

STATE OF MICHIGAN  
WORKERS' COMPENSATION APPELLATE COMMISSION

BARBARA DAVIS,  
PLAINTIFF,

V

DOCKET #03-0474

GENERAL MOTORS CORPORATION (LAD LANSING BODY ASSEMBLY),  
SELF INSURED,  
DEFENDANT.

APPEAL FROM MAGISTRATE L'MELL M. SMITH.

TIMOTHY S. BURNS FOR PLAINTIFF,  
MARTIN L. CRITCHELL FOR DEFENDANT.

OPINION

KENT, COMMISSIONER

Defendant appeals the decision of Magistrate L'Mell M. Smith granting plaintiff benefits,<sup>1</sup> stating its issue on appeal as follows:

**THE EMPLOYEE DID NOT SUSTAIN A *PERSONAL INJURY* WITHIN THE RUBRIC OF THE WORKERS' DISABILITY COMPENSATION ACT OF 1969.**

Plaintiff filed a reply brief restating the issue as follows:

**THAT THE DECISION OF THE MAGISTRATE IS SUPPORTED BY COMPETENT MATERIAL AND SUBSTANTIAL EVIDENCE.**

Plaintiff began work with defendant General Motors in 1996, and worked primarily in a variety of relatively light production/assembly jobs.<sup>2</sup> She began complaining of neck pain about the time she was transferred to defendant's Lansing plant performing a stabilizer bar buildup job. Other than a pregnancy leave in 1999, she continued working in various jobs until her last day of work, March 22, 2000.<sup>3</sup>

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<sup>1</sup> The Magistrate's opinion and order was mailed to the parties on November 18, 2003. It was assigned to the panel as ready for review on April 2, 2004.

<sup>2</sup> She did work a couple positions that were non-production assembly, such as "driving cars".

<sup>3</sup> There was evidence she twice attempted to return to work for very short intervals after that, each time complaining her neck pain prevented her from performing the required job tasks.

The magistrate weighed the various expert medical opinions and concluded that since at least three of them agreed work caused plaintiff's inability to continue working she had established a work related disability:

While it is clear that the doctors treating plaintiff are unsure of the precise mechanism which was causing plaintiff's pain, they all seem to agree that her problems are work related and that she is disabled from performing the type of work she did at General Motors. Each of the doctors, including Dr. Jakubiak, felt that plaintiff was being honest and was not overstating her pain or malingering. My impression of plaintiff at trial also was that she was an honest individual who was not trying to overstate her condition. While I was initially a bit skeptical about the job that plaintiff only performed for one day being the genesis of three years of complaints, all her medical records tracked very closely with plaintiff's testimony at trial and indicate that from the very beginning, she felt that the stabilizer bar job started her problems. Furthermore, the treating physicians felt that plaintiff's continued work in repetitive jobs had aggravated her condition to the point that she finally had to be taken off work.

Because we have the testimony of three treating physicians who essentially agree that plaintiff is disabled from work and her disabilities are work related, I find I must rely on the totality of their testimony in determining that plaintiff is in fact suffering from a work related disability. While I certainly respect Dr. Jakubiak's opinions, here he only examined plaintiff on two occasions. I believe that the ongoing interaction between plaintiff and her treating physicians is more impressive information than that which is derived from two independent medical examinations. Therefore, I rely on Drs. Teal, Chedid and Awerbuch in determining that plaintiff is entitled to benefits and has established a work related disability. I find the work relationship to be between plaintiff's neck, shoulder and arm problems only. Dr. Awerbuch testified that plaintiff had been complaining of migraine headaches but there was no real testimony at trial regarding migraine headaches and I see nothing that establishes a relationship between those headaches and plaintiff's work activities. There is also little or no mention in Dr. Teal's records regarding migraine headaches.

Defendant claims the magistrate misapplied the rule of law from *Rakestraw v Gen Dynamics Land Sys*, 469 Mich 220 (2003):

In the case of *Rakestraw v General Dynamics Land Sys, Inc*, 469 Mich 220; 666 NW2d 199 (2003), the Supreme Court established what is and is not a **personal injury** within the rubric of section 301(1), first sentence. A **personal**

**injury** is damage to the person of the employee which is medically distinguishable from an existing condition.

\* \* \*

And a **personal injury** *is not* the progressive effects of an existing condition. *Rakestraw, supra*, 226, 228. There, the Supreme Court recognized and reiterated the earlier rulings in the case of *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 116; 274 NW2d 411 (1979) and in the case of *Farrington v Total Petroleum, Inc*, 442 Mich 201, 216-217; 501 NW2d 76 (1993) that an existing condition and the progressive effects of that existing condition, including symptoms, were not a personal injury because there must be separate damage which can be medically identified.

\* \* \*

Moreover, the Board apparently thought that disability was enough by stating in *Davis v General Motors Corp*, unpublished opinion of the Board of Magistrates, decided on November 18, 2003 (Docket no 111803013), slip op., 8-9,

"I must rely on the totality of their testimony in determining that [the Employee] is in fact suffering from a *work related disability*. While I certainly respect Dr. Jakubiak's opinions, here he only examined [the Employee] on two occasions. I believe that the ongoing interaction between [the Employee] and . . . treating physicians is more impressive information than that which is derived from two independent medical examinations. Therefore, I rely on Drs. Teal, Chedid and Awerbuch in determining that [the Employee] is in[sic] entitled to benefits and has established a *work related disability*."

Section 301(1), first sentence, allows an employee to qualify for workers' disability compensation only after first establishing the presence of a **personal injury**, not **disability**. *Rakestraw, supra*, 232-233, n 11. Also, the statute in the WDCA which describes **disability**, MCL 418.301(4), first sentence, applies only after an employee has established a **personal injury** by stating that, "[a]s used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a *personal injury or work related disease*." (emphasis supplied) Plainly, an employee must first establish a **personal injury**, then relate that to employment, and then demonstrate that injury resulted in **disability**.

The Board effectively excised the **personal injury** requirement out of the WDCA by stating that there was "work-related disability."

The Commission must deny workers' disability compensation with the application of the rule of law that was established by the Supreme Court in the case of

*Rakestraw, supra*, to the determinations that were made by the Board. The Board determined that the doctors were unsure of the pathological basis for the symptoms of pain and numbness that the Employee related by stating that, "the doctors treating [the Employee] are unsure of the precise mechanism which was causing [the] pain . . ." *Davis, supra*, slip op., 8.

Defendant also makes it clear it objects to the reliance on plaintiff's testimony to establish a condition that is "medically distinguishable":

. . . "[t]he existence of . . . damage is, of course, a matter of *medical* proof. The factfinder in a workers' compensation case is ordinarily free to accept the most persuasive *medical* testimony." *Rakestraw, supra*, 227. (emphasis supplied).

Nowhere in *Rakestraw, supra*, *Miklik, supra*, or any case law is there a suggestion that a claimant could be competent to establish damage which is *medically distinguishable*.

The Employee denied having any gross lesion such as a broken bone or wound that would be a **personal injury**,

At issue before us is the *sine qua non* of what is required to establish a personal injury when a pre-existing condition is present. Perhaps a bit of history can help clarify this issue. Prior to *Rakestraw* the Courts struggled with two competing theories regarding proof of a causal work link to a disabling condition in an individual with a relevant pre-existing condition. In simplified terms, one side advocated that compensability required proof of a pathological change to (or from) the pre-existing condition<sup>4</sup> visited on plaintiff as a result of work. The other claimed that an increase in symptoms could in some circumstances be enough.

Faced with these competing views, the *Rakestraw* court sought to clarify precisely what sort of causal link with work is required. The Court began by making it clear that pain, in and of itself, is a symptom, and not a work injury:

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.<sup>4</sup>

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<sup>4</sup> The *Rakestraw* rule is not applicable where there is no preexisting condition. *Spiegel v Ford Motor Company*, 2004 ACO # 62 (Lv den ct app 8/26/4). If the preexisting condition is covered under Section 301(2) (mental conditions, heart and cardiovascular conditions, and other conditions of the aging process) in addition to proving a medically distinguishable work related condition, the injured worker must also show work was a significant contributing factor.

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.”<sup>9</sup>

However, we disagree with Justice Kelly’s conclusion that the *McKissack* quotation does not differentiate between a symptom and an injury. As the language in *McKissack* indicates, there is a distinction between “pain,” which is a symptom, and the “cause of the pain,” which is an injury, “illness or disease.”

In *McKissack*, a work-related injury was found by the WCAB. 447 Mich 60, 62. In this case, the irrefutable truth is that neither dissenting opinion is able to point to any holding that the “cause of [plaintiff’s] pain” was “illness or disease . . . caused or aggravated by the work or working conditions.” In fact, the magistrate specifically held that the workplace did *not* cause or aggravate the preexisting injury. *Post* at 2. Rather, plaintiff’s disability was premised on aggravated symptoms, without a finding of a work-related injury.

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<sup>4</sup> See *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 116-118; 274 NW2d 411 (1979); *Miklik v Michigan Special Machine Co*, 415 Mich 364; 329 NW2d 713 (1982); *Farrington v Total Petroleum, Inc*, 442 Mich 201; 501 NW2d 76 (1993); *McKissack v Comprehensive Health Services of Detroit*, 447 Mich 57; 523 NW2d 444 (1994). See also *Hagopian v Highland Park*, 313 Mich 608, 621; 22 NW2d 116 (1946) (“The amended act itself was not intended to cover aggravation of pre-existing disease without an accident or fortuitous event.”).

<sup>9</sup> “Symptom” is defined as “a sign or indication of something.” *Random House Webster’s College Dictionary* (2001).

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*Rakestraw* went on to specify that plaintiff must prove a work injury, which is medically distinguishable from any pre-existing conditions and the symptom (pain):

. . . we hold that a claimant attempting to establish a compensable, work-related<sup>1</sup> injury must adduce evidence of the injury that is medically distinguishable from a preexisting nonwork-related condition in order to establish the existence of a “personal injury” under §301(1).

\* \* \*

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.<sup>10</sup> 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). [Emphasis added.]

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<sup>1</sup> As used in this opinion, a compensable, work-related injury is one that arises “out of and in the course of employment” in accordance with MCL 418.301(1).

<sup>10</sup> An employee bears the burden of proving the relationship between the injury and the workplace by a preponderance of the evidence. *Aquilina v Gen Motors Corp*, 403 Mich 206, 211; 267 NW2d 923 (1978).

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Since that standard was first pronounced, in performing its role as the first appellate review in the Workers Compensation System, the Commission has attempted to give guidance on a case by case basis just what a plaintiff must prove to establish his or her condition is medically distinguishable.<sup>5</sup> In a recent decision, we summarized those efforts<sup>6</sup>

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Prior to the Supreme Court’s decision in *Rakestraw*, the Commission had struggled with the standard for establishing an aggravation injury, particularly in the realm of symptomatic aggravation of a prior work-related condition. In *Proffitt v Paramount Newport Corp*, 2000 ACO #251 we harmonized prior Commission decisions as well as appellate court decisions. We observed that the real test required by the Supreme Court’s decision in *Dressler v Grand Rapids Die Casting*, 402 Mich 243 (1978) is whether the second injury or period of employment has produced an increase in the level of impairment. We wrote:

In reviewing the leading case from the Supreme Court, *Dressler v Grand Rapids Die Casting*, 402 Mich 243 (1978), we find that the real question to be decided is whether the disability which currently prevents plaintiff from working arises from a discrete change resulting from subsequent work whether or not a pathological change can be proven. In evaluating the case before it, the *Dressler* court majority stated:

[A]lthough plaintiff suffered pain during substantially all of his employment from the time of his initial injury, the existence of an injury and pain therefrom do not necessarily create disability. As quoted above [Professor Larson’s Treatise], “the distinctive feature of the

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<sup>5</sup> As of this date, there are no post *Rakestraw* higher court opinions on this topic to look to for guidance.

<sup>6</sup> See *Lapham v Engineered Plastic Components, Inc* 2004 ACO #394.

compensation system \* \* \* is that its awards (apart from medical benefits) are made not for physical injury as such, but for 'disability' produced by such injury". Plaintiff was not disabled, despite the pain suffered in his successive jobs, until the pain became so extreme as to force his excessive absence from work at Michigan Plating, and his employment there was terminated.<sup>8</sup>

Even in the case most often cited in support of the pathological aggravation standard, the *Osantowski* case defendants rely on in this case, the facts on which the court based its reversal of the finding of subsequent injury clearly established only a disability due to the original injury. In reversing the findings of the Appeal Board, the court said:

On this record, we believe that there has been one identifiable injury, that of February 13, 1969, causing a degenerative disc disease which continued unchanged thereafter; that the symptoms of the disease continued, their presence merely evidencing the continuation of the condition; and that there is no evidence to support the WCAB's finding that the condition was aggravated by the physical efforts of employment.<sup>9</sup>

In coming to this conclusion the court rejected as unsupported the Board's finding that plaintiff reached "an entirely new plateau of impairment" as of his last day of work. The most that the record established was the "persistence of symptoms for over a year".<sup>10</sup> In addition, the Board based its conclusions of aggravation on mere possibilities and medical testimony based on inaccurate hypothetical questions.<sup>11</sup> The court did not state that work activity which creates a new level of symptoms leading to a new plateau of impairment is not compensable as an aggravation. Thus, taking all of these cases together, the critical requirement is that the second injury or period of work must produce a discrete change in the pathology or the symptoms such that a new level of disability is reached.

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<sup>8</sup> *Dressler* at 253.

<sup>9</sup> *Osantowski* at 739.

<sup>10</sup> *Id.* at 738.

<sup>11</sup> *Id.*

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In *Hale v Borgess Medical Center*, 2004 ACO #266 we looked to the Supreme Court's decision in *Connaway v Welded Construction*, reported sub nom *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000) as a guide to determine whether the employee sustained a medically distinguishable injury. We wrote:

The *Rakestraw* Court did not specifically define its new term “medically distinguishable”. The Court did offer some clues as to what is not a “medically distinguishable” condition. However, a review of the Court’s opinion in *Connaway v Welded Construction Co*, a companion case to *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000), gives us some insight into what the Court considered to be evidence of “aggravation” as opposed to a “recurrence” of a preexisting condition.

Plaintiff in that case suffered a severe knee injury while employed in a Michigan location. She was not a resident of Michigan nor was her employer located in Michigan. After surgery and a period of recuperation, she attempted to return to work, this time in New York. She continued to have symptoms from the Michigan injury and within ten days twisted her knee so as to increase those symptoms. She sought to have her worker’s compensation benefits reinstated under Michigan law. None of the medical experts, including the defense medical witnesses, felt that the New York incident caused plaintiff’s underlying pathology to worsen. Magistrate Wagner found her to be a credible witness and determined that the New York incident simply produced a temporary increase in symptoms, and that her attempt to return to work was a failed attempt.

The WCAC reversed that finding, holding that there was an “aggravation” as a result of the New York incident which constituted a “change in condition”.

In affirming, the Supreme Court stated:

The record supports the WCAC’s determination that Connaway’s New York injury was neither a mere recurrence nor a *temporary* aggravation of her Michigan injury: (1) the plaintiff’s physical condition following the New York injury was “subjectively different” than her physical condition before such injury, (2) the plaintiff experienced pain following the New York injury that she had not felt before such injury, (3) following the New York injury, the plaintiff was incapable of engaging in activities that she was capable of performing before such injury, (4) following the New York injury, the plaintiff’s treating physician restricted her from participating in any “heavy industry,” and (5) an examining physician opined, more than two years following the New York injury, that the plaintiff was incapable of engaging in any prolonged climbing, kneeling, and squatting, and that she would experience difficulty performing any prolonged standing or walking. Further, the WCAC observed that, six years following the New York injury, Connaway had yet to return to work. *Mudel, supra*.

The Court further noted that:

If the New York injury was simply a recurrence of the Michigan injury, or merely temporary in nature, logic would suggest that the plaintiff’s ability to return to work would have been restored to the status quo ante once the effects of that injury ameliorated. However, the evidence demonstrates that the New York injury resulted in

an “independent contribution,” permanent in effect, to the plaintiff’s “final condition” (her current disability). *Id.* (emphasis added).

*Connaway* is instructive in interpreting the term “medically distinguishable” condition. Pain alone is not conclusive evidence. However, an injury producing continuing pain, subjectively dissimilar from her pre-injury condition, and causing impaired performance of pre-injury activities can constitute an “independent contribution” to the “final condition”, thus resulting in a “medically distinguishable” condition.

A review of the decisions mentioned above leads to the conclusion that any discord among them is more perceived than real. *Dressler* and *Connaway* stand for the proposition that an employee sustains a new date of injury when it is shown the employee has sustained a permanent worsening in the disability due to subsequent injury or work activity.

As we noted in *Lapham*, the key to balancing *Connaway/Hale* and *Rakestraw* is that the evidence in *Connaway* was that the symptoms (pain) were NOT equally attributable to the progression of a pre-existing injury and a work related injury. Indeed, the Court in *Connaway* emphasized the second injury permanently elevated the symptom (pain) and was the significant factor from there on in time in causing it<sup>7</sup>:

Moreover, the record supports the WCAC’s determination that Connaway’s New York injury was neither a mere recurrence nor a *temporary* aggravation of her Michigan Injury....The record demonstrates the New York injury **did not simply elevate temporarily the severity of the plaintiff’s pre-New York injury physical condition** thus allowing her subsequent return to that condition. Rather, the evidence illustrates that the plaintiff’s *current* inability to engage in work activity is significantly impacted by the New York injury.....However, the **evidence demonstrates** that the New York injury resulted in an **“independent contribution,” permanent in effect**, to the plaintiff’s “final condition”...(emphasis added).

Perhaps the last sentence from *Proffitt* foreshadowed *Rakestraw*, when it(we) spoke of the critical requirement being the second work period producing “a discrete change in the pathology or symptoms such that a new level of disability is reached”.

The magistrate did not make any reference to *Rakestraw* or its predecessors concerning application of the law in this area. Apparently she chose to view this simply as a “new” injury as opposed to aggravation of a pre-existing one. Factually, there is medical evidence which, if considered

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<sup>7</sup> See *Connaway sub nom Mudel*, page 725-726.

persuasive, could support a finding of a new pathological injury. However, as the four medical experts each had a different diagnosis, other findings could have been supported by this record.<sup>8</sup>

Given the magistrate's apparent finding of a new injury, this case is akin to *Reed v City of Detroit*, 2004 ACO #279, in which we noted:

It is really not a question of whether *Rakestraw* as a legal principle applies, as much as a question of whether there exists a pre-existing non-work related condition which plaintiff must show is medically distinguishable from the work injury he claims causes the disability.

\* \* \*

Turning again to the case at hand, it is obvious the magistrate accepted medical testimony which, in her view, proved plaintiff suffered a new injury which was the cause of his current condition, rather than a symptomatic aggravation of a pre-existing one. However, to the extent an appellate court may view this as a case of aggravation of a pre-existing condition, we hold there exists on this record evidence of pathological change from injury which meets the *Rakestraw* requirement of medically distinguishable injury.

As in *Reed*, the evidence here supports the magistrate's finding that a new injury occurred. Likewise, to the extent an appellate court may view this as a case of aggravation of a pre-existing condition, we find evidence of a pathological change which meets the *Rakestraw* requirement of a medically distinguishable condition.

Affirmed.

Chairperson Reamon and Commissioner Leslie concur.

James J. Kent Commissioner

William G. Reamon, Jr. Chairperson

Richard B. Leslie Commissioner

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<sup>8</sup> Dr. Awerbuch diagnosed bursitis in plaintiff's shoulder caused or significantly aggravated by work. Dr. Teal diagnosed cervical neck pain, also caused or aggravated by work. Dr. Chedid diagnosed radiculopathy which work "could" have aggravated.

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GENERAL MOTORS CORPORATION (LAD LANSING BODY ASSEMBLY),  
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DEFENDANT.

This cause came before the Appellate Commission on defendant's appeal from Magistrate L'Mell M. Smith's decision, mailed November 18, 2003, granting plaintiff an open award of 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

James J. Kent Commissioner

William G. Reamon, Jr. Chairperson

Richard B. Leslie Commissioner