

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

JIMMY D. RUTHRUFF,
PLAINTIFF,

V

DOCKET #02-0197

TOWER AUTOMOTIVE, INCORPORATED AND
AMERICAN MANUFACTURERS' MUTUAL
INSURANCE COMPANY,
DEFENDANTS.

ON REMAND FROM MAGISTRATE GRIT.

MICHELENE B. PATTEE AND KENNETH R. OOSTERHOUSE FOR PLAINTIFF,
LANCE R. MATHER FOR DEFENDANTS.

OPINION

GLASER, COMMISSIONER

This case returns to us from the Board of Magistrates after remand at the direction of the Court of Appeals.¹ On remand we retained jurisdiction. The magistrate issued her Opinion/Order on Remand which was mailed October 18, 2004, after holding a supplemental hearing on September 21, 2004.

The facts of this case are set forth in the Commission's previous decision, 2003 ACO #32, which was reversed by the Court of Appeals. This case was remanded by the Court, with the following directive:

In light of the foregoing, we reverse the decision of the WCAC and remand this matter for an application of the presumption and a determination of whether plaintiff's injury arises out of his employment. Plaintiff shall be allowed to reopen the record and both parties shall be permitted to present evidence that will allow a determination of the exact nature of the risk involved in this case. The magistrate shall determine the nature of the risk present in light of the evidence and, then, apply the appropriate test for determining whether plaintiff's injury is one arising out of employment.²

¹ *Ruthruff v Tower Holding Corp./Tower Automotive, Inc*, 261 Mich App 613 (2004).

² *Id.*

On remand additional facts were elicited by plaintiff's testimony, which were also supported by defendants' witness Debbie Gyger. Those facts included: 1.) Employees were not allowed to leave the building during lunch and breaks; 2.) The lunch break was only 15 minutes; 3.) There was no cafeteria available, only vending machines. Ms. Gyger did testify that she witnessed employees receiving lunch from the outside. Plaintiff was unaware of any lunch deliveries. Plaintiff testified that bringing his lunch was more economical than the vending machines.

The magistrate analyzed the facts and concluded as follows:

Analysis and Conclusions

The case was remanded for additional fact finding on the "arising out of" issue. Specifically, the Court of Appeals noted the Magistrate and WCAC erred in applying *Ledbetter v Michigan Carton Co*, 74 Mich App 330 (1977) to the case, because the record was insufficient to "conclusively" determine whether the risk present in Mr. Ruthruff's case was truly a personal risk. In so noting the Court stated if Mr. Ruthruff, "was not required to bring a lunch, then the risk was of a personal nature and the WCAC did not err in applying *Ledbetter* to bar an award of benefits." (Ruthruff p 5) Mr. Ruthruff was clearly not required, by his own admission, to bring his lunch to work. The Defendant suggests the analysis should end there. However, the remand also specifically directs "a determination of the exact nature of the risk involved in this case."

I find the nature of Mr. Ruthruff's injury was personal. Despite all the evidence the parties presented about whether or not Mr. Ruthruff was required to bring his lunch, and the practicalities of purchasing a lunch on premises, or having a lunch delivered, the Court of Appeals asked for a determination of the "exact nature of the risk" involved in this particular case. Most of the testimony presented by the parties is irrelevant in light of the directive of the Court of Appeals. In this particular case, Mr. Ruthruff testified he brought his lunch to work, not because of problems obtaining a satisfactory lunch from the company vending machines, or because of time constraints in having food delivered, but because it was more economical. He only used the vending machines at work on occasion, because he felt buying a vending machine lunch cost too much. We would be straying far from the requirement that an injury "arise out of" the employment, if personal financial decisions gave rise to compensable injuries. The claim that the need to bring a lunch to work was related to the inconvenience or difficulty of buying a lunch at work is not a "real employment factor," but is rather "fictitious," as the reason Mr. Ruthruff brought a lunch was based on a personal financial decision. (Larson §9.01(4)(b), p 9-9) There was no evidence that Mr. Ruthruff's practice would have been altered with a longer lunch hour or the opportunity to leave the plant to purchase a restaurant lunch.

I find the exact nature of the risk presented in Mr. Ruthruff's case, per his testimony, was personal.³

Plaintiff argues that the magistrate's finding is not supported by competent, material and substantial evidence on the record. Plaintiff cites the Court of Appeals opinion and its reliance on Larson's treatise in support of his position. He states that the evidence shows this case to involve a mixed risk, rather than one that was personal in nature and that the employment was a substantial contributing factor to his injury in two significant ways:

First, the injury occurred when Ruthruff was in the process of exiting his car to begin work for the day, an activity that was necessary in furtherance of his work duties. Second, while some aspects of bringing his lunch to work are certainly personal in nature, Tower Automotive was a major contributor to his injury because of the extremely limited alternatives available for lunch due to the time, location and other constraints placed on the employees in their employment with Tower.⁴

Defendant asserts that there is the requisite evidence to support the magistrate's finding that the exact nature of the risk presented in this case was personal. It states:

The evidence in question is found in plaintiff's own testimony. He stated repeatedly that he took his lunch to work because he thought the vending machines in Tower Automotive's lunch rooms were too expensive (T2:10, T2:15, T2:19). Furthermore, plaintiff gave no other reason for his decision to take his own lunch. Plaintiff's brief contains a number of claims that there were other reasons why he took his lunch, but none of those arguments is supported by the evidence actually presented in this case. All of those claims are nothing more than after-the-fact attempts to make his testimony - which consistently identifies only a personal economic decision as the reason for taking his lunch - say what that testimony does not say. In other words, given the nature of the Magistrate's decision and the inability of his own testimony to demonstrate any error in that decision, plaintiff has found it necessary to present a number of arguments, completely unsupported by the actual evidence, to "prove" the existence of other causes for his decision to take his lunch to work. None of plaintiff's arguments has any merit.

* * *

³ Magistrate's opinion, pp 6-7.

⁴ Plaintiff's brief, pp 9-10.

Finally, as the Magistrate correctly noted in her opinion, no evidence whatsoever was presented that plaintiff would have stopped taking his lunch if Tower had a full-service restaurant or cafeteria on its premises and had a lunch hour sufficiently long to make use of that facility possible virtually every day. Even under those circumstances, plaintiff could still have decided that he would continue to take his lunch because doing otherwise was, in his personal opinion, too expensive. The possibility of his doing so once again points directly to the conclusion that his decision to take his lunch to work was a purely personal one, particularly given plaintiff's failure to allege, much less demonstrate, that he was in some way "required" to take his lunch by one or more conditions of his employment with Tower Automotive.⁵

In reviewing the court's opinion, we find the language from Larson, Workers Compensation Law sections 4.02; 9.01 and 9.03, upon which it relies to be significant.⁶

The court stated:

Ledbetter and its progeny are classified as cases that begin as personal risk cases. They are personal risks cases because the origin or central causal factor of the mishap is admittedly personal. Where the mishap is personal in origin, there is ample reason to assign the resulting loss to the employee personally. Larson, Workers Compensation Law §4.02, p 4-2; §9.01(1), pp 9-2-9-3; §9.01(4)(b), pp 9-7-9-8; §9.03, p 9-22.1. To demonstrate that an injury is one arising out of employment and, hence, to shift the loss to employment, the employee must show some affirmative employment contribution to offset the prima facie showing of personal origin. Larson, §9.01(1), p 9-3; §9.01(4)(b), pp 9-7-9-9; §9.01(4)(c), p 9-10. Stated another way, injuries arising out of risks or conditions personal to the claimant do not arise out of employment unless the employment contributes to the risk of or aggravates the injury. *Hill, supra* at 717-721; Larson, §9.01(1), p 9-1; Welch, §4.16, p 4-14, p 4-19 (2003 supp). "[T]he relative contributions of employment and personal causes are not weighed; the employment factor need not be the greater, but it must be real, not fictitious." Larson, §9.01(4)(b), p 9-9.

Defendant employer asserts that the risk presented in this case was clearly a personal one. If defendant is correct in its characterization of the risk presented, then the WCAC correctly determined that an application of the principles announced in *Ledbetter* barred benefits.

⁵ Defendant's brief, pp 3-4, & 8.

⁶ We acknowledge the magistrate's concern that the Court has, in essence, given plaintiff another "bite of the apple", however, we are constrained to follow the Court's directive here.

Larson supplies some insight into the nature of the risk presented in this case in his treatise, when he observed:

* * * The consumption of food, like many other activities grouped together in the personal-comfort category, is a reasonable and sometimes necessary incident of the employment. The practice of bringing lunch in a pail is therefore not entirely a personal activity of the employee, but is often a necessary feature of the employment. [Larson, §9.03(3), p 9-28.]

This scholarly observation leads us to conclude that there is a possibility that the risk present here was not a personal one and, therefore, that the WCAC erred in applying *Ledbetter* to deny benefits. The record is insufficient to conclusively decide this question, however, because there was no evidence in the instant record regarding the need of plaintiff to bring a lunch to work. If plaintiff was not required to bring a lunch, then the risk was of a personal nature and the WCAC did not err in applying *Ledbetter* to bar an award of benefits. Conversely, if plaintiff was required to bring a lunch, then this case might be considered a neutral risk case, i.e., a case that involves risks of neither distinctly employment nor distinctly personal character. Larson, §4.03, p 4-2. “In neutral risk case, . . . the connection is supplied by the fact that the injury occurs on the premises of the employer . . . and that the employment itself required the employee to be at that location where the exposure to the risk occurred.” *Ledbetter, supra* at 335. This case might also be viewed as a mixed risk case, i.e., one where the personal cause and an employment cause combine to produce the harm. Larson, §4.04. If this is a mixed risk case, then compensability exists if the employment was a contributing factor to the injury:

[t]he law does not weigh the relative importance of the two causes, nor does it look for primary and secondary causes; it merely inquires whether the employment was a contributing factor. If it was, the concurrence of the personal cause will not defeat compensability. [Larson, §4.04, p 4-3.]⁷

We believe that the magistrate misinterpreted the evidence in coming to her ultimate conclusion. The focus is not on the plaintiff’s actions and motives in bringing a lunch to work. Rather, it is the work environment that is to be examined. We believe that the evidence sought by the court was: What particular circumstances surround the plaintiff’s lunch? Was there an open lunch where employees were free to come and go? How long did plaintiff have to secure a lunch, if he did not bring one? What was the company policy for employee lunches? How long was the shift plaintiff worked?

⁷ *Ruthruff v Tower Holding Corp./Tower Automotive, Inc*, 261 Mich App 613 (2004).

Although the court refers to a “requirement” by the employer that the employee bring a lunch, clearly a literal interpretation of the word would lead to an absurd result.⁸ Of course no employer would ever “require” its employees to bring a lunch as a condition of employment. The choice of whether to bring a lunch or go without would always be up to the employee. The choice of whether to go out to get some lunch, or bring a lunch to the workplace and eat it there, is usually also a choice of the employee. Here, however, there is no dispute that plaintiff was not given that choice. He was “required” to remain in the confines of the workplace during a short 15 minute lunch break. Admittedly, plaintiff was given a choice of bring a lunch, go without, or eat from a vending machine. It is difficult to conceptualize a situation where a plaintiff needed to bring a lunch to work, if this is not such a situation.

Our duty here is to perform a quantitative and qualitative evaluation of the evidence to determine whether the magistrate’s finding of fact is supported by competent, material and substantial evidence. If so we must affirm; if not we cannot affirm. *Mudel v Great Atlantic and Pacific Tea Co*, 462 Mich 691 (2000). We do not find support for the magistrate’s finding. We find that the requirement that plaintiff remain in the workplace during his lunch, combined with the short duration of the lunch break provided, and the limited alternative of a vending machine, is, pragmatically speaking, tantamount to a requirement that he bring his lunch to work. Having so found, utilization of the cited rule enunciated by Larson §4.04 leads to the conclusion that the employment was a contributing factor to the injury thus rendering this injury compensable.

We reverse.

Defendants Tower Automotive, Incorporated and American Manufacturer’s Mutual Insurance Company are liable for weekly benefits to plaintiff in the amount of \$471.94, from February 26, 2001 until further order of the Bureau, and shall pay for all necessary and reasonable medical expenses related to plaintiff’s herniated disk and low back. Defendants shall have credit for any wages earned pursuant to section 301(5)(b) or (c) and benefits paid pursuant to section 354 and section 358, if any.

Commissioner Will and Chairperson Reamon concur.

Martha M. Glaser

Rodger G. Will

William G. Reamon, Jr.

Commissioners

Chairperson

⁸ The American Heritage Dictionary, Second College Edition defines “require” as: 1. To have as a requisite; need. 2. To call for as fitting; demand. 3. To impose an obligation on; compel. 4. To command; order.

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TOWER AUTOMOTIVE, INCORPORATED AND
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DEFENDANTS.

This cause came before the Appellate Commission on plaintiff's appeal from Magistrate Donna Grit's decision, mailed April 15, 2002, denying benefits. The Appellate Commission affirmed the magistrate by opinion mailed February 3, 2003. This matter returned to the Appellate Commission by order of the Michigan Court of Appeals, dated March 18, 2004. On June 16, 2004, the Commission remanded with retained jurisdiction to the magistrate for further proceedings in accordance with the Court's order. This matter returns to the Commission after Magistrate Donna Grit's remand decision, mailed October 18, 2004. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be reversed. Therefore,

IT IS ORDERED that the magistrate's decision is reversed.

Martha M. Glaser

Rodger G. Will

William G. Reamon, Jr.

Commissioners

Chairperson