

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

CARL L. WILT,
PLAINTIFF,

V

DOCKET #03-0142

FORD MOTOR COMPANY,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE JARVIS.

MARGARET A. O'DONNELL FOR PLAINTIFF,
ALAN S. GOROSH FOR DEFENDANT.

OPINION

LESLIE, COMMISSIONER

Defendant appeals the decision of Magistrate Valencia L. Jarvis mailed March 27, 2003 granting plaintiff an open award of benefits for right ankle and right shoulder disabilities. Defendant claims the magistrate's decision finding a last day of work injury date is erroneous because plaintiff did not prove a compensable aggravation of his condition within the meaning of *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003). Defendant also claims the right shoulder injury is not compensable because it was sustained at home and was not related to the right ankle injury. Plaintiff responds the magistrate's award is legally correct and factually supported by sufficient evidence that it must be sustained on appeal. We affirm.

The magistrate's opinion provides a full and accurate summary of the testimony adduced in the case before us. We adopt this summary as our own pursuant to MCL 418.861a(10). In granting plaintiff an open award of benefits for his ankle disability as of his last day of work, she wrote:

There is no dispute as to whether or not plaintiff is disabled. In fact, the parties stipulated to there being disability. The record evidence establishes that plaintiff had a reduction in his maximum wage earning ability, realized in the plumber/pipe fitter job, as a result of his work-related right ankle condition. He has suffered a loss of wages as a result of his ankle impairment. Defendant, however, argues that the appropriate date of injury is October 29, 1986. Plaintiff is of the opinion that his subsequent work aggravated the 1986 injury and he is therefore entitled to a new date of injury resulting in a higher rate. This, plaintiff must establish by a preponderance of the evidence. *Aquilina v General Motors Corp*, 403 Mich 206 (1978). In particular, the relevant statutory provision referable to selection of a time or date of injury is set forth in Section 301(1), which in relevant part states:

. . . 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.

I find that plaintiff's testimony, referable to subsequent aggravations to the right ankle following his return to his pipe fitter work, was credible. Plaintiff's trial testimony is consistent with the records of Dr. Higginbotham who recorded plaintiff's complaints of worsening pain at the time of his office visits. Progress notes kept by Dr. Higginbotham on March 29, 2001, and April 26, 2001, clearly indicate that plaintiff complained that walking at work, up to two and a half miles a night, led to complaints of increased pain and even severe pain in the right ankle.

I found the testimony of plaintiff and Dr. Higginbotham to be persuasive and supportive of plaintiff's claim for a new date of injury. Dr. Higginbotham had an opportunity to treat plaintiff over a period of time encompassing 1995 through 2002. He kept detailed notes contemporaneous with plaintiff's office visits for those times relevant to those periods that plaintiff claimed aggravation as opposed to the visits plaintiff had with Dr. Monson in 1994 and July, 2001. He concluded that plaintiff's work subsequent to his 1986 injury caused an actual change in his underlying condition and worsened his symptoms (H, p 41). Dr. Higginbotham testified that between his last visit with plaintiff, and the visit in 1999, something must have changed, increasing the severity such that plaintiff had become interested in a fusion. That opinion is consistent with plaintiff's testimony regarding increased problems in 1998 and 1999.

Dr. Monson does not believe that plaintiff's work activities aggravated the avascular necrosis or arthritis present in the right ankle, but I note he issued restrictions in 1994 that plaintiff avoid prolonged walking and climbing. Based on plaintiff's un rebutted testimony, between 1995 and 1999 he was working twelve hours a day, seven days per week. Dr. Monson did not see plaintiff in 1995 when he experienced a lot of swelling and pain in the right ankle, which led to the surgery performed by Dr. Higginbotham at that time. In addition, Dr. Monson did not see plaintiff in 1999 when he developed more problems with swelling and began to experience trouble with his activities outside of work. In fact, Dr. Higginbotham was able to examine plaintiff during these relevant periods of time and personally observe what impact the work activity had on plaintiff's right ankle.

Dr. Higginbotham testified that if plaintiff was not provided with restricted work activities and if he worked long hours, and if the work he performed in fact was not restricted, there would have been some aggravation of his underlying condition and possible acceleration of the condition. He explained the reason for his opinion as follows:

The ankle joint is a joint that has very close tolerances. Unlike other joints of the body, it is a primary weight-bearing joint that's very small. Those activities that would cause pressure over the incongruent

joint, that is, a joint where the surfaces are not perfectly mated to each other because of a bone lesion or lesion on the surface of the joint, would tend to stress the surrounding cartilage.

Less stress on that surrounding cartilage would tend to be less injurious and damaging to it. More stress would be worse. So more stress would tend, in this particular circumstance because of the nature of that joint, to aggravate or accelerate the rate at which he would develop arthritic changes.

Put another way, if you had this condition and did not bear weight, the symptoms would probably be less and the rate at which this would deteriorate would be slower. If you were doing quite a bit of weight bearing on the surface, your symptoms would be worse and it would tend to accelerate the rate at which the eventual arthrosis of the joint would develop (H, p 27-28).

Dr. Higginbotham's persuasive and credible testimony supports plaintiff's claim that his subsequent work as a pipe fitter, made his condition worse, thereby supporting his claim that he should have had an increase in benefits based on a new date of injury.

I find that plaintiff has shown by a preponderance of the evidence that the appropriate date of injury is January 4, 2000, the last time he was exposed to his regular pipe fitting work, which required that he perform weight bearing activities such as climbing, prolonged walking, and standing. His job activities accelerated and aggravated the right ankle condition that resulted from his work-related fall in 1986. MCL 418.301(1). I find that the arthritis is not an age-related condition. I find that the avascular necrosis is not an age-related condition.¹

As the magistrate noted, defendant does not dispute liability for plaintiff's original ankle injury in 1986 or plaintiff's compensable disability as a result of this injury. Defendant contends the proofs in the record establish only a natural worsening of plaintiff's original ankle injury with, at most, symptomatic aggravation, and no pathological change. In making this argument, defendant first asserts the magistrate failed to expressly or implicitly acknowledge the proper legal standard that mere symptomatic aggravation is not compensable pursuant to *Rakestraw*. Plaintiff agrees that *Rakestraw* governs the case but argues the magistrate's findings clearly meet that standard. Plaintiff also argues that defendant merely urges a different factual result based on its contrary interpretation of the evidence. As a result, there is no basis for reversal, and, the magistrate's decision must be affirmed.

We note that the hearing took place, and the magistrate's opinion was issued, prior to the Supreme Court's decision. That said, based on the testimony of plaintiff's treating doctor, Dr. Higginbotham, the magistrate specifically found a pathological aggravation of plaintiff's ankle condition. The Commission has held on several occasions that a well-grounded conclusion of pathological change

¹ Magistrate's opinion at 13-15.

in a medical condition meets the *Rakestraw v General Dynamics*, 469 Mich 220 (2003) requirement of a medically distinguishable condition.²

Thus, the question becomes: Is the magistrate's conclusion of pathological aggravation supported by competent, material and substantial evidence? Defendant contends plaintiff's complaints of pain and swelling cannot be a new personal injury. In *Rakestraw v General Dynamics*, 469 Mich 220 (2003) the Supreme Court clearly stated that mere symptoms of a preexisting condition alone do not constitute a work-related personal injury, but that symptoms may be evidence of injury. The court stated:

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 §301(1).³

In this case the magistrate did not simply accept plaintiff's complaints of worsening symptoms as the new injury. She relied on Dr. Higginbotham's testimony that the worsening symptoms did, in fact, demonstrate a worsening of plaintiff's underlying condition. As the magistrate noted, this doctor was in the best position to evaluate plaintiff's condition, having treated him from 1995 through 2002. This is certainly a reasonable basis to accept his testimony as persuasive.

² See, e.g., *Harwood v Mercy Amicare*, 2003 ACO #213.

³ *Rakestraw* at 225, 230-231. Footnotes omitted.

Defendant disputes the doctor's conclusion, contending "the record reveals that there was only the progressive effects or consequences of the existing condition in the right ankle."⁴ The magistrate specifically relied on the cross-examination testimony of the doctor at page 41 of his deposition. This portion of the testimony reads:

Q. When he came back, was it your understanding that his symptoms never abated; they continued; he continued to have pain in the same ankle?

A. That it had gotten worse, was my understanding; that between the time that I saw him last and the time that I saw him in '99, something must have changed, increasing the severity that he was now interested in having a fusion.

Q. As a practitioner, do you differentiate between a patient's description of an increase in symptoms from what you know as an actual worsening of their underlying condition?

A. Yes.

Q. Are you talking about Mr. Wilt telling you his pain was getting more severe as opposed to you seeing an actual physical change in his condition?

A. I thought there was an actual physical change in his condition, that it had gotten worse and his symptoms were worse.⁵

Defendant is certainly correct that plaintiff's ankle condition was a progressive one, and there was evidence to support defendant's assertion plaintiff's surgery resulted from the original injury. However, Dr. Higginbotham's medical conclusions on which the magistrate relied are sufficient to support the magistrate's decision that plaintiff's continued work contributed to the worsening of the condition. As a result, we affirm the magistrate's finding of a January 4, 2000 date of injury.

Defendant next contends plaintiff's shoulder injury is not compensable. In finding this injury covered by the Act, the magistrate wrote:

I further find that plaintiff's right shoulder, i.e., torn rotator cuff is work-related. Based on plaintiff's testimony, he fell while using crutches, which were necessitated by his work-related right ankle surgery.

It was held in *Schaefer v Williamston Community Schools*, 117 Mich App 26 [(1982)], that where a primary compensable injury arises out of and in the course of employment, compensability may be extended to a subsequent injury or aggravation of the primary injury where it has been established that the subsequent injury or aggravation is the direct and natural result of the primary injury and the claimant's own conduct has not acted as an independent intervening cause of the subsequent injury or

⁴ Defendant's brief at 9.

⁵ Deposition of Dr. Higginbotham at 41.

aggravation. I find that the injury to the right shoulder was a direct and natural result of the work-related ankle injury. Plaintiff's work-related injury required the use of crutches, and while utilizing the crutches to exit his vehicle, following a doctor's appointment for the work-related condition, plaintiff slipped on ice. I find that his conduct was not negligent in light of his knowledge of his condition.

The records of Dr. Higginbotham and the testimony of plaintiff support his contention that he was on crutches because of the ankle condition. Plaintiff had his surgery on August 23, 2000, and January 7, 2000. Dr. Higginbotham's record includes the notation he made on January 20, 2000. The record states:

Mr. Carl Wilt is status post ankle fusion on the right. He reports a recent fall when he was getting out of the car and lost his crutches. He states that he did not hurt his ankle but that he actually fell on his shoulder.

Dr. Lederman testified that the January, 2000, fall caused the tear, although it was impossible to state whether the second incident on March 27, 2001, had any contribution to the extent or size of the tear (L, p 25). Dr. Lederman recommended surgery as being reasonable and necessary treatment to address the torn rotator cuff. Dr. Monson does not dispute the relationship of the tear to the fall in January, 2000, if plaintiff's history is accurate. I find that it is accurate. In addition, he was not totally opposed to the recommendation of surgery to address the torn rotator cuff. As such, plaintiff is entitled to reasonable and necessary medical treatment, pursuant to cost containment, to address the torn rotator cuff, including surgery.⁶

Defendant argues the magistrate's legal framework is erroneous. First, defendant correctly asserts that the trip to the doctor is not in the course of employment, citing *Dean v Chrysler Corp*, 434 Mich 655 (1990), and as a result, an injury incurred during this trip is not by that fact alone compensable. This was not the basis of the magistrate's award, however. She made a specific finding that plaintiff's ankle condition required the use of crutches and that plaintiff's exiting his vehicle while using crutches was the cause of his shoulder injury. As a result, the shoulder injury was a direct and natural result of the work-related injury, and is compensable based on the Court of Appeals' decision in *Schaefer v Williamston Schools*, 117 Mich App 26 (1982). Defendant contends, however, that *Schaefer* is in conflict with the Supreme Court's pronouncements in *Dean*. We do not agree with defendant's assertion that *Dean* and *Schaefer* are inconsistent.

In *Dean*, the employee was injured in an automobile accident while traveling to her doctor for treatment of a work-related injury. There was no testimony that the impairment from the work-related injury played any role in causing the automobile accident. The only connection between the accident and work was the fact that the trip was undertaken for medical treatment for the injury.⁷ This is a fundamentally different situation from the one before us and from the situation in *Schaefer*. Here, the

⁶ Magistrate's opinion at 16.

⁷ *Dean* at 658.

magistrate found that the original work-related injury was a factor in causing the second injury, thus rendering it a direct and natural consequence of the original work injury.

In *Schaefer* the employee sustained a non-occupational aggravation of a work related back injury while moving to a new residence. The Appeal Board initially ruled that the non-work aggravation was compensable so long as the employee's conduct was not willful misconduct within the meaning of MCL 418.305. The Court of Appeals reversed. The court stated that an employee, in order to be entitled to compensation for a non-work aggravation must show the second injury is the direct and natural consequence of the work injury.⁸ An employee's intentional or negligent conduct breaks the link between the original work injury and a later non-work injury.⁹ Thus, the proper inquiry is whether the claimant's own activities were an independent intervening act breaking the chain of causation between the primary injury and any subsequent injury or aggravation.¹⁰ The court remanded the matter for the Appeal Board to determine whether plaintiff's conduct during his move was negligent in the light of his knowledge of his condition. On remand the Board found that it was not. This ruling was affirmed.¹¹

Although the legal principle in *Schaefer* governs the facts before us, this case is more closely analogous to a very early Michigan Supreme Court decision, *Cook v Hoertz & Son*, 198 Mich 129 (1917). In *Cook* the employee sustained a work leg fracture, necessitating the use of crutches. On two occasions, as a result of the use of crutches, plaintiff sustained further injuries to his leg delaying the healing of the fracture. The employer contended it was not liable for plaintiff's non-occupational injuries. The court held that the employer was liable for continuing compensation benefits occasioned by the two injuries resulting from the use of crutches caused by the original work injury. The court said:

It is quite evident that had it not been for the initial injury plaintiff received he would not be obligated to go about on crutches. It does not appear that he was violating the order of his physician in doing so, nor does it appear that there was anything negligent, intentional, or willful about the incurring of the subsequent injuries, but it does appear that they were simply mishaps, due to the fact that he was obliged to depend upon crutches.

The essential point abides. If the second injury is a direct and natural consequence of the work injury, the consequences of the second injury are compensable. The fact that in this case the injury caused by the use of crutches was not an aggravation of the original work injury is irrelevant where there is a direct causal link between the work injury and the second injury.¹² As a result, there was no error in the magistrate's legal framework for deciding this question.

Second, defendant argues that because plaintiff's injury occurred as a result of slipping on ice, a hazard common to all, the use of crutches was irrelevant, and plaintiff's injury is not compensable.

⁸ *Schaefer* at 37.

⁹ *Id.* at 34.

¹⁰ *Id.* at 37.

¹¹ *Schaefer v Williamston Schools*, 150 Mich App 186 (1986).

¹² *Goro v Grand Machining Co*, 2000 ACO #185.

Again, the magistrate found the use of crutches to be a factor in plaintiff's slipping on the ice. Defendant does not challenge this fact finding. As a result, the premise for defendant's argument, that the use of crutches is irrelevant to plaintiff's injury, is contrary to the magistrate's finding. The magistrate applied the proper legal framework, and her finding plaintiff's rotator cuff tear was a direct and natural consequence of plaintiff's ankle injury is proper.

We affirm the magistrate's decision in its entirety.

Commissioners Will and Glaser concur.

Richard B. Leslie

Rodger G. Will

Martha M. Glaser

Commissioners

S T A T E O F M I C H I G A N
W O R K E R ' S C O M P E N S A T I O N A P P E L L A T E C O M M I S S I O N

CARL L. WILT,
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DOCKET #03-0142

FORD MOTOR COMPANY,
SELF INSURED,
DEFENDANT.

This cause came before the Appellate Commission on defendant's appeal from Magistrate Valencia L. Jarvis' decision, mailed March 27, 2003, granting plaintiff an open award of benefits for right ankle and right shoulder disabilities. 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.

Richard B. Leslie

Rodger G. Will

Martha M. Glaser

Commissioners