

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

LEONARD NESSEL,
PLAINTIFF,

V

DOCKET #04-0370

SCHENCK PEGASUS,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE COPE.

LAWRENCE J. SCHLOSS FOR PLAINTIFF,
GERALD M. MARCINKOSKI FOR DEFENDANT.

OPINION

WILL, COMMISSIONER

This cause was heard by Magistrate Cope on March 29, April 26, and June 7, 2004. Plaintiff and several other lay witnesses testified.

Robert E.M. Ho, M.D., testified by deposition held October 13, 2003. Dr. Ho was plaintiff's treating neurosurgeon. Scott T. Monson, M.D., testified by deposition held October 29, 2003. Dr. Monson was plaintiff's treating orthopedic surgeon. Adel El-Magrabi, M.D., testified by deposition held on November 19, 2003. Dr. El-Magrabi is a board certified physical medicine and rehabilitation specialist who has examined plaintiff at defendant's request.

On August 12, 2004, the magistrate's decision was mailed. She gave plaintiff a closed award.

Beginning on page one of her decision, the magistrate described the procedural history followed by a summary of the evidence presented. Thereafter, beginning at the middle of page six of her decision, the magistrate made her fact findings and conclusions of law.

Insofar as the magistrate's procedural history and her summary of the evidence presented is concerned, we believe the magistrate has done a good job of summarizing same and pursuant to MCL 418.861(a)(10), we adopt these portions of her decision as our own.

The magistrate's findings of fact and conclusions of law read, in pertinent part as follows:

B. Back Condition

I do, however, find Mr. Nessel has demonstrated he has a disabling arthritic back condition. I rely on the testimony of Dr. Monson and Dr. Ho, both of whom would restrict plaintiff from heavy lifting over 20 lbs. and repetitive bending and would not return him to the job he performed on November 19, 1999. Dr. Ho, who wanted to perform surgery on plaintiff, felt that even if he had the surgery, he would probably only be able to return to light duty work with a sit/stand option, no repetitive bending, twisting or lifting and occasional lifting of 15 lbs. Dr. El-Magrabi, defendant's expert, thought plaintiff was capable of returning to work suitable to his age and body build. However, due to arthritic changes in the back, he would restrict him from lifting more than 40-50 pounds. I accept the testimony of Drs. Monson and Ho since I find it to be more consistent with plaintiff's testimony concerning his inability to perform all his job functions from November 19, 1999 through June 3, 2002.

* * *

Work Relationship

In order to be compensable, disability must arise out of and in the course of employment.²² Beyond that, conditions of the aging process, such as arthritis, must meet a higher standard of compensability by demonstrating that the disability is contributed to or aggravated or accelerated by the employment in a significant manner.²³ As discussed above, there is no real dispute that Mr. Nessel has arthritis and degenerative disc disease, which are both conditions of the aging process and hence, there is no dispute that he must meet that standard. The Michigan Supreme Court has recently held that "a claimant attempting to establish a compensable work-related injury must adduce evidence of the injury that is medically distinguishable from the pre-existing nonwork-related condition in order to establish the existence of a 'personal injury' by a preponderance of the evidence."²⁴

²²MCL 418.301(1).

²³MCL 418.301(2).

²⁴*Rakestraw v General Dynamics Land Systems*, 469 Mich 220, 234 (2003).

As a threshold matter, I must indicate there is no question in my mind that Mr. Nessel's right foot fracture arose out of and in the course of his employment as a result of his fall on November 19, 1999. However, as discussed above, I do not find that condition to be disabling since there is no medical evidence supporting that conclusion.

Dr. El-Magrabi opined the degenerative changes in plaintiff's lumbar spine were simply not caused by his employment. Under the above standards of law, the testimony

of plaintiff's experts fails to convince me otherwise. Dr. Ho acknowledged the spinal stenosis he diagnosed was secondary to the aging process and that it would not be unusual for someone age 55, such as plaintiff, to have disc protrusions and possibly radiculopathy. On the other hand, Dr. Ho noted plaintiff gave him a history of having immediate pain after the fall, unrelenting to the present, and disc protrusions can also be the result of impact. In assessing causation, the doctor relied on the history that plaintiff had no prior symptoms and the fact that testing showed disc protrusion possibly secondary to trauma and spinal stenosis secondary to the degenerative process. He added that, given the force sufficient to break the foot in a certain number of places, that force would be transmitted up the leg to the lumbar disc area and could conceivably cause a problem. Even though Dr. Ho expressed the opinion that the condition of plaintiff's low back could be related to his fall off the ladder, he was not asked and never expressed the opinion that plaintiff's back condition was impacted by the work incident in a significant manner.

On the other hand, Dr. Monson testified plaintiff has significant arthritis throughout his spine and that that condition is a disease process that will progress. Dr. Monson further observed that plaintiff had diffuse and intermittent back pain, which he considered common for a middle-aged person. He advised plaintiff to stay in shape, keep his weight down and exercise. Dr. Monson was never asked and did not express the opinion the occupational incident affected plaintiff's low back in a significant manner or that it resulted in a finding that was medically distinguishable from the pre-existing osteoarthritis he already had in his spine. Under these circumstances, I must conclude plaintiff has failed to meet his burden proving a compensable low back condition. [Magistrate's opinion, pp 6, 9-10.]

On September 30, 2004, plaintiff filed a delayed claim for review. On December 6, 2004, the Commission granted the delayed appeal. On March 2, 2005, plaintiff filed his brief on appeal, raising one issue:

THE MAGISTRATE ERRED IN APPLYING A HIGHER BURDEN OF PROOF FOR THE STANDARD OF COMPENSABILITY IN DETERMINING CAUSAL RELATIONSHIP THAN WARRANTED BY THE FACTS, REQUIRING THE PLAINTIFF TO DIFFERENTIATE BETWEEN A NON-APPLICABLE PRE-EXISTING CONDITION AND THE WORK-RELATED INJURY; SECONDLY, THE MAGISTRATE IGNORED THE EVIDENCE ON THE WHOLE RECORD ON CAUSE, AND REQUIRED THE MEDICAL WITNESSES TO EXPRESS AN OPINION ON THE AFFECT [sic] OF PLAINTIFF'S OCCUPATION ON PLAINTIFF'S LOW BACK USING THE EXACT JURISPRUDENCE LANGUAGE OF *RAKESTRAW V GENERAL DYNAMICS LAND SYSTEMS*, SUPRA, AS TO THE SIGNIFICANT MANNER TEST OR THE MEDICALLY DISTINGUISHABLE TEST.

Initially we note that the burden of proof is on the plaintiff to establish all of the elements of his case. *Aquilina v General Motors Corp*, 403 Mich 206 (1978). It is plaintiff's position that the magistrate has required plaintiff to carry his burden by a higher standard in establishing causal relationship in this case.

Plaintiff has argued that either *Rakestraw v General Dynamics Land Systems* is not applicable to this case, or that plaintiff has a medically distinguishable condition from the preexisting resulting from his November 1999 work-related injury. In so arguing, the plaintiff has discussed several court decisions and Appellate Commission decisions discussing *Rakestraw* and other considerations dealing with causal relationship.

The plaintiff concluded his argument with the following:

In conclusion, the Magistrate, erroneously hide bound the Plaintiff to a requirement on burden of proof and a standard of causation that did not apply under the law. Firstly, Mr. Nessel presented with no pre-existing degenerative arthritis that was symptomatic and therefore could have qualified such a condition to be subjected to the *Rakestraw*, supra, analysis. This error was prejudiced to Mr. Nessel as his case was evaluated based upon a standard applicable to those whose preexisting patent and symptomatic condition warranted such an analysis to separate out an injury form [sic] an underlying condition. Secondly, the medical witness to couch their medical testimony on the causal relation of the herniated disc to the work in the exacting work of *Rakestraw*, supra, is not evidence in the jurisprudence nor the WCAC Opinions. This error was prejudicial to Mr. Nessel in that he presented substantial proofs distinguishing the work elated [sic] herniated disc from the latent, non-symptomatic arthritis. [Plaintiff's brief, p 36.]

If *Rakestraw* was the only barrier to an open award, we would be inclined to grant plaintiff relief. However, the magistrate's decision clearly indicated that a more serious barrier to compensability is present in this case. That barrier is that plaintiff does have an age-related arthritic condition, preexisting plaintiff's injury, acknowledged by both Drs. Ho and Monson, the physicians who testified on plaintiff's behalf. In this connection the magistrate noted that neither of these physicians testified that plaintiff's work-related injury impacted plaintiff's low back in a significant manner. Actually, neither of these physicians were even asked this critical question. Equally important, we note that neither Dr. Ho nor Dr. Monson took the position that the November 1999 injury would be disabling as an independent factor from plaintiff's preexisting arthritic status.

Even Dr. Ho, whose testimony was the strongest for compensability, admitted the following on cross-examination:

- Q. Is that basically in a nutshell what—the reason you came to that conclusion?
- A. Correct. As I indicated before, given the absence of symptoms prior to the fall and the appearance of symptoms within a fairly close period after the fall, then I would assume that the fall was casual.
- Q. Yeah. And if the symptoms didn't start until December of 2000 or the year afterwards, there might be some question on causal relation, correct?

MR. SCHLOSS:Objection, foundation.

THE WITNESS: If—even if the symptoms started a year later, there would be some question on the causality.

Q. Some of the orthopedic surgeon [sic] in this case indicate that he has an arthritic back. Would you agree with that?

MR. SCHLOSS:Objection to hearsay, foundation.

THE WITNESS: He has a what?

BY MR. FINEGAN:

Q. Arthritic back.

MR. SCHLOSS:Objection, hearsay, foundation, form.

THE WITNESS: I wouldn't agree with that because the nerve testing shows he has a pinched nerve.

BY MR. FINEGAN:

Q. Well, maybe we'll just clarify here if we can. Spinal stenosis, is that something that can be caused by the aging process? Isn't that the narrowing of the spine?

A. As I indicated in my opinion is that—and I did state that the spinal stenosis is secondary to an aging process, but the lumbar disc protrusions could be the result of an impact.

Q. Could be. Protrusions could also be just a product of the aging process as well, is that correct?

A. Could be.

Q. It could be the cumulation [sic] of all his various life experiences, correct?

MR. SCHLOSS:Objection, foundation, form, no basis for that.

THE WITNESS: Possible but not consistent with the history. [Dr. Ho's deposition, pp 24-26.]

This testimony relied upon by the magistrate serves as a firm foundation for a finding that plaintiff's condition is a condition of the aging process, calling for a relationship between injury and disability to be established in a significant manner. See, *Farrington v Total Petroleum*, 442 Mich 201 (1994) and *Gardner v Van Buren Public Schools*, 445 Mich 23 (1994). These cases call for a

balancing of occupational and non-occupational factors in determining whether an age-related disability is work-related in a significant manner for the condition to be compensable.

Actually, it seems that none of the medical proofs offered in this case come close to making a balance between occupational and non-occupational factors to establish compensability. Accordingly, we affirm the magistrate's decision on plaintiff's appeal.

On March 2, 2005, defendant filed a cross claim for review. On May 31, 2005, defendant filed its brief on appeal as cross-appellant. Defendant raised two issues as cross-appellant and we need to deal with the first issue only because we have affirmed the magistrate's denial of an open award.

The issue that we must address in the defendant's cross-appeal is the magistrate's failure to apply the one year back rule because the defendant had paid benefits from April 30 through May 31, 2001.

The plaintiff filed his application for mediation or hearing on or about July 31, 2002. Accordingly, it is defendant's position that no benefits can be awarded before July 31, 2001.

Plaintiff filed his reply to defendant's brief as appellant and cross-appellee on July 1, 2005. Pertaining to the one year back rule, plaintiff argued:

Plaintiff was paid worker's compensation benefits for April 30 through May 31, 2001, voluntarily by the Defendant. All benefits were wrongfully withheld thereafter, Wozniak v G.M.C., 212 Mich App 40 (1995) and the Magistrate was not barred in awarding benefits wrongfully withheld by the one year back rule.

Mr. Nessel was also paid his regular wage in lieu of worker's compensation benefits thereafter by his employer and placed on favored work until he was terminated July 3, 2002 due to claimed "lack of work" (Opinion, p 4). The rule does not apply here. [Plaintiff's reply brief, p 6.]

Wozniak v GMC, 212 Mich 40 (1995) is not applicable in this case because in *Wozniak*, the Second Injury Fund could not utilize the one year back rule because of the date of injury the Second Injury Fund was obligated to pay without application those entitled to benefits.

Accordingly, we hold for defendant that plaintiff is not entitled to the benefits awarded because they predate July 31, 2001.

If perchance these benefits have already been paid this decision is not a basis for reimbursement of same by plaintiff, because defendant has not sought reimbursement of the benefits awarded by the magistrate.

In summary, the magistrate's decision is affirmed with the modification that the closed award of weekly benefits from November 20, 1999 to September 7, 2000, is deleted.

Commissioner Kent concurs.

Commissioner Przybylo concurs in result.

Rodger G. Will

James J. Kent

Commissioners

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This cause came before the Appellate Commission on plaintiff's appeal and defendant's cross-appeal from Magistrate Susan B. Cope's decision, mailed August 12, 2004, granting plaintiff a closed award for a claim of low back disability. 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 that the closed award of weekly benefits from November 20, 1999 to September 7, 2000, is deleted.

Rodger G. Will

Gregory A. Przybylo

James J. Kent

Commissioners