

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

MICHELLE D. JAMISON,
PLAINTIFF,

STATE FARM MUTUAL AUTO INSURANCE COMPANY,
INTERVENING PLAINTIFF,

BLUE CROSS/BLUE SHIELD OF MICHIGAN,
PETITIONER,

V

DOCKET #03-0108

ABZ STEEL FABRICATION, LLC AND
LEGION INSURANCE COMPANY,
C/O MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,
DEFENDANTS.

APPEAL FROM MAGISTRATE ZETTEL.

FRANCESCO L. PARTIPILO AND DARYL ROYAL FOR PLAINTIFF,
JOHN C. BRENNAN FOR INTERVENING PLAINTIFF STATE FARM MUTUAL AUTO
INSURANCE COMPANY,
GARY L. SCMALZRIED FOR PETITIONER BLUE CROSS/BLUE SHIELD OF MICHIGAN,
DONALD H. HANNON FOR DEFENDANTS.

OPINION

REAMON, CHAIRPERSON

Defendants appeal the decision of Magistrate Richard J. Zettel, mailed February 12, 2003, which granted weekly wage loss benefits to plaintiff for injuries found to have been sustained in an auto accident of February 2, 2000. Defendants appeal on two bases. First, it is argued that plaintiff's motor vehicle accident did not arise out of and in the course of her employment with defendants. Second, defendants claim the magistrate improperly ordered reimbursement of certain medical expenses to petitioner-appellee Blue Cross Blue Shield of Michigan (BCBS) when defendants specifically challenged the reasonableness and necessity of the medical care and charges and no proofs were presented as to their reasonableness and necessity. Intervening plaintiff-appellee State Farm Mutual Automobile Insurance Company (STATE FARM) concurs.¹ The reimbursement question was also the subject of a supplemental

¹ STATE FARM is plaintiff's automobile no-fault insurance carrier, which aptly noted in Issue I of its brief that defendants-appellants did not contest on appeal the magistrate's order granting reimbursement to STATE

brief filed by the Michigan Property & Casualty Guaranty Association (MPCGA) on November 12, 2003. MPCGA came into the case to administrate the claim after the July 28, 2003 Bankruptcy Court ordered the liquidation of Legion Insurance Company. MPCGA argued for reversal of the award of benefits by the magistrate and asserted MCLA 500.7925(3) as a bar to its obligation to render payment of reimbursement to STATE FARM and BCBS as required by the magistrate's order. Alternatively, MPCGA asked for the matter to be remanded to the magistrate to complete the record, particularly as to the issue of whether STATE FARM and BCBS meet the definition of "insurer" contained in MCLA 500.7925(3).

The magistrate addressed the issue of whether plaintiff's auto accident arose out of and in the course of employment with the following factual summary, which we find accurate and hereby adopt as our own per Sec. 861a(10) of the Act:

Plaintiff further testified that she began working at Defendant on 11/19/99 as a full-time bookkeeper. Plaintiff testified that Defendant's business had been recently established and that she did "whatever had to be done" in Defendant's office. Plaintiff said that besides keeping the company's books, she also ran errands, delivered packages, answered telephones, and the like. Plaintiff explained that she frequently used her personal automobile to go to the bank to make deposits or to the post office to buy stamps.

Plaintiff also testified that on 2/3/00 she was working at Defendant and left in the morning in her own automobile to pick up a check for Defendant from a debtor located in Mt. Clemens. Plaintiff then began driving to the Macomb County Clerk's office to file a Discharge of Construction Lien, which had previously been prepared, when she had a flat tire. Plaintiff said she called her husband who arrived with Plaintiff's brother to fix the flat tire. Plaintiff stated that they subsequently had pizza for lunch together. After lunch Plaintiff started for the County Clerk's office again when her car was struck head-on by another vehicle.

Plaintiff testified that she suffered a closed head injury in the accident as well as pain in her shoulders, arms, hands, fingers, hips, legs, and feet. Plaintiff stated that because of her head injury she has virtually no long-term memory today. Plaintiff also stated that she is also not unable to comprehend numbers. Plaintiff explained that although she used to keep books for multi-million dollar companies, she is now unable to help her third-grade son with his math homework. Plaintiff insists she is now unable to work with computers or perform even routine scheduling functions. Plaintiff explained that she has to set three timers to remind herself that her daughter is getting off the school bus. Plaintiff maintains that it is virtually impossible for her to "multi-task" and that she suffers

FARM of any benefits granted to plaintiff which are duplicative of the no-fault benefits previously paid to her by STATE FARM.

panic attacks when she is under stress. Plaintiff testified that she has a hard time focusing or concentrating today.

Plaintiff then called Paula Friscioni to the stand to testify as a hostile witness. Ms. Friscioni testified that she is employed at Defendant and is also the owner's wife. She, too, does whatever has to be done around the office. Ms. Friscioni explained that Defendant's business was established on 6/15/99. She confirmed that Plaintiff began employment as a bookkeeper at Defendant on 11/19/99 and that Plaintiff kept all the books for Defendant except the payroll records which were sent out to a contracted payroll processing company. Ms. Friscioni recalled that Plaintiff was only sent once to the bank and only once to pick up a computer which Defendant purchased. More importantly, however, Ms. Friscioni confirmed that Plaintiff was sent to pick up a check from a debtor on 2/3/00 and that Plaintiff was to file a Discharge of Lien at the County Clerk's office after she picked up the check. Ms. Friscioni stated that she initially intended to file the Discharge of Lien herself but that Plaintiff volunteered to take care of the filing saying that she could then have lunch with her friends at the county office. Ms. Friscioni acknowledged that she did not know where or how to file a Discharge of Lien since she had never done so before.²

Having thus discussed the factual backdrop of the circumstances of plaintiff's auto accident, the magistrate offered the following analysis, in which he also reached fact findings and conclusions of law relevant to this question:

The Act and its interpreting case law have, for many years, held that a plaintiff in a workers' compensation case must prove his or her case by a preponderance of the evidence. MCL 418.851; MSA 17.237(851). See also, *Aquilina v General Motors Corp*, 403 Mich 206; 267 NW2d 923 (1978); *Durham v Chrysler Corp*, 128 Mich App 102; 339 NW2d 705 (1983). The burden, therefore, is on Plaintiff to prove each of the elements of her claim. *Warner v Chrysler Corp*, 1988 Mich ACO 407, 1 MI[WC]LR 1077 (1988). It is not necessary for Plaintiff to exclude every possible alternative explanation as the cause of her problems. *Kepsel v McCready & Sons*, 345 Mich 335; 76 NW2d 30 (1956). However, the preponderance of evidence standard is not merely met because it is possible or conceivable that Plaintiff has an injury or that the injury is work-related. *Mansfield v Enterprise Brass Co*, 97 Mich App 736 (1980).

To prove her case then, Plaintiff must establish by a preponderance of the evidence that she (i) suffered a personal injury (ii) arising out of and in the course of her employment with Defendant, and which (iii) resulted in a limitation of wage earning capacity in work suitable to her qualifications and training. MCL 418.301; MSA 17.237(301). See also, *Sington v Chrysler Corp*, 467 Mich 144;

² Magistrate's opinion, pp 3-4.

648 NW2d 624 (2002). In order to receive an open award of benefits, Plaintiff must also show that she remains disabled under the Act.

In these regards the record offers certain relevant albeit sometimes contradictory evidence.

Plaintiff testified that on 2/3/00 she was working at Defendant and driving her own automobile when she was involved in an automobile accident. Plaintiff testified that she suffered a closed head injury in the accident as well as pain in her shoulders, arms, hands, fingers, hips, legs and feet. Plaintiff maintains she is no longer able to work because of ongoing symptoms which she insists are secondary to her closed head injury. These symptoms include loss of long-term memory, inability to comprehend numbers, inability to work with computers or perform even routine scheduling functions, panic attacks, and difficulty focusing and concentrating on tasks at hand.

Paula Friscioni testified that she is employed at Defendant and is the owner's wife. Ms. Friscioni confirmed that Plaintiff was working as a bookkeeper at Defendant on 2/3/00 when Plaintiff was sent to pick up a check from a debtor and then to file a Discharge of Lien at the County Clerk's office after she picked up the check. Ms. Friscioni said that Plaintiff volunteered to take care of the filing because Plaintiff wanted to visit with and have lunch with her old friends at the county office.

* * *

A magistrate's function, as a trier of fact, is to weigh the credibility of competent evidence and to draw reasonable inferences from the facts presented. *Zytkewick v Ford Motor Co*, 304 Mich 309, 65 NW2d 813 (1954); *Berger v General Motors Corp*, 159 Mich App 171, 406 NW2d 923 (1978); *Fields v General Motors Corp*, 1992 Mich ACO 1894. The weight to be accorded to conflicting evidence is within the reasonable discretion of the magistrate. *Miklik v Michigan Special Machine Co*, 415 Mich 364, 329 NW2d 713 (1982); *Fleese v Bil-Mar Foods*, 1995 Mich ACO 541, 8 MIWCLR 1556 (1995); *Giles v Detroit Board of Education*, 1992 Mich ACO 1263. A magistrate's acceptance of certain expert testimony over that of another, and the weight accorded to it, are specifically within the purview of the magistrate's discretion. *Kope v Network Services, Inc, et al*, 1992 Mich ACO 2346. In assessing credibility, a magistrate is permitted, but not required, to give greater weight to the testimony of treating physicians. *Parker v Chrysler Corp*, 1997 Mich ACO 57; *Kleinow v McCord Gasket Corp*, 1996 Mich ACO 189; *Jones v General Motors Corp*, 1992 Mich ACO 474; *Hardon v National Bronze Conway Co*, 1998 Mich ACO 259. See also, *Robinson v General Dynamics*, 1992 Mich ACO 2021; *Alexander v U.S. Mfg, Inc*, 1992 Mich ACO 1500.

Based upon the entire record, particularly the un-rebutted testimony of Plaintiff, I find Plaintiff has established by a preponderance of the evidence that she was involved in a motor vehicle accident on 2/3/00 and that the motor vehicle accident arose out of and in the course of Plaintiff's employment with Defendant. In that regard I find Defendant's assertion that Plaintiff volunteered to run the errand to the Macomb County Clerk's office and that Plaintiff thereafter intended to visit and have lunch with some friends once she arrived there to be irrelevant, immaterial and not dispositive in this instance. I find that Defendant derived a definite benefit from Plaintiff's activity and that Plaintiff's stated intent to visit with some old friends upon her arrival at her destination did not cause Plaintiff to deviate from her employment-related route. See, *Thomas v Certified Refrigeration, Inc*, 392 Mich 623, 221 NW2d 378 (1974), and *Conklin v Industrial Transport, Inc*, 312 Mich 250, 20 NW2d 179 (1945).³

Defendants argue that benefits should be denied in this matter because the record demonstrated the major purpose of the trip was social and therefore not compensable per Sec. 301(3) of the Act. The case of *Hawkins v State of Michigan*, 1997 ACO #708 is cited as providing four elements which require analysis to determine whether there is a relationship between work activities and injury. Those steps are said to include (1) the nature of the hazard which led to the injury; (2) the direct benefit to the employer from the employee's work-related activities at the time they were prepared; (3) the employee's activity at the time of injury; and (4) the location of the employee either at the place where work is to be performed or away from it. Defendants read *Hawkins* as recognizing that each element be viewed on a continuum ranging from unrelated to work to clearly related to work. Also, no single factor is outcome determinative; rather, they must be evaluated in conjunction with the others.

Defendants then argue the facts adduced at trial compel the conclusion that plaintiff's activities at the time of the accident—going to meet friends and have lunch—were “the only reason” for the trip. It was further contended that to make such a trip was never part of her job duties with defendants, that the owner's wife was going to make the trip but that plaintiff volunteered in order to go to lunch with former co-workers at the Macomb County Register of Deeds office. In addition, the Supreme Court case of *Eversman v Concrete Cutting and Breaking*, 463 Mich 86 (2000) is cited as holding Sec. 301(3) applicable even when a person is on a business trip. Finally, the case of *Williams v Northwest Airlines, Inc*, 2002 ACO #186, is pointed out as another case recognizing that where the major purpose of the employee's activities at the time of the injury are social or recreational, a finding against compensability is mandated.

Plaintiff's brief acknowledges the legal problems that might have derailed her claim had she made it to the Register of Deeds office to have lunch with her friends. *Eversman's* interpretation of Sec. 301(3) would likely have been applicable. However, as pointed out by plaintiff, she never made it to the Register of Deeds office. Such being the case, the magistrate

³ *Id.*, pp 7-8, 9-10.

was fully correct in finding that plaintiff's injury was not sustained in the pursuit of any social or recreational activity. Plaintiff's brief goes on to characterize the facts concerning her trip and the legal and practical consequences in the following passages:

Instead, plaintiff was injured while on a clearly and singularly work-related portion of her trip. Her accident occurred after she had picked up a check from one of defendant's customers, and while she was on the way to, but before she had arrived at, the Register of Deeds office to discharge a construction lien based upon the debt the check alleviated. This was a fully work-related activity. It was not even a dual purpose trip at this time although, if it had been, it would still be compensable. *Burchett v Delton-Kellogg School*, 378 Mich 231; 144 NW2d 337 (1966).

Defendant makes much of the fact that the wife of defendant's owner would have made the trip, had not plaintiff volunteered. However, as the magistrate noted at the hearing, stating, ". . . simply because she volunteered to do some job, I mean, I volunteered to work through lunch. Doesn't mean I'm not working." (64). This is absolutely correct. Plaintiff may have offered to do the task in question, but that does not mean that she stopped working by doing so. This was a task that someone from defendant had to do, and plaintiff was doing it. When she was injured in the course of that effort, her injuries arose out of and in the course of her employment.⁴

We are persuaded of the correctness of the magistrate's determination of this issue as expounded upon by plaintiff's brief. While plaintiff may have had lunch with friends at the Register of Deeds office on her mind, the undeniable fact is that by making this trip, she was conferring a special benefit upon her employer. She had picked up a check from a customer of defendants'. She was directly en route to complete that customer's construction lien discharge at the Register of Deeds office. Alas, short of that destination, her auto accident occurred. The compensability of such cases has been recognized for decades, and sensibly so as was pointed out by our Supreme Court, over 50 years ago:

We believe that the rule applicable to this class of cases is well stated in *Katz v A. Kadans & Company*, 232 NY 420 (134 NE 330, 23 ALR 401), wherein the court of appeals said:

If the work itself involves exposures to the perils of the street, strange, unanticipated, and infrequent though they may be, the employee passes along the streets when on his master's occasions under the protection of the statute.

The court further said that:

⁴ Plaintiff's brief, p 6.

Particularly on the crowded streets of a great city, not only do vehicles collide, pavements become out of repair, and crowds jostle, but mad or biting dogs may run wild, gunmen may discharge their weapons, police officers may shoot at fugitives fleeing from justice, or other things might happen from which accidental injuries result to people on the streets, . . . and do not commonly happen indoors.

See, also, our own decisions in *Kunze v Detroit Shade Tree Company*, 192 Mich 435 (LRA 1917A, 252), where the employee was injured while boarding a streetcar while traveling from job to job in the course of his employment, and *Arnested v McNicholas*, 223 Mich 488, where the employee was shot by an unknown deer hunter while searching for a route over which to construct a roadway through the woods. In both these cases we held that the employee's injuries arose out of their employment. A number of cases from other jurisdictions holding that street injuries are compensable as arising out of the employment when it is the employment itself that places the employee on the street may be found in 80 ALR 126 and many supplemental decisions listed in the ALR blue books.

The award of compensation is affirmed, with costs to plaintiff.⁵

We hereby affirm the magistrate's finding that plaintiff's auto accident injuries arose out of and in the course of her employment.

The second issue raised by defendants cites as error the magistrate's alleged failure to find which of plaintiff's auto accident-related medical bills, if any, were reasonable and necessary. Criticism is leveled at the magistrate's failure also to find whether the charges covered in the BCBS lien were related to the auto accident.

The terms of the magistrate's award expressly limited the medical expenses to only those reasonable and necessary pursuant to Sec. 315 of the Act:

IT IS FURTHER ORDERED that Plaintiff be awarded reasonable and necessary medical, surgical and hospital services and medicines, or other attendance or treatment pursuant to and in accordance with this Opinion and Section 315 of the Act from 2/3/00 until further order of the Board of Magistrates. (Magistrate's Opinion, at 12.)

It is also quite clear from the decision of the magistrate that he found the testimony of Dr. Sand, plaintiff's treating psychiatrist, and Dr. Weiss, the neuropsychologist, to be "better

⁵ *LeVasseur v Allen Electric Co*, 338 Mich 121, 125-126 (1953).

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DEFENDANTS.

This cause came before the Appellate Commission on defendants' appeal from Magistrate Richard J. Zettel's decision, mailed February 12, 2003, which granted weekly wage loss benefits to plaintiff for injuries found to have been sustained in an auto accident of February 2, 2000. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed in part and remanded in part. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed as to the open award of benefits, and remanded as to whether State Farm Mutual Auto Insurance Company and Blue Cross/Blue Shield Of Michigan are "insurers" within the meaning of MCLA 500.7925(3), and thus disentitled to receive the reimbursements ordered by the magistrate. The appellant shall file a transcript of any supplemental proceedings held by the Board of Magistrates, with the Commission within 60 days of the mailed date of the magistrate's supplemental opinion. The appellant may file a supplemental brief with the Commission not more than 30 days after filing the transcript, or, if no transcript is required, 30 days from the date of the magistrate's supplemental opinion. Appellee may file a reply brief not more than 30 days after receipt of Appellant's brief. We retain jurisdiction.

William G. Reamon, Jr.

Chairperson

Martha M. Glaser

Rodger G. Will

Commissioners