

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

SHIRLEY D. JARMAN,
PLAINTIFF,

V

DOCKET #02-0209

SIMPLICITY PATTERN COMPANY, INCORPORATED,
TRAVELERS INSURANCE COMPANY AND
AMERICAN ZURICH INSURANCE COMPANY,
DEFENDANTS.

ON REMAND FROM MAGISTRATE QUIST.

TIMOTHY A. KRAGT FOR PLAINTIFF,
LAURENCE M. BURKE FOR DEFENDANTS SIMPLICITY PATTERN COMPANY,
INCORPORATED AND TRAVELERS INSURANCE COMPANY,
JAMES J. HELMINSKI FOR DEFENDANTS SIMPLICITY PATTERN COMPANY,
INCORPORATED AND AMERICAN ZURICH INSURANCE COMPANY.

OPINION

GLASER, COMMISSIONER

This case is before the Commission, on retained jurisdiction, after a second remand to the Board of Magistrates. Initially the matter was remanded because of the Commission's need for clarification as to whether or not the injury found as of March 2000 was aggravated or contributed to in a significant manner. After a decision was issued on remand from the Board of Magistrates, the Supreme Court issued its decision in *Rakestraw v General Dynamics Land Systems, Inc.*, 469 Mich 220 (2003). We again remanded for a decision as to whether there had been a medically distinguishable condition established for the March 2000 date of injury. We ordered that the parties be afforded the opportunity to present additional evidence in support of their respective positions. Defendant-appellant, American Zurich Insurance Company submitted deposition testimony from Dr. Frye and Dr. Kihm. Defendant-appellee, Travelers Insurance Company and plaintiff did not submit any additional evidence on remand.

Magistrate Quist set forth an accurate summary of the procedural history of this case as well as the evidence on remand, in his opinion at pages 1-7. We adopt that summary as our own pursuant to MCL 418.861a(10) and incorporate it here by reference.

After allowing the parties to present oral arguments and admitting the additional medical evidence, the magistrate issued an Opinion on Re-Remand, finding that plaintiff had not sustained her burden of proving a March 2000 date of injury. He stated:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff bears the burden of proof by the preponderance of the evidence that she is entitled to benefits under the statute. *Aquilina vs. General Motors Corporation*, 403 Mich 206 (1978). The sole issue on this remand is whether the plaintiff established an injury on her last date of work, March 31, 2000, based on the Michigan Supreme Court's opinion in *Rakestraw v General Dynamics Land Systems, Inc.*, 469 Mich 220 (2003). In the *Rakestraw* opinion, the Michigan Supreme Court held:

“On several occasions, this Court has held that symptoms such as pain, standing alone, do not establish a personal injury under the statute. Rather, a claimant must also establish that the symptom complained of is causally linked to an injury that arises ‘out of and in the course of employment’ in order to be compensable.”

* * *

“A symptom such as pain is evidence of injury, but does not, standing alone, conclusively establish the statutorily required causal connection to the workplace. In other words, evidence of a symptom is insufficient to establish a personal injury ‘arising out of and in the course of employment.’”

* * *

“Where 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. Therefore, as a practical consideration, a claimant must prove that the injury claimed is distinct from the preexisting condition in order to establish ‘a personal injury arising out of and in the course of employment’ under Section 301(1).” (footnotes omitted)

Based on the evidence submitted, plaintiff failed to establish that she suffered an injury on her last date of work, March 31, 2000. The opinions of the defense experts, Drs. Kihm and Frye, did not help me arrive at an opinion in this case. When Dr. Kihm

was deposed, he did not have any medical records regarding the plaintiff's prior history and treatment. On cross-examination, he admitted that he could not provide an opinion whether the plaintiff had a change in her prior condition as a result of her light duty employment, because he did not know what her prior condition was. Dr. Frye simply attributed the plaintiff's low back condition to the aging process. He did not attribute the plaintiff's condition to the protruding disc the plaintiff suffered at the L4-5 level arising out of the 1978 injury. Dr. Frye refused to acknowledge that plaintiff had a preexisting condition other than age related degenerative disc disease. Under the circumstances, the opinions of Drs. Kihm and Frye that the plaintiff's light duty work did not cause a medically distinguishable condition are essentially useless.

Therefore, the key evidence which must be analyzed to determine whether the plaintiff's work through March 31, 2000 caused an injury based on *Rakestraw*, is the testimony of Dr. Baran. Quite frankly, Dr. Baran's testimony was difficult to understand, and the doctor admitted that his opinion was "hard to explain." The doctor testified that the plaintiff has four distinct conditions which are affecting her low back: 1) a herniated or protruding disc at the L4-5 level; 2) degenerative changes precipitated by the protruding disc; 3) degenerative changes attributable to the aging process; and 4) hypersensitivity. There was no substantive evidence presented that items 1 through 3 were caused or aggravated by an alleged injury on March 31, 2000. The issue, therefore, is whether the hypersensitivity in the plaintiff's low back is related to the plaintiff's work activities through March 31, 2000.

I find that Dr. Baran's testimony regarding hypersensitivity is insufficient to establish a work related injury on March 31, 2000. The doctor testified that plaintiff experienced pain as a result of different activities subsequent to her injury in 1978. However, the plaintiff failed to establish that any pain she may have suffered as a result of extensive sitting, walking or other light duty activities constitutes a new injury as opposed to the natural progression of pain related to her initial injury and the aging process. Any pain the plaintiff experienced as a result of her light duty activities was transient in nature. The plaintiff would have experienced similar pain outside of work. It is obvious the plaintiff's condition has continued to deteriorate despite the fact that she left work in 2000. Given the lack of clarity in Dr. Baran's opinion, and the fact that any light duty activities only caused transient symptoms, I find that the plaintiff failed to sustain her burden of proof that she suffered a work related injury on March 31, 2000.

Defendant-appellant filed a brief on re-remand asserting that the magistrate's decision is supported by competent, material and substantial evidence, and any other finding would lack such support.

We agree with defendant-appellant. As accurately stated by the magistrate, plaintiff in this case had the burden of proving an aggravation of her already established 1978 back injury. This case was remanded for the purpose of allowing the parties to submit additional evidence, because they could not have anticipated the *Rakestraw* standard at the time the case was originally tried. There was not sufficient evidence to sustain plaintiff's burden prior to the remand. Although plaintiff chose to rely on

her cross-examination of the appellant's experts on remand, this was simply not sufficient evidence to sustain her burden. The magistrate chose to rely on the testimony of plaintiff's expert as the most credible. That testimony did not support plaintiff's allegation of a work related aggravation of her back pain pursuant to *Rakestraw*.

We affirm the magistrate's finding that there was not a new injury date of March 2000 established. Plaintiff's established injury date of 1978 is not affected by this decision. Defendant Traveler's Insurance Company remains liable to plaintiff for benefits for that injury.¹

Commissioners Leslie and Kent concur.

Martha M. Glaser

Richard B. Leslie

James J. Kent

Commissioners

¹ We acknowledge defendant Traveler's Motion for Clarification, and consider it moot in light of this decision.

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This matter returns to the Commission after remand to the Board of Magistrates for a supplemental opinion pursuant to *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003). Magistrate G. Jay Quist issued an opinion on re-remand, mailed July 20, 2004, denying a new work injury date. 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

Richard B. Leslie

James J. Kent

Commissioners