2005 ACO #32

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

JAMES WILLIAMS,
PLAINTIFF,

V DOCKET #04-0139

LEIDAL & HART MASON CONTRACTORS, INC. AND
ACCIDENT FUND INSURANCE COMPANY OF AMERICA;
KELSEY CONSTRUCTION, AND
CITIZENS INSURANCE COMPANY OF AMERICA,
DEFENDANTS.

APPEAL FROM MAGISTRATE ZETTEL.

GAD L. HOLLAND AND DARYL ROYAL FOR PLAINTIFF,
RICHARD R. WEISER FOR DEFENDANTS LEIDAL & HART MASON CONTRACTORS, INC. AND ACCIDENT FUND INSURANCE COMPANY OF AMERICA,
MICHAEL J. MASON FOR DEFENDANTS KELSEY CONSTRUCTION, AND CITIZENS INSURANCE COMPANY OF AMERICA.

OPINION

WILL, COMMISSIONER

This matter was heard by Magistrate Zettel on February 9, 2004. Plaintiff was the only lay witness to testify. Jacquelyn G. Lockhart, M.D. testified by deposition for plaintiff. Donald C. Austin, M.D. testified by deposition for defendants. In a decision mailed April 14, 2004, the magistrate gave plaintiff a closed award. We affirm with modification.

The magistrate has summarized the evidence presented under the heading of Presentation of Proofs, found at pages 2-5 of his decision. We find his summary to be very accurate and pursuant to MCL 418.861a(10) we adopt his summary as our own.

After his summary of the evidence the magistrate set forth what he labeled as his analysis, concluding with the following:

> Based upon the entire record, particularly the stipulations of the parties and the testimony and opinions of the medical experts who testified, I find that Plaintiff has established by a preponderance of evidence that he suffered an injury to his back on 7/01/97 and that this injury arose out of and in the course of his employment with Defendant. I further find that Plaintiff has established that this personal injury resulted in a limitation of his wage earning capacity in work suitable to his qualifications and training. Again, there appears to be no real dispute in this regard. The more difficult

issues to be determined are whether or not Plaintiff continues to be disabled due to this particular work-related back injury and, if not, when his disability under the Act ended.

In these regards I find that Plaintiff has failed to establish by a preponderance of evidence that he continues to be disabled under the Act due to the back injury he suffered at work on 7/01/97. I note the conflicting opinions of Doctors Lockhart and Austin and, in this instance, find the testimony and opinions of Dr. Austin to be the better supported and more persuasive evidence. I have no doubt that Plaintiff continues to experience back pain and pain radiating into his left leg and that he continues to be unable to return to work as a brick layer. I am persuaded, however, that Plaintiff's current symptoms are secondary to a herniated disc in Plaintiff's low back at L5-S1 which was not diagnosed until more than ten months after Plaintiff left work at Defendant. I am convinced that Plaintiff suffered this new herniated disc sometime after he underwent surgery on his back in July, 1997, and, consequently, that this particular injury did not arise out of or in the course of Plaintiff's employment with Defendant. I find, therefore, that Plaintiff's disability under the Act due to his work-related injury on 7/01/97 ended on 10/30/01, the date Plaintiff was examined by Dr. Austin and that doctor declared that Plaintiff's symptoms were secondary to his herniated disc at L5-S1. I recognize that the MRI which revealed that Plaintiff had a new herniated disc at L5-S1 was performed on 5/8/98. However, Dr. Austin never said that the symptoms Plaintiff experienced due to his work-related injury and subsequent surgery in July, 1997, subsided or resolved by 5/8/98 when the new disc herniation was first discovered.

Since this court has ruled that the injury which Plaintiff suffered at Defendant on 7/01/97 resulted in a disability under the Act that ended on 10/30/01, before Plaintiff began employment at Leid[a]l & Hart, this court finds the issues raised in Defendant's application for hearing to determine its rights against Leid[a]l & Hart to be moot and, therefore, no findings or rulings are made in that regard.[1]

Plaintiff filed a timely claim for review. Plaintiff filed his brief on appeal on June 21, 2004, raising a single issue:

THE MAGISTRATE'S FINDING THAT PLAINTIFF'S CURRENT PROBLEMS ARE UNRELATED TO HIS JULY 1, 1997 INJURY IS UNSUPPORTED BY COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE AND SHOULD BE REVERSED ON APPEAL.

Plaintiff's argument for reversal concluded with the following:

In that regard, the doctor expressly noted that some of plaintiff's findings could be explained by this herniation, but then goes on to discredit his own theory in that regard:

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[1] Magistrate's decision, pp 7-8.

> My opinion is that the new disc herniation at L5-S1 may possibly explain some of the left leg pain, although on examination he has no concrete objective findings to correlate with it. (A 16)

Quite obviously, this is not evidence that all the current difficulties were the result of a herniation at L5-S1. Instead, it seems somewhat the opposite.

Furthermore, when plaintiff's treating surgeon seemed to attribute plaintiff's difficulties to the MRI findings regarding the "new" herniation, Dr. Austin indicated that those difficulties would actually be related to the "old" one:

> Dr. Mazhari comments, saying, "His MRI of the lumbosacral spine shows that he has a herniated disc on the left side at L5-S1. His previous surgery was at L4-5." On examination, "he has some weakness of the dorsiflexors of the left foot that is not very impressive, but from looking at the MRI I think that explains his left leg pain." The problem with this is that dorsiflexion of the foot is supplied by the nerve root at L4-5, not L5-S1. (A 15-16)

Again, this suggests that the current problems are related to the first herniation, not the second one.

Plainly, the magistrate should have looked beyond Dr. Austin's convenient conclusions to see if they were supported by his examination findings. There is simply no reason on this record to find that problems found to have resulted from a prior disc herniation suddenly became the result of a second, nor is there any reason given why the earlier problems would have magically resolved. Absent such an explanation, there cannot be competent, material, or substantial evidence sufficient to support the magistrate's conclusions.

It should additionally be noted that Dr. Lockhart explained a possible cause of confusion relative to the levels involved:

> Well, first, I have to comment, comparing the two MRIs, that the second MRI states that a S1 vertebral body appear(s) lumbarized and is a transitional vertebral body. That is not mentioned on the first MRI. What does occur when the S1 is lumbarized meaning it looks like a lumbar vertebra and is not fused into the sacrum, it can be miscounted. The levels can be miscounted. In other words, what's L4 or 5 or what one thinks is L4-5 can actually be L5-S1 and so forth. (L 31-32).

Even Dr. Austin had to acknowledge that there was at least a "theoretical possibility" that such a miscounting could have occurred:

> Q. Could the surgery have been at L5-S1 and not L4-L5?
>
> * * * (objection omitted) * * *

> A. That's always a theoretical possibility. I would have to just rely on Dr. Mazhari's long years of being a neurosurgeon that he would not usually make a mistake like that. (A 28-29)

The magistrate does not even acknowledge this situation, let alone resolve it.

As a result, this is one of those rare cases in which this Commission should, after conducting its quantitative and qualitative review of the evidence, find that the magistrate's decision simply is not sufficiently supported by the record so as to withstand even its limited appellate review standard. Instead, it should be found that plaintiff's current disability is still the result, in full or at the very least in part, of his July 1, 1997 work injury. An ongoing award should be granted accordingly.[2]

Defendants Kelsey Construction and Citizens Insurance Company of America responded to the above:

In briefing, much is made of the alleged failure of the magistrate to perform an intricate medical exegesis of the report of Dr. Austin. Dr. Austin is a board-certified neurosurgeon who examined Plaintiff in October, 2001. His testimony, which was accepted by the magistrate, is dismissed with such adjectives as "conveniently" and "overly simplistic." This is simply an invitation for the Commission to reject the opinion of Dr. Austin in favor of Dr. Lockhart.

The case cited by Plaintiff, *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000) is indeed the basic case regarding the division of fact finding power between the magistrates and this Commission. The contention that, under appropriate circumstances, the Commission can exercise fact finding jurisdiction comparably to the prior (and discredited) opinion of *Holden v Ford Motor Company*, 439 Mich 257 (1992) is a gross overstatement of the law. It is particularly inapplicable in this case.

Mudel teaches us that the Commission, when examining the factual basis of a magistrate's opinion, is to give great deference to the magistrate. As long as there is competent, material, and substantial evidence on the whole record supporting the decision of the magistrate, the magistrate's fact findings should not be disturbed. Only if such evidence is lacking, should this Commission exercise its fact finding powers.

In this case, the magistrate chose to accept the earlier examination of a board certified neurosurgeon over the much later explanation of a physical medicine specialist. Cases too numerous to cite have held that, as long as there is rational basis for preferring the medical testimony of one expert over another, that choice should not be disturbed. Dr. Austin has performed neurological surgery innumerable times. Dr. Lockhart admits that she does not perform surgery. His qualifications clearly exceed hers.

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[2] Plaintiff's brief on appeal, pp 7-9.

Indeed, there is a clear basis for [] Dr. Austin's opinion that the later-developing disc herniation, at a level different than that operated on by Plaintiff's treating surgeon, is the most likely explanation for plaintiff's symptoms. As the magistrate noted, the residual problems at the original operative site of L4-L5 showed a herniation which extended to the right. The herniation at L5-S1, which had not been demonstrated on the prior MRI, extended to the left. Most of Mr. Williams' symptoms had to do with the left side. Because of the left-sided nature of the herniation and the subjective symptoms, Dr. Austin reasonably concluded that the most likely source of the plaintiff's problems was the later developing left sided disc herniation at L5-S1.

The serial MRI tests are instructive. The 1997 MRI shows a definite disc herniation at L4-L5, more prominent on the right, but also present on the left. At L5-S1, no disc protrusion is demonstrated. In May, 1998, there appears to have been a recurrent disc at L4-L5, lateralizing to the right, as well as a newly developed herniated disc lateralizing to the left at L5-S1. It is to be recalled that most of Mr. Williams' subjective complaints had to do with problems on the left side of the body.

The presence of the original bilateral protrusions at L4-L5 and the subsequent left-sided disc protrusion at L5-S1 would indeed then be consistent with Mr. Williams' continued complaints of left-sided problems. Mr. Williams denied any injuries between these two MRI studies and, indeed, no subsequent injuries prior to the July, 1998 incident falling down stairs were brought out in testimony.

Therefore, contrary to the arguments of plaintiff's appellate counsel, the objective medical imaging studies completely support the opinions of Dr. Austin. The acceptance by Magistrate Zettel of Dr. Austin's opinion, therefore, was neither inappropriate nor legally unsupported.[3]

Dr. Austin's testimony included the following:

Q. Okay. Now, Doctor, did you find any anatomical or objective signs of anatomical problems in this individual, particularly with reference to his low back?

A. No.

Q. Was there any atrophy?

A. No.

Q. Or any sensory or reflex changes?

A. No.

[3] Defendants Kelsey Construction and Citizens Insurance Company of America's brief on appeal, pp 2-3.

Q. Specifically, did you see anything that pointed to the need for additional surgical intervention at the time you examined him?

A. No.

Q. Even presuming such a condition may have existed which would have been at a subclinical level, could you in fact relate that to his employment, to the injury that he described to you as a result of his employment?

A. No. Because his original MRI scan reported that the L5-S1 level was normal, and now this abnormality that's showing up would have had to have occurred sometime later and would not be related directly to the original injury.

* * *

Q. Doctor, how long—presuming his history to be accurate, how long had it been since he was last employed with Kelsey Construction?

A. He last worked July 1st, 1997, and I saw him in October of 2001, so it had been a little over three years.

Q. Given that time interval, what, if any, relationship could you attribute any symptoms he may have had to the work injury or to the work experience at Kelsey Construction?

A. I wouldn't attribute any of his complaints when I saw him to the original injury.

MR. MASON: Okay, thank you. I have no further questions.

* * *

Q. Also, Doctor, Mr. Williams did not give you a history of any subsequent injuries to his back following the July 1, 1997 incident; is that correct?

A. That's true.

Q. You also noted in your report, Doctor, a new disc herniation that may explain some left leg pain in Mr. Williams; is that correct?

A. Yes.

Q. Could this new disc herniation be a residual from the July 1, 1997 injury?

A. No.

* * *

Q. Okay. And, Doctor, with respect to Mr. Williams, would you agree that the best prophylactic device for the care and treatment of his back is not to return to work as a brick mason?

A. In view of a new disc rupture, yes, I would agree.

* * *

Q. Could it also, Doctor, in terms of the distinction between L5-S1 and L4-L5, could it also be a possibility of a progressive type process where the back problems that Mr. Williams initially underwent or initially incurred on July 1, 1997 had not completely resolved [themselves], notwithstanding the surgery?

A. No, because the problem now is at a different level.

* * *

Q. When you say his subjective complaints, are you referring to the complaints resulting from the injury or from the apparently later-arising disc herniation?

A. No, from the currently new herniation.[4]

There is some logical appeal to plaintiff's position, but our qualitative and quantitative analysis of the record convinces us that competent, material, and substantial evidence supports the magistrate's decision to give plaintiff a closed award. The quotes set forth above from Dr. Austin's deposition demonstrate that the decision is supported by the requisite evidence; *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000).

If our role on appeal was that of de novo review we could have reversed the decision of the magistrate. However, in this connection the magistrate has the discretion to find credible the medical testimony that he selected. In this case, he selected to find Dr. Austin's testimony most credible and there is no basis to determine that the magistrate was wrong in so selecting. Thus on plaintiff's appeal we affirm the magistrate's closed award.

At the time defendants filed their brief on appeal, they filed a timely cross-appeal, supporting that appeal with the following argument:

> Defendants-Appellees urge this Commission to modify the decision of Magistrate Zettel to incorporate both the one-year back rule of MCL 418.833(1) and the limitation on benefits by reason of incarceration provision of MCL 418.361(1).
>
> The record is clear that plaintiff was paid benefits based on his stipulated 1997 injury, and that those benefits continued until suspended by reason of plaintiff's

[4] Dr. Austin's deposition, pp 19-20, 21, 24, 26, 29, 30.

incarceration October 5, 1998. Thus the one-year back rule of MCL 418.833(1) would be applicable.

> One year prior to the filing of the petition would have extended back only to February 26, 2001. Application of the rule would bar any benefits for any prior periods. It is to be noted that at that time, plaintiff continued to be incarcerated for his second term.
>
> This period of incarceration extended from November 19, 1999 through July 19, 2001. By virtue of Section 361(1), any benefits prior to his release date, July 19, 2001, would not be payable.
>
> The magistrate's decision can be read to include the period of time between incarcerations, April 22, 1999 through November 19, 1999. Again, this period is well beyond the one-year back limitation of MCL 418.833(1).
>
> For these reasons, Defendants-Appellees respectfully request that any award be limited to the period of time following Plaintiff-Appell[ant]'s second incarceration to the examination of Dr. Austin, which would run only from July 20, 2001 through October 30, 2001.[5]

Plaintiff responded thusly:

> Defendant contends that the following language from MCL 418.361(1) applies to this claim:
>
> > However, an employee shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.
>
> However, this provision is only applicable where it is imprisonment or commission of a crime that renders the claimant unable to obtain or perform work, not where it is the work injury that had that effect. *Sweatt v Dep't of Corrections*, 468 Mich 172; 661 NW2d 201 (2003). Plaintiff further believes that, even if a nonwork-related condition causes the inability to work, this language would still be inapplicable because it is not the imprisonment or commission of a crime that is causing the inability to work.
>
> In the instant case, plaintiff was not shown capable of working until he returned to work in 2003, and even then he was not all that capable. Instead, he had little choice, given his financial circumstances (58-59). Put simply, this was a man who had only worked as a truck driver or construction laborer, who had significant health problems and ultimately a herniated disc.

[5] Defendants' brief, pp 3-4.

> As a result, even if plaintiff had not been incarcerated, he would not have been able to work during the periods of his imprisonment. That being so, the language reprinted above from §361(1) is inapplicable to this case.[6]

Defendants contested the above with the following:

> Defendants-Cross-Appellants respectfully request that this Commission enforce the provisions of MCL 361(1) barring Plaintiff from receipt of benefits during the time of his incarceration.
>
> It is noted by opposing counsel that the basic case in this area is *Sweatt v Department of Corrections*, 468 Mich 172 (2003). In that case, the Supreme Court reversed and remanded to the magistrate for determination whether a corrections officer who was not at the time incarcerated and was in fact working, would be precluded from differential benefits because he was unable to be re-employed as a corrections officer due to a prior felony conviction.
>
> All of the operative facts indicated in the preceding paragraph were necessary for the Court's decision. In this case, a very different situation arises. Defendant seeks only the suspension of the right to receive benefits during active periods of incarceration. This is a distinction with a significant difference, as noted in the Supreme Court's Opinion.
>
> Attention is drawn to the Opinion of Justice Markman, favorably quoting the language of Judge Griffin in the Court of Appeals decision which generated the Supreme Court case. The operative language is found at 468 Mich 172, 89 at n 12. To quote, "the parties, magistrate, WCAC majority, WCAC dissenters, my colleagues and I all agree that Subsection 361(1) operates to exclude defendant from liability for workers' compensation benefits for the period plaintiff was imprisoned."
>
> The remainder of the case has to do with the operation of this subsection in a context where he is out of prison, but unable to accept certain employment because of a prior conviction (commission of a crime).
>
> The logic of this case does not bar, and in fact supports, Defendant's contention that no benefits are payable for periods of incarceration.[7]

Defendants are absolutely correct. Plaintiff's argument, in essence, if adopted would make the provisions of MCL 361(1) a dead letter. To adopt plaintiff's position would place imprisoned workers in a superior position to those who are not confined. Such is true because a non-confined, injured worker will lose his weekly indemnity for an unreasonable refusal of reasonable employment during the

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[6] Plaintiff's responsive brief, p 2.

[7] Defendant's responsive brief, p 2.

period of refusal. Those injured workers who are imprisoned, on the other hand, need not worry about being bothered by offers of reasonable employment.

Accordingly we adopt Defendants' position pertaining to this issue, adding that plaintiff understandably does not dispute the applicability of the one-year-back rule. The one year back rule would limit benefits to the period beginning February 26, 2001. However, because plaintiff was incarcerated on that date until July 20, 2001, his entitlement would thus begin on July 20, 2001.

Accordingly, we modify the magistrate's decision to grant a closed award from July 20, 2001 through October 30, 2001.

Commissioner Kent and Chairperson Reamon concur.

Rodger G. Will

James J. Kent Commissioners

William G. Reamon, Jr. Chairperson

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DEFENDANTS.

This cause came before the Appellate Commission on plaintiff's appeal and defendants Kelsey Construction and Citizens Insurance Company of America's cross-appeal from Magistrate Richard J. Zettel's decision, mailed April 14, 2004, granting a closed award for plaintiff's back injury. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed with modification. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed with the modification to grant a closed award from July 20, 2001 through October 30, 2001, in accordance with the attached opinion.

Rodger G. Will

James J. Kent Commissioners

William G. Reamon, Jr. Chairperson