

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

JASON CURTISS,
PLAINTIFF,

V

DOCKET #03-0505

MENARD, INCORPORATED,
STAR INSURANCE COMPANY,
c/o MEADOWBROOK CLAIMS SERVICE,
DEFENDANT.

APPEAL FROM MAGISTRATE QUIST.

TERRENCE J. LILLY FOR PLAINTIFF,
LANCE R. MATHER FOR DEFENDANT.

OPINION

WILL, COMMISSIONER

This case was heard by Magistrate Quist on October 15 and October 23, 2003. Plaintiff and plaintiff's mother testified on plaintiff's behalf. Joseph Pasterik, defendant's office manager, testified on behalf of defendant.

Augustus Guerrero, M.D., Bruce E. Dall, M.D., and Carol Ann Martin Shaver, Ed.D., testified by deposition for plaintiff. Ronald J. Jakubiak, M.D., testified by deposition for defendant.

On November 18, 2003, the magistrate's decision was mailed. The magistrate gave plaintiff a closed award. The decision is affirmed in its entirety.

The magistrate devoted page three through the middle of page eight of his decision summarizing the evidence presented. Pursuant to MCL 418.861a(10), we adopt his summary as our own because we find it very thorough and accurate.

The magistrate concluded his decision with his findings of fact and conclusions of law which contain the following:

Plaintiff bears the burden of proof by the preponderance of the evidence that he is entitled to benefits under the statute. *Aquilina v General Motors Corp*, 403 Mich 206 (1978). This case essentially involves two issues: (1) Whether the plaintiff suffered a work-related injury; and (2) whether the work injury resulted in a period of disability.

The first issue is whether the plaintiff suffered a work-related injury on April 8, 2001. I find that the plaintiff failed to establish an injury to his cervical spine as a result of the April 8, 2001 incident. Plaintiff did not have an immediate onset of symptoms in his cervical spine following the April 8, 2001 event. Moreover, there is no medical evidence to support the fact that plaintiff suffered a work-related cervical injury.

Although the plaintiff failed to establish a cervical injury, I find that he did establish a work-related injury to his lumbar spine on April 8, 2001. Plaintiff credibly testified that he suffered a significant onset of pain while pulling a pallet on April 8, 2001. Plaintiff did have a preexisting congenital condition in his low back. Because the plaintiff had a preexisting low back condition, he must establish that the events of April 8, 2001 caused a medically distinguishable condition from his preexisting low back condition. *Rakestraw v General Dynamics Land Systems, Inc.*, ___ Mich ___ (2003). I find that the plaintiff has established a medically distinguishable condition based on his symptoms, medical restrictions, and the testimony of Dr. Guerrero. Plaintiff credibly testified that he suffered a dramatic increase in symptoms as a result of a specific event on April 8, 2001. Shortly thereafter, medical restrictions were imposed which were directly related to that event. Moreover, Dr. Guerrero opined that the plaintiff has a disc protrusion at the L5-S1 level which is related to the April 8, 2001 incident. I find the testimony of Dr. Guerrero more credible than the testimony of the other medical experts on this issue. This evidence is sufficient to establish a work-related injury based on the *Rakestraw* decision.

The second issue is whether the plaintiff established a disability arising out of the injury he suffered to his low back on April 8, 2001. The Michigan Supreme Court defined disability in *Sington v Chrysler Corp*, 467 Mich 144 (2002). Based on my interpretation of the *Sington* case, a disability is a physical limitation which affects a worker's ability to earn maximum wages at available work which he or she is qualified and trained to perform. Based on the evidence submitted, I find that the plaintiff suffered a closed period of disability from June 2, 2001 through September 4, 2001 arising out of the April 8, 2001 injury. Plaintiff had a significant increase in symptoms following the April 8, 2001 injury. He was able to work for a period of time. However, he was off work completely from June 2 through September 4, 2001 as a result of low back pain. He credibly testified that he was unable to perform his job as a carryout person at Menards due to low back pain during this time period.

Although the plaintiff established a closed period of disability, I find that he failed to establish a compensable disability beyond September 4, 2001. To establish the compensable disability, plaintiff must establish a causal link between work injury and wage loss. The plaintiff returned to work with restrictions on September

4, 2001. However, he continued to perform many of the essential functions of the carryout job. Plaintiff also received a higher hourly rate following his return to work in September of 2001. Although the plaintiff may have been earning less wages due to reduced hours, the plaintiff and Mr. Pasterik clearly testified that the reduced hours were related to economic reasons as opposed to the plaintiff's restrictions. Therefore, from the plaintiff's return to work on September 4, 2001, through his last date of work in April of 2002, he failed to establish a compensable disability.

I also find that the plaintiff failed to establish a compensable disability following his termination on April 8, 2002. The plaintiff suffered wage loss following April 18, 2002 because he was justifiably terminated by the defendant for violating company policy. If he had not been terminated, the plaintiff would have been capable of continuing to work at Menards and his ability to earn full wages would have been unaffected.

Based on the above analysis, the plaintiff has established an injury to his lumbar spine which occurred on April 8, 2001. He is entitled to all reasonable and necessary medical treatment arising out of that work-related injury. It appears that plaintiff has several unpaid medical bills for treatment to his lumbar spine following his work-related injury. These bills must be paid by the defendants. It would be appropriate to award an attorney fee on the unpaid medical bills based on Section 315(1) of the Act. However, because an attorney fee was never requested, it will not be ordered. Plaintiff established a closed period of disability from June 2, 2001 through September 4, 2001. Because the defendant failed to present any substantive evidence that the plaintiff avoided available work during his period of disability, he is entitled to his full benefit rate. Defendants are entitled to all 354 and 358 coordinations or offset during plaintiff's period of disability. Because the plaintiff failed to prove a period of disability beyond September 4, 2001, plaintiff's argument regarding the applicability of Section 301(5)(e) of the Act and defendant's argument that the plaintiff refused an offer of reasonable employments are moot.¹

Plaintiff filed a claim for review. On May 13, 2004, Plaintiff filed his brief on appeal raising three issues:

DOES THE RECORD AS A WHOLE, CONTAIN COMPETENT MATERIAL AND SUBSTANTIAL EVIDENCE TO ESTABLISH THAT THE PLAINTIFF SUSTAINED A COMPENSABLE DISABILITY AS A RESULT OF A WORK INJURY OF APRIL 8, 2001 FOR THE PERIOD FOLLOWING HIS FIRING IN APRIL 2002 CONSISTENT WITH *SINGTON V CHRYSLER CORP AND ITS PROGENY*?

¹ Magistrate's decision, pgs. 8-10.

DID THE MAGISTRATE APPLY THE APPROPRIATE LEGAL STANDARD TO DENY COMPENSABLE WAGE LOSS BENEFITS TO PLAINTIFF FOLLOWING HIS FIRING IN APRIL 2002 FROM HIS FAVORED ACCOMMODATED WORK POSITION?

DID THE MAGISTRATE ERR IN FAILING TO AWARD AN ATTORNEY FEE AND PLAINTIFF'S MEDICAL BILLS INCURRED FOR THE DETERMINED PERSONAL INJURY, FOR THE MEDICAL BILLS SET FORTH IN "EXHIBIT 5".

Plaintiff's first and second issues deal with plaintiff's possible entitlement to workers' compensation benefits after he was terminated by his employer in April 2002. Accordingly, we will treat this subject matter as one issue. Plaintiff supported his claim that he is entitled to an open award with the following:

Plaintiff returned to work at favored work or modified work under the reasonable employment statutory definition. This was not a real job in the real world, but a job at which the employer essentially claimed he told Mr. Curtiss to go at his own pace avoiding the substantial restrictions medically placed upon him. Although Mr. Curtiss had disagreed with the claimed concern of the employer over his welfare, it is nevertheless undisputed that the work he performed was favored and not a real job.

* * *

Within 100 weeks of his return he was fired. The language of subsection 5 mandates that if [he] has been employed under the reasonable work doctrine for less than 100 weeks and "loses his or her job for whatever reason, the employee shall receive compensation based upon his or her wage at the original date of injury." The Supreme Court has clearly said that "whatever reason" means exactly that. *Russell v Whirlpool Fin Corp*, 461 Mich 579 (2002). Plaintiff did not simply quit or walk away from this favored work. The termination resulted in a dispute over scheduling for necessary therapy due to his work related back injury, plaintiff was well within subsection (c) of MCL 418.301(5)(e).

There would be simply no meaning to the statutory scheme if Jason Curtiss is denied continuing benefits in this case. To accept the reasoning of Magistrate Quist is to overturn of what is a well settled policy in Michigan Workers Compensation Law, that is to encourage the return to work on favored basis of injured employees. The legislature made choices as to when benefits would be reinstated following that return.

Plaintiff was not performing full job duties. Without assistance [sic] from the employer he could not perform the job without the ability to go at his own pace,

accommodating even his pain he would not have been able to do the job. The statute [sic] says what it says and must be applied in this case.

The facts in this case are undisputed in all material matters. There is simply no fact to determine, but rather an appropriate application of the proper legal test to apply. Under that analysis, Jason Curtiss is entitled to continuing disability benefits.²

Plaintiff's theory set forth above is valid if, in fact, plaintiff was discharged from reasonable employment formerly known as favored work at a time when he remained disabled. Such is true because MCL 418.301(5)(e) brings this about for such workers terminated within 100 weeks from his or her return to work.

Pertaining to plaintiff's contention that his employment was reasonable employment or favored work, defendant argued in its brief received June 11, 2004:

In addition to not performing favored work after he went back to Menard's in September 2001, plaintiff was not disabled when he worked there from that time until April 2002. The Magistrate found as a fact that he performed his usual carryout job during that time, and that finding necessarily negates any finding of disability during that time.

Given the fact that plaintiff was not disabled when he worked between September 2001 and April 2002, it is clear beyond question that he could not have been "employed pursuant to this subsection" as required by MCL 418.301(5)(e); and thus that provision could not possibly have applied to him. All of subsection (5) of section 301 is subject to the first sentence of the subsection which provides that "[i]f disability is established pursuant to subsection (4) [MCL 418.301(4)], entitlement to wage loss benefits shall be determined pursuant to this section and as follows: * * *." Thus, the various subparts of MCL 418.301(5) apply only to those who have been employed while subject to a disability as defined in the immediately preceding subsection (4).

In this case the Magistrate expressly found that plaintiff was not disabled when he worked between September 2110 [sic] and April 2002, and that finding renders subsection (5) inapplicable to plaintiff's claim. As the Magistrate correctly noted in his opinion,

"* * * Because the plaintiff failed to prove a period of disability beyond September 4, 2001, plaintiff's argument regarding the applicability of Section 301(5)(e) of the Act and defendant's

² Plaintiff's brief on appeal, pgs. 15-16, 17.

argument that the plaintiff refused an offer of reasonable employment are moot." (Magistrate's Opinion, p 10).

Plaintiff did not perform favored work between September 2001 and April 2002, and he was not disabled when he worked during that time. Thus, subsection 301(5)(e) of the Act does not apply to him or to his claim for benefits. Plaintiff's attempt to use that provision as support for his argument that the Magistrate erred in denying him an open award is misplaced and does nothing to show the sort of error plaintiff alleges.³

Thus defendant hotly disputes plaintiff's claim that he was performing favored work when terminated in April 2002. Further, defendant's quote from page 10 of the magistrate's decision tells the reader the magistrate had a clear understanding of plaintiff's potential entitlement to benefits beginning after his termination if plaintiff was engaged in reasonable or favored employment at the time he was discharged.

Defendant has cited testimony from the record to show plaintiff was performing regular and not favored or reasonable employment at the time he was discharged:

Q. You were hired in at Menards in 1998?

A. That's correct.

Q. And you continued to work there until mid April 2002, is that true?

A. That's true.

Q. Did your job duties or function ever change from the day you hired in?

A. No.

Q. And did you receive periodic raises over the course of time?

A. Yes, I did.

Q. And was that based on merit?

A. Some of them were and some of them were cost of . . .

* * *

³ Defendant's brief, pg. 11.

- Q.* The work you were doing, Jason, was it work restrictions all the time after April 8, 2001?
- A.* Yes.
- Q.* Were you able to keep within the restrictions?
- A.* Yes. I, at least, tried my best to keep inside those restrictions.
- Q.* Were you able, in fact, to accomplish this?
- A.* It was difficult, but --
- Q.* Why was it difficult?
- A.* Because apparently they expected me to be out there acting as a partial carry out and also pushing those carts that are -- were, at that point, over my restriction.
- Q.* Well, what did they have you doing? I'm not clear here, were you a carry out or not?
- A.* Yes.
- Q.* Alright, let me ask you this, you're on restrictions, did they give you another job within those restrictions or was it the carry out job?
- A.* The carry out job.
- Q.* Alright, so were you instructed to do only parts of the carry out job?
- A.* Yes.
- Q.* Were you able to keep within the restrictions then doing part of the job?
- A.* No.
- Q.* Why not?
- A.* Because it required bringing in carts in, pushing the big lumber carts, which weigh over 50 pounds.⁴

⁴ October 15, 2003, trial, pgs. 62, 80-81.

This testimony is right on the edge as to whether this was regular or favored employment gone wrong so to speak. Because the magistrate had to make a finding of plaintiff's credibility and he thoroughly understood the nuances of what would happen if he found this to be favored or reasonable work, we will not disturb his fact finding. This is especially true because the magistrate did not totally disavow the testimony of Dr. Jakubiak who testified for the defendant and found plaintiff was not disabled.

Plaintiff's second argument deals with the magistrate's failure to order defendant to pay for an attorney fee on medical bills ordered paid by the magistrate in the instant litigation. Specifically, plaintiff argued:

The plaintiff submitted a number of medical bills contained in "Exhibit 5" which were not paid by the employer. The record in this matter inquired into why those bills were not paid and the best indication given by Pasterik, defense only witness was that the insurance carrier must not have paid them. This magistrate found that these bills were proper but found that no attorney fee should be paid because it wasn't requested.

This is clear error. MCL 418.315(1), provides that the employer shall furnish, or cause to be furnished reasonable and necessary medical care for work related injuries. It provides that if there is a failure to pay for the cure, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment made on behalf of the employee to persons to whom the unpaid expenses may still be owing by the worker's compensation magistrate. It further provides that the magistrate may prorate attorney fees on a contingent rate paid by the employee.

This commission has determined that under the circumstances of this case, the plaintiff should be entitled to a prorated attorney fee. In *Stankovic v Kasle Steel Corp*, 2000 ACO #124 the following appears:

"Plaintiff was injured in 1977 while he was employed as a machine operator for the defendant. It was established in his first trial that his injury was caused as a result of his job and he was awarded disability benefits from the last day of his employment with the defendant. In addition, the magistrate awarded the plaintiff medical costs.

In March of 1998, plaintiff brought an additional claim for attorney fees, which the magistrate granted:

The only issue presented is whether this magistrate can order defendants to pay plaintiff's attorney fees based upon an award of medical benefits. I find that MCL 418.315(1) provides for such an award and grant plaintiff's attorney's request.

In *Gross v Great Atlantic & Pacific Tea Co*, 87 Mich App 448 (1978) the court refused to order defendants to pay plaintiff's attorney fee following defendant's petition to stop. The court explained that the [sic] neither section 858 nor Bureau Rule 14 provided for attorney fees in a petition to stop compensation. "Attorney fees, other fees, and expenses must be borne by the parties in the absence of a statute shifting the incidence of such expenses." *Gross, supra*, at 451. However, the instant petition is premised on MCL 418.315(1). That section provides in pertinent part that, "The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee". Although the Court of Appeals has never authorized such an award, it has implied that an award of attorney fees may be appropriate in certain circumstance. See *Nezdropa v Wayne County*, 152 Mich App 451 (1986) and *Walkins v Chrysler Corp*, 167 Mich App 122 (1988). I find that the circumstances suggested by the court are present in the instant matter. Furthermore, the Appellate Commission has upheld an award of attorney fees assessed against defendants and based upon medical benefits. *Sikkema v Taylor Carving Inc*, 1992 ACO #469, 5 MIWCLR 1394. The Commission premised its decision on section 315 and distinguished section 858 which was at issue in *Gross, supra*."

See also *Belinda Ironside v Dana Corp*, 2004 ACO #6610-12.

The only reason given by the magistrate for not awarding an attorney fee was that one was not requested. There is no basis in the statute or in the case law to deny a fee for such reason. Specifically, the magistrate certainly did not follow the decided case authority such as *Walkins v Chrysler Corp*, 167 Mich App 122 (1988) adopting by reference *Boyce v Grand Rapids Asphalt Paving Co*, 117 Mich App 546 (1982). It is pointed out that there was clearly a dispute with reference to this matter as it related to unpaid medical expenses as raised by the applications for mediation or hearing in this matter. Those petitions do not require any specific relief be requested. They do however set the frame work for what the issues in the matter are. It appears that the only basis on which the magistrate was attempting to deny a fee has to come from some sort of misapplication of Doctor [sic] Nuras Judicata as contained in *Mower v The MI Dep't of Transportation*, 1994 ACO #543, which involved an award of \$20,000.00 in nursing care fees with an attorney fee being asked some six years later. The commission denied that on the basis it was raised [sic] Judicata because it could have been raised in the first case. The issue of attorney fees is directly raised in this case. This is the only case.⁵

⁵ Plaintiff's brief on appeal, pgs. 18-20.

Defendant argued that it should not be assessed any attorney fee. Defendant's argument pertaining to the attorney fee issue included the following:

Plaintiff's request for an attorney fee on certain unpaid medical bills also has no merit. As the Magistrate noted in his opinion (p 10), plaintiff never requested such a fee; and it would be patently unfair to require defendants to pay such a fee when plaintiff never requested it and thereby failed to put defendants on notice that entitlement to it was an issue in the case. Plaintiff's current claim for such a fee is nothing more than an attempt to take advantage of a statement in the Magistrate's decision concerning an issue plaintiff clearly waived by failing to raise it at the proper time.

If plaintiff had requested an attorney fee on the medical bills in question, the defendants would have had the opportunity to oppose that request and to present proofs concerning the reasons why the bills I question had not been paid previously. Having denied defendants the opportunity to oppose a request for such a fee, plaintiff has clearly waived it and cannot resurrect it at this time simply because the Magistrate mentioned that issue in his decision.

MCL 418.315(1) provides in pertinent part:

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 in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.

These two sentences quoted above are to be read in conjunction with each other. Thus the prorated fee is to be paid by the carrier/employer and not the health care provider because the health care provider did not fail, neglect, or refuse to provide reasonable and necessary medical care but the carrier/employer failed to pay for same. To hold that the health care provider pays the prorated attorney fees under these circumstances, puts the provider in a position of having provided medical care in good faith and having to accept a discounted payment in addition to the limitations set by the cost containment rules.

Having said the above, we do not believe that attorney fees are to be awarded in all cases where reimbursement of medical expenses is at issue.

In the instant case, we agree with the magistrate that attorney fees are not payable because plaintiff did not seek attorney fees at the trial level. To hold to the contrary would be unfair to the defendant because the defendant would not be afforded the opportunity to contest the propriety of such fees within the facts of the case.

In so holding, we note that the language of Section 315(1) quoted above makes it clear that an award of attorney fees is discretionary. The plaintiff has not shown that the magistrate has abused his discretion.

We now turn to defendant's cross appeal filed May 19, 2004. On June 11, 2004, the defendant filed its brief on appeal which contained as a second argument the issue defendant raised in its cross appeal:

THE EVIDENCE PRESENTED IN THIS MATTER FAILS TO SUPPORT THE MAGISTRATE'S FINDING OF COMPENSABLE DISABILITY BETWEEN JUNE 2, 2001, AND SEPTEMBER 4, 2001, BECAUSE IT FAILS TO SHOW THAT PLAINTIFF SUFFERED A MEDICALLY DISTINGUISHABLE INJURY AS REQUIRED BY *RAKESTRAW V GENERAL DYNAMICS LAND SYSTEMS, INC*, 469 MICH 220, 666 NW2D 199 (2003).

Defendant's argument in this regard included the following:

Dr. Guerrero, a physician who is board certified in physical medicine and rehabilitation, saw plaintiff on referral by Dr. Dall, and took over plaintiff's care on May 3, 2002 (Guerrero 4, Guerrero 9). Dr. Guerrero, unlike the other physicians who testified in this matter diagnosed plaintiff's condition as a disc herniation at L5/S1; and he said it was reasonable to assume that the herniation occurred in the work-related incident that allegedly occurred in April 2001 (Guerrero 16). He also said that plaintiff's work activities could have caused or aggravated the conditions his examination of plaintiff revealed (Guerrero 16-17).

Dr. Guerrero's conclusions concerning the causes of plaintiff's back problems are problematical for several reasons. First, none of the other physicians who treated plaintiff (Dr. Dall) or examined him (Dr. Jakubiak) found a herniated disc at any level in plaintiff's lumbar spine. Dr. Dall made no mention of any disc herniation in his testimony, and he blamed the abnormal disc plaintiff has at L4/L5 for his continuing low back pain (Dall 22-23, Dall 25). Dr. Jakubiak expressly stated that the MRI of plaintiff's low back did not demonstrate any disc herniation and at most showed very mild bulging or protrusion of the disc at L5/S1 without any impingement on the nerve roots at that level (Jakubiak 12). Dr. Guerrero's conclusion that plaintiff's back problems result from a herniated disk at L5/S1 thus find no support in the testimony of either of other physicians who testified in this manner.

Dr. Guerrero was also unaware of any treatment plaintiff had received for his low back problems prior to April 2001 (Guerrero 25). Thus, he was apparently unaware of plaintiff's history of back problems going back at least several years before he began treating with Dr. Dall for those problems in 1999 (Dall, 16-17). This lack of knowledge concerning plaintiff's prior history of back pain necessarily casts

serious doubt on Dr. Guerrero's conclusion that the alleged event in April 2001 was the cause, indeed the sole cause, of plaintiff's claimed problems after that time. Dr. Guerrero seemingly knew nothing of plaintiff's undeniable problems before that time and thus was in no position to make an accurate assessment of the relative contributions of the alleged incident in April 2001 and plaintiff's prior condition.⁶

On July 2, 2004, plaintiff filed his reply brief to defendant's cross appeal. In this brief, plaintiff argued that the testimony of Dr. Guerrero demonstrated that plaintiff's condition resulting from his injury was clearly medically distinguishable from any pre-existing condition:

Dr. Augustus Guerrero testified that the plaintiff suffered from L5-S1 disc herniation, read by the radiologist as disc protrusion, which was causing pain in which he directly related to the incident of April 8, 2001. Dr. Guerrero actually used the term lumbo-sacral disc protrusion which he also described disc herniation, a difference only in nomenclature. Accordingly to the doctor, the work incident of April 8, 2001 caused this inner disc disruption. (G-16) Further, Dr. Guerrero testified that the plaintiff also had facet irritation due to the same activity together with a discogenic disruption which was a new medical term that "spinal care doctors have agreed upon in the study of the spine." (G-17) This is further described on the MRI which showed disc disruption with accompanied by a continuous and persistent pain. (G-18)

Dr. Guerrero conceded that while he used the term herniation, it was a not herniation in terms of nerve root impingement but actually a condition which he describes as actually worse.

Dr. Guerrero further went on by in cross examination at pages 28-29 to testify.

Q. "Okay. Well, if -- given what you agree were the initial essentially normal findings for the spine and lower extremities in your neurological exam for your first visit, what then formed the basis for your differential diagnoses of possible inner discogenic disruption at a higher level, and also, the facet irritation?"

A. Two things. His description of what happened during the time of the accident, which could put undue axial and torque loading on the disc, as well as the facet joints, and cause pain [sic] and damage to the facet joints as well as to the disc.

⁶ Defendant's brief, p. 15-16.

And number two, the history of this patient. This has been going on for months and that is a natural history of disc herniation or inner discogenic disruption, as well as facet joint dysfunction.

- Q. So at least at this point, though, the MRI, your EMG, the caudal block, your physical exam, don't provide you with a basis for a diagnosis which would explain his pain, so you're left to, based on your training, come up with other potential explanations which, at lease at this point, are based largely on this man's subjective history, right?
- A. I believe the MRI is quite helpful. I believe that there's a disc herniation and disc degeneration, and that is a potential pain generator. And a lot of times the natural history of disc herniation is actually beginning this degeneration, and one day the patient lifts a heavy object and the disc herniation protrudes and then it causes severe pain. And the pain is intermitting, continuous, and never lets up for months. And so it's reasonable to assume that is indeed what happened to the patient.

And far as the facet joint disruption is concerned, that particular effort happened at the work site would have caused a strain to the capsule as well as the contents of the lacet joint, and that can be a chronic, painful condition."

Dr. Guerrero's testimony is further "spun" by the defendant when it attempts to suggest that he did not use the official term- "disc protrusion". This was already understood to be the understanding of the magistrate.

In essence, the defendant chooses to ignore the whole record standard, and does not provide any explanation as to why as a matter of law Dr. Guerrero's testimony should be disregarded. Defendant has shown no reason to upset or reverse the finding of the Magistrate on injury or a closed period of disability.⁷

The testimony of Dr. Guerrero, which was found to be credible by the magistrate, serves two purposes in this litigation. First, the testimony is competent, material, and substantial evidence supporting the magistrate's decision. Second, this testimony also clearly meets any test for compensability created by *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003) because the doctor's testimony establishes that plaintiff's condition resulting with work-related injury is medically distinguishable from plaintiff's pre-existing condition.

Thus, we affirm the magistrate's decision in its entirety.

⁷ Plaintiff's reply brief, pgs. 4-5.

Chairperson Glaser and Commissioner Kent concur.

Rodger G. Will

Commissioner

Martha M. Glaser

Acting Chairperson

James J. Kent

Commissioner

STATE OF MICHIGAN
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JASON CURTISS,
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DOCKET #03-0505

MENARD, INCORPORATED,
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c/o MEADOWBROOK CLAIMS SERVICE,
DEFENDANT.

This cause came before the Appellate Commission on plaintiff's appeal from Magistrate Jay Quist's decision, mailed November 18, 2003, granting 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.

Rodger G. Will Commissioner

Martha M. Glaser Acting Chairperson

James J. Kent Commissioner