2009 ACO # 126

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

TIMOTHY L. TRAMMEL,
PLAINTIFF,

V DOCKET #08-0226

CONSUMERS ENERGY COMPANY,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE DECKER.

MARGARET A. O'DONNELL FOR PLAINTIFF,
GERALD M. MARCINKOSKI FOR DEFENDANT.

OPINION

GRIT, COMMISSIONER

The defendant appeals a closed period of general disability benefits and an award for specific loss benefits. The defendant argues the magistrate erred by not applying the retiree presumption in § 373, erred in finding a specific loss, erred by failing to perform a disability evaluation for the closed period under *Stokes v Chrysler LLC*, 481 Mich 266 (2008) and erred by failing to apply the significant manner test in § 301(2).

This appeal presents legal challenges to the magistrate's decision. We review alleged legal errors de novo. *Mudel v Great Atlantic & Pacific Tea Company*, 462 Mich 691 (2000).

We affirm with modification. We affirm the award of medical benefits and the award for specific loss benefits. Because the magistrate did not find the date the specific event injury occurred, we make that factual finding and modify the order. The closed award for general disability benefits is moot, because it runs concurrent with the specific loss benefits.

Case Summary

Mr. Trammel began working for Consumers Energy in 1968, the same year he graduated from high school. Over the years he performed four different jobs for the defendant; meter reader, unskilled laborer, gas line worker and gas mechanic. The magistrate accurately summarized the plaintiff's work history. We adopt his summary as our own:

> Mr. Trammel testified that his first job for Consumers was as a "meter reader." The job required a great deal of walking. He would walk a route from meter to meter for both residential and commercial units. The meters were sometimes outside and sometimes inside the buildings and homes. He performed this job for two and a half years. He had no physical problems.
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> He then joined the distribution department and was classified as an "Advanced Unskilled Worker." This job required him to handle shovels and rakes (plaintiff's exhibit B). The job description for this position included 1) grading and bracing trenches, 2) operating pneumatic tools, 3) route barring of gas lines, 4) cutting, threading, and assisting in connecting up pipe, 5) preparing materials for joint making or pipe coating, and 6) performing other similar or related work. He worked in the distribution department for 12 years as an advanced unskilled worker.
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> Mr. Trammel testified he was then transferred into another department as a "Gas Line Worker." This position would require him to operate trenching machines, jack hammers, and tunneling equipment. The job would involve climbing into holes that he termed "excavations". He would kneel, squat, and carry heavy equipment. He performed this work until January of 2000.
>
> Mr. Trammel testified that he then became a "Gas Mechanic." In this job he would overhaul regulators. The job would require him to climb onto roofs and into holes, tubs, vaults, and pits that were all underground and covered. Sometimes the covers were made of steel and quite heavy. According to Mr. Trammel the job required a lot of kneeling and squatting. The main tool he handled was a two-foot crescent wrench. The regulators that he handled weighed between 25 to 100 pounds. He never installed meters. The gas mechanic job was the last position he held before his retirement. [Magistrate's opinion at 4.]

The magistrate found the plaintiff suffered a specific event left knee injury in June of 1984. Mr. Trammel was stepping down from the back of a truck and twisted his left knee. He underwent arthroscopic surgery and returned to work without restrictions after three months. [Magistrate's opinion at 10, Trial transcript at 46-47.]

The magistrate also found the plaintiff suffered a second specific event left knee injury on December 12, 2005. Mr. Trammel stepped in a hole and jammed his left knee. [Magistrate's opinion at 10, Trial transcript at 51.]

The plaintiff underwent a total knee replacement surgery on April 12, 2006. He returned to work, without restrictions, July 10, 2006. Mr. Trammel retired from active employment in October of 2007.

The magistrate granted a closed period of wage loss benefits, plus medical benefits and specific loss benefits, all related to the left knee/left leg. The defendant filed a timely appeal.

Analysis

I.

The defendant claims the magistrate erred by failing to apply the disability standard in § 373(1). The defendant argues because the plaintiff retired from active employment, the disability standard in § 373(1) controls. We disagree.

The Court of Appeals has directly addressed the issue of whether the retiree presumption in § 373(1) applies to specific loss benefits. The Court found the retiree presumption did not apply. In *Holbrook v General Motors Corporation,* 204 Mich App 637, 642-643, the Court stated:

> We agree with plaintiff and hold that the retiree presumption is not applicable to specific loss benefits.
>
> Two types of benefits are available under Michigan's workers' compensation system. General discharge or wage loss benefits depend upon proof of lost wage-earning capacity as a result of personal injury or occupational disease. Specific loss benefits are paid pursuant to a statutory schedule of losses upon proof of the loss, irrespective of loss of earnings or earning capacity. An employee who proves a specific loss is entitled to benefits during the statutory period regardless of whether the employee receives greater or less wages during that period. *Lindsay v Glennie Industries, Inc,* 379 Mich 573, 578; 153 NW2d 642 (1967); *Hutsko v Chrysler Corp,* 381 Mich 99, 102; 158 NW2d 874 (1968); *Miller v Sullivan Milk Products, Inc,* 385 Mich 659, 666; 189 NW2d 304 (1971).
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> Section 373(1) provides that a retired employee is "presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease." Because an employee is entitled to specific loss benefits regardless of whether the employee has lost earnings or earning capacity, the retiree presumption is not applicable to claims of specific loss.

Holbrook is controlling law on this issue. The retiree presumption does not apply to specific loss benefits.

II.

The defendant argues the magistrate legally erred in granting specific loss benefits. We start with a review of two cases; *Cain v Waste Management, Inc*, 465 Mich 509 (2002), commonly referred to as "*Cain I*" and *Cain v Waste Management, Inc*, (*After Remand*), 472 Mich 236 (2005), commonly referred to as "*Cain II.*"

Mr. Cain suffered crushing injuries to both legs in a 1988 work-related accident. The right leg was amputated. He was voluntarily paid 215 weeks of specific loss benefits for the right leg. He underwent surgery and bracing for the left leg. He returned to work in a clerical job. He alleged his non-amputated left leg continued to deteriorate, resulting in a specific loss and/or total and permanent disability as a result of the loss of industrial use of both legs. The magistrate found both. He found the plaintiff suffered the specific loss of the left leg, because the deterioration of the left leg was "tantamount to amputation." *Cain I* at 514. Because the right leg had been amputated and because he found the left leg condition was the equivalent of amputation, the magistrate granted total and permanent benefits for loss of industrial use of the legs.

When the case made it to the Michigan Supreme Court, the Court addressed a single issue. That issue was whether the permanent and total loss of the industrial use of both legs under § 361(3)(g) should involve a "corrected" or "uncorrected" test. The *Cain I* Court did not address whether the injury to the non-amputated left leg constituted a specific loss. What the Court did address was whether the corrected or uncorrected test should be used for claims of loss of industrial use under § 361(3)(g).

Sometimes the provisions of § 361 are all lumped together as the "specific loss provisions." In addressing the § 361(3)(g) issue, the Court noted there are different statutory provisions for different categories of loss. First, § 361(2) outlines the scheduled or specific losses for named body parts, such as legs, arms, hands, fingers, etc. Then § 361(3) outlines total and permanent disability claims based on the loss of more than one body part.[1] Finally, under § 361(3)(g) are claims for permanent and total loss of "industrial use" of both legs, both arms or a combination of the two. Because the statutory language for each type of claim is different, each needs to be evaluated separately. *Cain I* at 521-522.

Because Mr. Cain had sought benefits under § 363(3)(g), the loss of industrial use provision, *Cain I* held he had to prove his disability in the "corrected" state. The Court reasoned the phrase "industrial use" focused on the function of the limbs in their corrected state. In addition, the Court noted the words "permanent" and "total" referred to a corrected state. The Court stated:

> …the ordinary meaning of the word "permanent" suggests a condition or injury that cannot be improved or made functional.
>
> The word "total" similarly suggests a situation that cannot be corrected. Further, the use of the phrase "industrial use" in this section itself implies the kind of functional analysis that is implicit in the "corrected" standard of MCL 418.351. This phrase modifies "permanent and total loss" and effectively limits the coverage of this provision to only certain kinds of permanent and total losses, to wit, those that have adverse implications for the ability of an employee to carry

[1] With the exception of incurable insanity or imbecility, which is listed as a single loss.

> out his industrial responsibilities. Different forms of serious injury may carry altogether different consequences in terms of the ability of an employee to perform his "industrial" responsibilities. The express language of MCL 418.351, in particular the phrase "industrial use," makes these different consequences relevant. [*Id.* at 520.]

Because Mr. Cain retained the "industrial use" of the non-amputated left leg, the *Cain I* Court reversed the decision that the plaintiff was entitled to permanent and total benefits under § 361(3)(g).

The *Cain I* Court remanded to the WCAC for consideration of whether the non-amputated left leg constituted a specific loss. The WCAC affirmed the magistrate's finding that the plaintiff had suffered the specific loss of the left leg, even though the leg had not been severed. The WCAC held:

> The magistrate reasonably accepted the testimony that the injury to plaintiff's left leg equates with anatomical loss and that the limb retains no substantial utility. Though Dr. Mahaney testified that plaintiff can walk without the brace, the magistrate was free to accept the countervailing testimony of plaintiff that he cannot ambulate without the brace, as well as plaintiff's wife's testimony that she has never seen him walk without the brace. Given such support, we affirm his findings. [*Cain v Waste Management, Inc*., 2002 ACO #130 at 6.]

The issue of whether the non-amputated left leg should be evaluated in its corrected state was addressed by the Supreme Court in *Cain II*. In *Cain II*, (at 247 and 257, emphasis added) the Court discussed the definition of the word "loss" as used in § 361(2) and (3) and found that it was not necessary to suffer an amputation in order to suffer a specific loss. The Court defined loss as follows:

> "When determining the common, ordinary meaning of a word or phrase, consulting a dictionary is appropriate." *Title Office, Inc, supra* at 522. In the dictionaries from the era of the original legislation, the definition of "loss" is fairly broad: "Perdition, ruin, destruction; the condition or fact of being 'lost,' destroyed, or ruined," *New English Dictionary* (1908); "State or fact of being lost or destroyed; ruin; destruction; perdition; as *Loss* of a vessel at sea," *Webster's New Int'l Dictionary of the English Language* (1921); "Failure to hold, keep, or preserve what one has had in his possession; disappearance from possession, use, or knowledge; deprivation of that which one has had: as, the *loss* of money by gaming, *loss* of health or reputation, *loss* of children: opposed to *gain,*" *Century Dictionary and Cylopedia* (1911). **From this we can see that severance is but one way a loss may occur; loss also occurs when something is destroyed, ruined, or when it disappears from use**. We conclude that amputation is not required in order for a person to have suffered the loss of a specified body part.

* * *

> To be clear, we are endeavoring here not to craft a new standard, but to articulate clearly the standard enacted in 1912. We find that the original understanding the word "loss" carried when the WDCA was enacted was its plain and ordinary meaning, consistent with how it had been construed in the context of insurance law. **Thus, "loss" includes not only amputation but also loss of usefulness**.[20] It was the intent of the drafters to write into the statute a word that was expansive enough to cover both situations and the words and language they chose conveyed this. Moreover, in our case law, this Court has with considerable consistency, albeit not unfailingly, upheld this construction. We do so again today, believing as courts have before us that the meaning we give to the word "loss" in MCL 418.361(2) is the meaning originally intended.
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> [20] In *Pipe, supra* at 530, and again in *Cain I, supra* at 524, we referred to this as anatomical loss or its equivalent.

Mr. Trammel did not allege loss of industrial use or total and permanent disability. He alleged a claim for specific loss benefits. Therefore, under *Cain I* and *II*, the correct standard to be applied is the "uncorrected" standard. We look to the condition of the plaintiff's leg before surgery, not afterward.

The defendant relies on two cases from the Court of Appeals: *Tew v Hillsdale Tool & Manufacturing Company,* 142 Mich App 29 (1985) and *O'Connor v Binney Auto Parts,* 203 Mich App 522 (1994). The defendant claims these two cases should control our analysis. We disagree.

In both *Tew* and *O'Connor*, the Court of Appeals indicated an implant that becomes part of the body, such as a knee replacement, should be distinguished from corrective aids that are not part of the body. In *Tew*, the Court of Appeals reasoned that when a device is implanted, it becomes part of the body, which the Court reasoned, meant condition should be evaluated under its "new" corrected state.

The Michigan Supreme Court has already rejected the defendant's argument in the context of permanent and total disability loss of industrial use cases. In *Cain I*, a unified court dismissed the distinctions raised by *Tew* and *O'Connor* because they were inconsistent with the statutory language and previous case law.

> …both *Tew* and *O'Conner* distinguished between artificial devices or objects that are made part of the body and external aids that merely enable a person to accomplish what the limb or member cannot do on its own. *O'Conner* at 534, citing *Tew* at 36-37. We cannot agree with this distinction because it has no basis in the language of the statute. The distinction is also contrary to *Hakala,* which required consideration of glasses that clearly are an external device. Whether a corrective device is external or internal is of no importance in

> determining whether a claimant has suffered a permanent and total loss of the industrial use of a limb. [*Cain I*, at 521, footnote #12.]

There is no reason to believe the Court would rule differently in a § 361(2) specific loss claim. No part of § 361(2) distinguishes between external corrective devices and implants. Because the statute makes no distinctions and because the Michigan Supreme Court has already indicated it will apply the statute as written, we conclude the external device versus implant distinction is not relevant in a § 361(2) specific loss claim. If, as Justice Taylor indicated, the distinction plays "no importance in determining whether a claimant has suffered a permanent and total loss of industrial use of the limb," it would be inconsistent to find the distinction applied to specific loss claims under § 361(2).

In Mr. Trammel's case, we note the defendant does not appeal the magistrate's factual finding of a specific loss. The finding that the plaintiff's knee was "so damaged" that it required a surgical implant is not contested. [Magistrate's opinion at 13.] Therefore, we do not address the issue of whether the injuries caused the leg to lose its usefulness. What the defendant does argue is that the magistrate should have used the corrected test, rather than the uncorrected test, to evaluate if a specific loss occurred. *Cain I* and *Cain II* say otherwise.

III.

While the magistrate granted specific loss benefits for the leg, he neglected to find the date of the plaintiff's specific loss. It is critical to find the date of loss, so the defendant knows when to begin the payment of benefits and whether or not those benefits run concurrently with general disability benefits. The magistrate's order is silent on this issue. In his opinion, the magistrate tells us the specific loss occurred before the surgery, but does not find a date of loss. [Magistrate's opinion at 13.] We do not know if the magistrate felt the specific loss occurred on the date of the injury, the date before the surgery, or on some date in between.

Because the magistrate failed to make specific findings on this issue, we will. *Mudel, supra*, at 711. We find that the date of loss is the date of injury, December 12, 2005. In doing so, we turn first to the magistrate's finding of specific loss. The magistrate noted a number of factors in support of his finding of specific loss. He noted Dr. DeClaire felt surgery was the only real option for Mr. Trammel because of the loss of function and the plaintiff's inability to carry out normal activities. [Magistrate's opinion at 10-11.] He also noted Mr. Trammel was unable to ambulate without a cane and was unable to stand for more than a few minutes, even with the help of a cane. [Magistrate's opinion at 11.] The magistrate relied on the testimony of Dr. DeClaire to find the plaintiff's knee was "so damaged" that surgery was required. [Magistrate's opinion at 13.]

There is no indication the plaintiff's condition was altered in any material way from the date of injury until the date of surgery. In fact, the plaintiff, who the magistrate found "very credible," testified that following the injury he could not walk, could not bear his weight on the leg and just "hobbled along." [Magistrate's opinion at 11; Trial transcript at 54.] Mr. Trammel

testified he began using a cane the night of the injury or the following day, and continued to use the cane "all the time" until his surgery. [Trial transcript at 68-69.] Our review of the records of Dr. DeClaire show no real change in the plaintiff's physical examinations from his first visit in January of 2006, several weeks after the injury, until the surgery. We conclude the specific loss occurred on the date of injury, December 12, 2005. We modify the order accordingly.

The defendant argues the magistrate failed to analyze the closed period of general disability under the *Stokes* standard. We agree. However, because the found period of general disability runs concurrently with the specific loss benefits, whether or not the plaintiff met the *Stokes* standard is moot.

IV.

The defendant argues the magistrate erred in failing to apply the "significant manner" test in § 301(2). In the alternative, the defendant argues the magistrate should have explained why the section does not apply. We disagree.

The statute provides conditions of the aging process are only compensable when "contributed to or aggravated or accelerated by the employment in a significant manner." [MCL 418.301(2).] Section 301(2) does not apply to all degenerative conditions, only those associated with the aging process. We have noted this distinction many times, as summarized in the following quote:

> The flaw in the magistrate's analysis … is that she seems to assume that the term, "degenerative," definitionally equates with "aging-process." It does not. "Degenerative" merely describes a process of deterioration over time, as opposed to an acute process. Tissue degeneration may follow injury, or disease, or indeed may result simply from aging. [*Carpenter v General Motors Corporation,* 2002 ACO #123 at 8.]

There was no need for the magistrate to mention the § 301(2) standard, because there was no testimony the plaintiff's left knee condition was a condition of the aging process. To the contrary, the treating orthopedic surgeon, Dr. DeClaire, testified the plaintiff had post-traumatic arthritis related to the 1984 injury. The traumatic arthritis progressed over time and the December 2005 injury caused further damage to the articular cartilage and meniscus cartilage. [Dr. DeClaire's deposition at 9, 11, 16.] The defense examiner agreed the plaintiff's arthritis was "largely initiated and made symptomatic in the 1984 incident." [Dr. Travis' deposition at 11.] He confirmed once an arthritic condition is traumatically induced, it usually continues to progress. *Id*. at 25-26.

If there was conflicting medical evidence on this point, then it would have been necessary for the magistrate to make factual findings on whether or not arthritis was a condition of the aging process. Given there was no testimony that the plaintiff's arthritis was a condition of the aging process, there was no need for the magistrate to explain why he did not analyze the

case under the § 301(2) standard. The magistrate would have erred if he had analyzed the case under the § 301(2) standard in the absence of medical testimony linking the arthritis to the aging process.

Conclusion

We modify the order to reflect the specific loss occurred on the date of injury, December 12, 2005. We affirm on all other issues.

The magistrate used the correct legal test, the "uncorrected" test, to evaluate the specific loss claim. *Cain I* and *Cain II*.

The retiree presumption does not apply to specific loss benefits.

Because there was no evidence linking the plaintiff's condition to the aging process, a § 301(2) analysis would not have been appropriate.

The *Stokes* issue is moot, because the defendant does not owe a separate amount for general disability benefits, as the closed award granted runs concurrently with the specific loss.

Commissioner Will, Chairperson Gasparovich and Commissioners Przybylo and Ries concur.

Donna J. Grit	Commissioner
Rodger G. Will	Commissioner
Martha M. Gasparovich	Chairperson
Gregory A. Przybylo	Commissioner
Granner S. Ries	Commissioner

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This cause came before the Appellate Commission on a claim for review filed by defendant from Magistrate Lee A. Decker's order, mailed September 24, 2008, granting benefits for a closed period. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be affirmed with modification. Therefore,

IT IS ORDERED that the magistrate's order is affirmed with modification. The order is modified to reflect the specific loss occurred on the date of injury, December 12, 2005. All other issues are affirmed.

Donna J. Grit	Commissioner
Rodger G. Will	Commissioner
Martha M. Gasparovich	Chairperson
Gregory A. Przybylo	Commissioner
Granner S. Ries	Commissioner