STATE OF MICHIGAN

COURT OF APPEALS

CAROL REISS,

Plaintiff-Appellant,

V

PEPSICO METROPOLITAN BOTTLING WORKS and PACIFIC EMPLOYERS INSURANCE COMPANY,

Defendants-Appellees.

FOR PUBLICATION
February 5, 2002
9:20 a.m.

No. 228384
Worker's Compensation Appellate Commission
LC No. 98-000171

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff Carol Reiss[1] appeals by leave granted from the order and opinion of the Worker's Compensation Appellate Commission affirming the magistrate's decision to grant defendants' petitions to stop and to recoup benefits. We affirm.

Plaintiff's decedent, Joseph Reiss (hereinafter "Joseph"), suffered a work-related injury to his lower back in 1988. At the time of the injury, plaintiff already had a long history of back problems that included two laminectomies. On December 12, 1991, the magistrate concluded that the injury aggravated Joseph's pre-existing spinal stenosis and granted Joseph an open award of benefits. That decision was not appealed.

In December 1997, defendants filed a petition to stop benefits, arguing that Joseph's medical condition, even if disabling, was no longer related to the 1988 injury. Attached to this petition were the medical findings of Dr. Emmanuel Obianwu, who found only degenerative disc disease unrelated to Joseph's work injury; he opined that although Joseph was unable to return to work at his former job, the 1988 injury had resolved itself. Approximately two months later, defendants filed an affidavit stating that benefits had been paid and were current, as required by 1979 AACS R 408.40 [Rule 10].

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[1] While this action was pending, plaintiff Joseph M. Reiss died on June 25, 2001. His widow, Carol Reiss, has been substituted in the place of the deceased party plaintiff–appellant, Joseph M. Reiss.

Joseph moved for dismissal of the petition to stop on the grounds that the proof of payment of compensation was not filed at the same time as the petition and because the petition did not comply with Rule 10's additional mandate that the filing include a statement from a physician that Joseph had returned or could return to work. The magistrate denied Joseph's motion, reasoning that defendants were permitted to proceed on any grounds allowed by current case law. He determined that the late filing of the proof of payment merely meant that defendants' petition was not "perfected" until the date of that filing.

After reviewing the testimony of the medical witnesses, the magistrate concluded that defendants met the burden of showing that Joseph's condition had changed and that his current disability "is no longer due to the symptomatic aggravation of his spinal stenosis in 1988." For this reason, the magistrate granted defendants' petition to stop in a decision mailed March 12, 1998. In a separate December 9, 1998 opinion, the magistrate also granted defendants' petition for recoupment, but limited recovery to benefits paid on and after February 1, 1997 pursuant to the one-year-back rule of MCL 418.833(2).

Joseph appealed both decisions to the WCAC, which were consolidated for review. Joseph first argued that the magistrate erred in failing to dismiss the petition to stop because it did not comply with Rule 10. The commission conducted an extensive and detailed analysis and concluded that the rule was not binding to the extent that it purported to limit the legal and factual grounds for stopping compensation. The commission rejected Joseph's claim that the magistrate erred in not according res judicata effect to the original magistrate's findings and affirmed the grant of defendants' petition for recoupment.

On appeal to this Court, plaintiff argues that the commission erred by refusing to give effect to Rule 10 and in failing to give res judicata effect to the first magistrate's decision. Plaintiff also contends that the commission and the magistrate misapplied the burden of proof in connection with the petition to stop. Judicial review in worker's compensation cases is limited to whether the commission applied the correct legal standard and whether there is any evidence to support its factual findings. MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709-710; 614 NW2d 607 (2000); *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992). However, questions of law involved in any final order of the WCAC are reviewed de novo. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000).

Rule 10 provides:

> A petition to stop compensation shall include both of the following:
>
> (a) Proof of payment of compensation to within 15 days of the date of the filing of a petition to stop compensation.
>
> (b) An affidavit stating that the employee has returned to gainful employment and substantially describing the nature of the employment, or a signed statement from a physician stating that the employee is able to return to employment.

MCL 418.205 authorizes the director of the bureau to "make rules not inconsistent with this act for carrying out the provisions of the act. . . ." Thus, if the director promulgates a rule that is. . . inconsistent with the act or judicial decisions interpreting the act, the director exceeds his authority. We agree with the commission that subsection (b) of Rule 10 is invalid for this reason.

In *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628, 662; 566 NW2d 896 (1997), the Supreme Court interpreted the definition of "disability" in MCL 418.301 *et seq*. to hold that an employee must prove three things in order to be entitled to worker's compensation benefits: "(1) a work-related injury, (2) subsequent loss in actual wages, and (3) that the injury caused the subsequent wage loss." An employer is entitled to file a petition to stop payment of benefits whenever it obtains evidence indicating a change in the employee's physical condition that negates any of these factors. See *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 381-382; 521 NW2d 531 (1994). However, Rule 10 precludes an employer from filing a petition to stop benefits so long as an employee is unable to return to work, regardless of whether the work-related injury continues to be the cause of the employee's wage loss. Thus, in cases in which an employee's work-related injury resolves itself but the employee continues to be disabled by a non-work related condition, enforcement of the rule would implicitly compel payment of benefits for a non-work related disability, in contravention of the language and purpose of the worker's disability compensation statute and the holdings of *Haske*, *supra*, and *Kosiel*, *supra*. Accordingly, the WCAC correctly concluded that Rule 10 is invalid to the extent it is contrary to the provisions of the act and case law interpreting that act. Although plaintiff cites authority holding that the commission is bound by the rules of the bureau, see, e.g., *Paselli v Utley*, 282 Mich 267; 276 NW 444 (1937), the commission cannot be bound by rules that are inconsistent with the act.

Rule 10 also requires that a petition to stop payment of benefits include proof of payment of compensation to within fifteen days of the petition. However, the rule is silent with regard to any sanction for failure to do so. In this case, defendants filed such proof two months late. As a result, the filing of the petition to stop was held not to have been "perfected" until the date that the proof of payment was filed. An administrative agency's interpretation of its own rules is entitled to deference. *Thomas Twp v John Sexton Corp of Michigan*, 173 Mich App 507, 514; 434 NW2d 644 (1988); *Sibel v Dept of State Police*, 154 Mich App 462, 465; 397 NW2d 828 (1986).

The penalty imposed in this case effectively sanctioned defendants for the late filing by limiting their recovery under MCL 418.833(2) to one year back from the date the proof of compensation was filed, rather than one year back from the date the petition was filed. Plaintiff has not shown how she was prejudiced in any way by the late filing, particularly in view of the fact that, had the petition to stop been dismissed, it could have simply been re-filed immediately with the proof of compensation. Consequently, we find no error in this portion of the commission's decision.

Plaintiff contends that there are alternatives to petitions to stop that apply when an employee refuses to cooperate with rehabilitation or medical treatment or evaluation or there is a controversy with regard to benefits. However, even if plaintiff's arguments are accepted, it would still not remedy a situation where a plaintiff continues to be disabled, but the reason for his continuing disability is not related to his work. Although plaintiff contends that defendant

could have avoided Rule 10 by filing a petition for determination of rights rather than a petition to stop, such a title would not be an accurate description of the relief sought where, as in this case, the employer specifically seeks to terminate benefits. Further, avoidability cannot render an invalid rule valid. Plaintiff also contends that *Haske*, *supra*, is inapplicable because Rule 10 merely shifts the burden of proof to the employer to show that the employee is no longer disabled. However, as previously noted, this is of no help to the employer where the employee continues to be disabled from a non-work related injury. Consequently, we find plaintiff's arguments in this regard unpersuasive.

Plaintiff next contends that the commission erred in affirming the decision granting defendants' petition to stop because defendants failed to prove that Joseph's spinal stenosis had resolved, improved, or changed in any way. Although plaintiff phrases this issue as one involving the burden of proof, it is really a request to have this Court reexamine the facts of the case, which we cannot do. The WCAC's opinion must be affirmed if there is evidence in the record supporting its factual finding that Joseph's disability was no longer work-related. MCL 418.861a(14); *Mudel*, *supra* at 709-710.

It is important to note that in the first decision issued in this case, the magistrate did not make any specific findings with regard to Joseph's medical condition, but simply adopted the opinion of Joseph's treating physician, Dr. Herkowitz. Herkowitz testified specifically that Joseph's work injury did not cause the MRI findings showing spinal stenosis, but symptomatically aggravated Joseph's condition through a "stretching or pulling of the nerves and muscles in the narrowed area." The doctor's testimony was unequivocal that the injury was to soft tissues only. Therefore, the injury at issue did not directly involve Joseph's pre-existing spinal stenosis, but only to the soft tissue in his lower back.

According to defendants' expert, Dr. Obianwu, the physical examination revealed that Joseph had no muscle spasm in the lower back or evidence of nerve impingement in that area. Obianwu accordingly concluded that the 1988 soft tissue injury could not be the cause of Joseph's current problems. We are therefore compelled to affirm the WCAC's finding that defendants carried their burden of proof in establishing a change in Joseph's condition because there is evidence in the record supporting the finding.

Finally, plaintiff asserts that the doctrine of res judicata barred relitigation of the first magistrate's finding that Joseph's spinal stenosis was pathologically worsened by his fall at work. This argument is without merit in view of the fact that neither the magistrate nor Dr. Herkowitz ever made such a finding. At any rate, it is well established that res judicata does not preclude a reevaluation of Joseph's entitlement to benefits when there has been a change in his condition. See *Kosiel, supra*; *Pike v City of Wyoming*, 431 Mich 589, 600-601 (Griffin, J.); 433 NW2d 768 (1988), *Houg v Ford Motor Co*, 288 Mich 478, 481; 285 NW 27 (1939) ("[t]he doctrine of res judicata is limited in its operation when sought to be applied to man's physical

condition which constantly changes and under a statute which provides that weekly payments may be reviewed and ended, diminished, or increased as the facts warrant”).

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey