

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

KHALIL DAKROUB,
PLAINTIFF,

V

DOCKET #04-0006

AMERICAN AXLE & MANUFACTURING OF MICHIGAN AND
PACIFIC EMPLOYERS INSURANCE COMPANY,
DEFENDANTS.

APPEAL FROM MAGISTRATE GUYTON.

ROBERT S. STRAGER FOR PLAINTIFF,
BRIAN J. KINGSLEY FOR DEFENDANTS.

OPINION

KENT, COMMISSIONER

Plaintiff appeals the decision of Magistrate Carol R. Guyton, granting defendants petition to stop benefits.¹ In his appeal brief, plaintiff included the following as his formal statement of issue:

MAGISTRATE CAROL R. GUYTON'S DECISION TO GRANT DEFENDANT-APPELLEES' PETITION TO STOP IS NOT SUPPORTED BY COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD TO SUPPORT HER FINDINGS AS REQUIRED BY MCL 418.861(a)(3), MSA 17.237(861a)(3).

In the body of his argument, plaintiff complains of both the magistrate's negative credibility finding regarding his testimony, and what he terms her failure to consider the testimony of Dr. Awan or the medical records of Dr. Morawa.

We begin with the magistrate's credibility finding, which she based in large part on observation of plaintiff via a surveillance tape:

Dorman Sartwell is employed as an investigator at Data Surveys, Inc., where he has worked for the last six years. He performed surveillance on plaintiff

¹ The magistrate's decision was mailed to the parties on December 29, 2003.

on 12 different occasions; however, the only video shown during trial was obtained on May 30, 2002 and October 10, 2002.

On May 30, 2002 he started his surveillance at plaintiff's residence and then followed plaintiff to the Islamic Community Center where plaintiff attended a picnic. He filmed plaintiff helping others carry a cooler to the picnic area and he also carried several watermelons. On the video plaintiff was seen in a sleeveless T-shirt and appeared very muscular. A few times throughout the day he raised his arms above his shoulders without any apparent problems. It appeared to be a normal motion for him. Later in the video he was seen lifting a young girl onto his shoulders. He was also seen swinging the girl by her arms. On October 10, 2002 he was observed trying to get into a locked van without the key. Apparently the key was locked inside the van. He held his arms up above shoulder level for a considerable time while trying to open the door. His shirt was off and once again he appeared very muscular.

On cross-examination, Mr. Sartwell testified that he spent about 100 hours, from 2001 through April 2003 observing plaintiff, but he only obtained five hours of videotape.

* * *

Plaintiff has a current real estate license which he obtained before his divorce. Every so often he visits the real estate office in order to use the computer. He says he wants to keep the relationship he has with the broker. Currently he is not selling any homes and he has not joined the local real estate board. He considers himself disabled from real estate sales because occasionally he has to lie down and sometimes it is difficult for him to be with people all the time. Sometimes while he is in the realtor's office, he looks at available homes because he is interested in buying a home. He admitted that some of the sales staff at Real Estate One earn \$1200.00 a week. He insisted that he is in too much pain to work as a realtor, because it would require too much sitting and standing. He admitted that during the summer of 2002 he spent time in Lebanon. The air travel took about 14 hours. He said the trip made him uncomfortable. He forced himself to travel because a relative was sick.

He admitted that sometimes during his exercises, he lifts five to seven pound dumbbells, but mostly he walks on the treadmill.

* * *

There is no question that plaintiff has a muscular build and exercises regularly. Even his treating physician, Dr. Muaffar Awan, agreed plaintiff has the

physique of a well-built athlete. Whether plaintiff admits it or not, it is apparent that he uses weights to maintain the muscular tone of his upper body. . . .

* * *

I found plaintiff's testimony about his current limitations exaggerated. He said his back condition would not allow him to sell real estate. Based on the limited findings of Dr. Awan regarding his back this statement is inconsistent with the medical testimony.

Plaintiff claims error in that finding, alleging her analysis is "unsound". However, he does not address the observations of his physical activity or his statements regarding inability to work as a realtor in disputing that finding. Instead, he relies on juxtaposing select statements from the magistrate's opinion with a disputed statement from the medical records of Dr. Morawa²:

In granting the Petition to Stop, Magistrate Guyton also relied on the fact that Plaintiff-Appellant has a muscular building[sic] and exercises regularly. (O, p. 10) Plaintiff-Appellant indeed testified that he exercised regularly, watched what he ate, and used dumbbells of five to eight pounds which were within the restrictions given him by Dr. Awan.

It is interesting to note that although Magistrate Guyton finds that the Plaintiff-Appellant "may have a small or partial tear of the supraspinatus tendon," she doesn't feel that it would "appear to affect mobility or strength in the shoulder," (O, p. 10) Magistrate Guyton does not support the opinion that a partial tear of the supraspinatus tendon would not affect mobility or strength in the shoulder with any evidence. Indeed, Dr. Morawa indicates that he would recommend surgical repair of the tear. The only evidence Plaintiff-Appellant can speculate Magistrate Guyton relied on was the videos.

This, like most of Magistrate Guyton's analysis, is unsound. First it is interesting to note that although Plaintiff-Appellant was under surveillance for approximately 100 hours, only five hours of video was taken, and of those five hours of video taken, Defendant-Appellee found less than an hour beneficial to its claim. (O, p. 4) . . .

² Plaintiff asserts the Magistrate "ignored" those records, presumably because she only referred to it as admitted, and did not "summarize" it along with those of the two medical experts who were deposed. As we have noted in the past, it is not necessary in every case for the magistrate to specifically refer to every witness or exhibit, so long as she considers and recites that evidence necessary to support her findings. *Trenary v Camshaft International Inc.*, 1999 ACO # 781.

In matters of credibility, acknowledging the magistrate's sometimes unique opportunity to view plaintiff and hear his testimony, we generally differ to his or her findings. As we have stated in the past, we may reject the magistrate's credibility finding when it is contradicted by serious inconsistencies and incongruities. *Motdoch v Sea Ray Boats*, 1994 ACO #15; *Baur v City of Westland Police Department*, 1992 ACO #434.

However, we do not find that plaintiff's contentions rise to the level of serious inconsistencies or incongruities, and we yield to the magistrate's decision on this issue, as his findings are supported in the record.

Next, we turn to plaintiff's contention that magistrate "ignored" the testimony of Dr. Awan and the records of Dr. Morawa.³ When carefully viewed, it becomes apparent what plaintiff really is complaining about is not that the magistrate failed to consider that evidence, but that she may have not given it the weight plaintiff would:

Moreover, Magistrate Guyton ignored the medical records of Dr. Lawrence Morawa, M.D. Dr. Morawa clearly notes on February 5, 2003, that he examined the MRI's and that Plaintiff-Appellant has a small tear on the supra spinatur tendon, and that this small tear is giving him tendonitis.

* * *

In the instant case, Magistrate Guyton clearly ignored the deposition testimony of Dr. Awan and the records of Dr. Morawa. A reasonable mind, taking that evidence into account would not come to the same conclusion as Magistrate Guyton. Rather, such evidence, if not ignored, clearly shows that the condition of Plaintiff-Appellant's shoulder has not improved.

Magistrate Guyton instead chose to accept Dr. Paul Drouillard's deposition testimony to be more persuasive, even in light of the MRI suggesting otherwise. Magistrate Guyton fails to report that both Dr. Morawa and Dr. Drouillard actually read the MRI films and came to markedly different conclusions.

³ Plaintiff also claims that there is a "...general rule in workers' compensation cases that the testimony of the treating physician is to be given greater weight than that of a one time only independent evaluator".

That is a misstatement of the rule. A magistrate is permitted, but not required, to give greater weight to the testimony of treating physicians. *Freigruber v Wall Mart*, 2004 ACO 50. *Parker v Chrysler Corp*, 1997 Mich ACO 7; *Kleinow v McCord Gasket Corp*, 1996 Mich ACO 189; *Jones v General Motors Corp*, 1992 Mich ACO 474; *Hardon v National Bronze Conway Co*, 1990 Mich ACO 259. See also, *Robinson v General Dynamics*, 1992 Mich ACO 2021; *Alexander v U.S. Mfg, Inc*, 1992 Mich ACO 1500.

To begin with, as noted above, the Magistrate need not refer to and summarize each and every exhibit. It is enough if those exhibits necessary to support her factual finding are reviewed, or at least mentioned. Getting to the heart of plaintiffs' complaints, we note the magistrate did in fact consider both the MRI, and Dr. Awan's interpretation of it, noting:

. . . Dr. Awan testified there was no indication of impingement syndrome and there were no outward signs of atrophy. An MRI of the back showed evidence of disc protrusions in the lumbar spine, but Dr. Awan agreed these findings are not significant. There was no indication of nerve root compression. Although an MRI report regarding the right shoulder indicates plaintiff may have a small or partial tear of the supraspinatus tendon, it does not appear to affect mobility or strength in the shoulder.

Finally, plaintiff argues defendant failed to meet its burden of showing a change of condition as a pre-requisite for relief in a petition to stop. It argues that "Magistrate Rabaut had originally found a rotator cuff injury and that plaintiff's treating doctors still find a rotator cuff injury", ergo, Defendant has "failed to show the Plaintiff's physical condition has changed".

It is true in order to prevail defendant must show some change of condition. However, that does not mean it must show plaintiff no longer has any remnants of a particular disease or condition. Such a rule would lead to extreme, and perhaps absurd results. For instance, suppose a worker suffers from work induced bursitis in a joint, such as his shoulder. At an early stage, the pain resulting from that bursitis may well be disabling. Later, as the condition subsides, it may not, even though he still has bursitis in that shoulder.

What defendant must show is that plaintiff's condition had improved, to the point it no longer physically prevented him from working.⁴ That is what the magistrate found, and her finding is supported by competent, material and substantial evidence on the whole record.

Affirmed.

Commissioners Glaser and Will concur.

James J. Kent

Martha M. Glaser

Rodger G. Will

Commissioners

⁴ See for instance *McCray v Delphi Saginaw Steering Systems*, 2004 ACO # 194. *Osworth v Barnes Group*, 2004 ACO # 391, *Fenn v Thomson Saginaw Ball Screw Co*, 2004 ACO #371

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This cause came before the Appellate Commission on plaintiff's appeal from Magistrate Carol R. Guyton's decision, mailed December 29, 2003, granting defendants petition to stop. 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.

James J. Kent

Martha M. Glaser

Rodger G. Will

Commissioners