Court of Appeals' interpretation of this section:

The relevant portion of Section 315(1) reads:

If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the hearing referee or worker's compensation magistrate, as applicable. The hearing referee or worker's compensation magistrate, as applicable, may prorate attorney fees at the contingent fee rate paid by the employee.

I submit that defendant in this case is perfectly correct when it argues that the proration of the fees is between the employee and the provider of services and does not impose an additional obligation on the employer. The last sentence which permits the proration of attorney fees relates to the next to last sentence. That sentence states that reimbursement for medical expenses is to be made to the employee or to the party to whom the unpaid expenses may be owing. In no way does this language, reasonably interpreted, create an obligation on the part of the employer to pay fees over and above

the obligation to pay the medical benefit. It clearly provides for a division of the fee based on the interests of those who recover. To the extent that the employee paid for medical expenses he or she owes the fee. To the extent that medical providers are paid directly, they owe the fee.

Although there may be valid reasons for the legislature to impose fees on the employer, I cannot see in the wording of section 315(1) that they did so.¹ I am confirmed in this view by reviewing the history of section 315(1).

¹ The court in *Boyce, infra*, pointed to the dissent at the Appeal Board which noted the reluctance of an attorney to accept a case where the medical bill or bills may be the most substantial portion of the case.

Prior to May 15, 1963, the last portion of this section read:

If the employer shall fail, neglect or refuse so to do [pay medical benefits specified earlier in the section] *such employee* shall be reimbursed for the reasonable expense incurred by or on his behalf in providing the same, by an award of the Commission. (Emphasis added.)

This language only allowed for payment of the reasonable medical expense to the employee. Even in situations where the medical bill was, as yet, unpaid, the provider could not be reimbursed directly.² In response, in 1963 the legislature amended this section to provide for direct payment to medical providers. The new language read:

² The court in *Boyce, infra*, pointed to the dissent at the Appeal Board which noted the reluctance of an attorney to accept a case where the medical bill or bills may be the most substantial portion of the case.

If the employer shall fail, neglect or refuse so to do, such employee shall be reimbursed for the reasonable expense paid by him, *or payment may be made in behalf of such employee to persons to whom such unpaid expenses may be owing*, by an award of the commission. *The commission may prorate attorney fees in such cases at the contingent fee rate paid by such employee and it may also prorate such payments in the event of redemptions.* (Emphasis added).

Thus, when the legislature amended the statute to allow for direct payment to medical providers, it added the provision which is currently under consideration. The

only purpose for such an addition was to make sure that the provider, which could now be reimbursed directly, would pay its proportionate share of the attorney fee.

The error of interpreting section 315(1) began with the Court of Appeals' decision in *Boyce v Grand Rapids Paving*, 117 Mich App 546 (1982). In that decision the court summarily rejected the claim that the medical provider, a beneficiary of the efforts of plaintiff's attorney in obtaining a recovery, should share in the obligation to pay attorney fees. The court did so without reference to the language of the statute. Compounding its error, the court immediately turned to the employer, and created an obligation under section 315(1). Their strained reading required the employer, under certain circumstances, to pay an attorney fee over and above the amounts for reasonable and necessary medical treatment.

However, the decision in *Boyce* on the employer's liability for attorney fees is *obiter dictum* because the court did not decide the case on that issue. In denying that a separate fee could be assessed against the employer, *Boyce* looked to then Bureau Rule 14, which governed attorney fees. At the time of Mr. Boyce's injury, this rule did not allow any attorney fee on the recovery of medical expenses. Because unpaid medical was not included in the amounts for which a fee could be charged, section 315(1), whatever its interpretation could not be the basis for requiring the employer to be responsible for any additional fee payment. Thus, the court's understanding of the meaning of the last sentence of this provision is without force of law.

As a result, the court in *Boyce* got the interpretation of the statute exactly backwards. The statute does, in fact, create an obligation on the part of the provider to pay the portion of the attorney fee reflected in the amount of the bill which was recovered on its behalf.³ Had the court interpreted this section properly, then there never would have been any need to consider the obligation of the employer for payment of a separate fee.

³ The court in *Boyce* resorted to a generalized treatise in support of its conclusion that no attorney client relationship was created by the recovery of monies in a worker's compensation proceeding simply because the provider benefited from the recovery. Although that may be correct as a general proposition, the legislature may impose such an obligation. In my view it did. The court did not even discuss the compensation statute until it focused on the argument that the employer was liable for an additional fee. Whether there is an attorney client relationship is not the point. The point is whether the compensation statute obligates the medical provider to pay its proportionate share of the attorney fee based on its favorable recovery.

Six years after *Boyce* the court revisited the issue in *Watkins v Chrysler Corp*, 167 Mich App 122 (1988). At that time, Bureau Rule 14 had been modified to allow for an attorney fee on the payment of medical benefits. In reversing the Appeal Board's award of medical expenses, however, the court found that the medical expenses were not unpaid because the plaintiff's medical expenses had been paid by defendant's health

and accident insurer. As a result, there was no extended discussion of *Boyce* or the statutory language.

Unfortunately, *Boyce* has also been uncritically followed in cases solely involving provider fees. In *Zeeland Hospital v Vander Wal*, 134 Mich App 815 (1984) and *Duran v Sollitt Construction*, 135 Mich App 610 (1984) the court held that medical providers are not liable for an attorney fee in the absence of a specific agreement with the plaintiff's attorney to do so. As in *Boyce*, neither of these cases considered the specific language of section 315(1) or its history. Had they done so, presumably they would have come to the correct conclusion that the legislature has imposed such a fee on those who receive the benefit of recovery.

I concur with the result reached by my colleagues because of the Court of Appeals' and Commission's longstanding and consistent, albeit erroneous, interpretation of section 315(1) on the question of employer attorney fees. I believe that this issue should be reconsidered by the Court of Appeals or Supreme Court to interpret this section of the act commensurate with its plain meaning. Section 315(1) imposes liability for a fee on plaintiff and the medical providers and not the employer.

I again urge the appellate courts to revisit and reconsider this question.

Richard B. Leslie

Commissioner

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

BELINDA (HARTLINE) IRONSIDE,
PLAINTIFF,

V

DOCKET #02-0528

DANA CORPORATION,
SELF INSURED,
DEFENDANT.

This cause came before the Appellate Commission on defendant's appeal from Magistrate Bernard S. Kielton, Jr.'s decision, mailed November 18, 2002, granting plaintiff's claims for further compensation 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.

William G. Reamon, Jr.

Chairperson

Richard B. Leslie

Martha M. Glaser

Commissioners