

STATE OF MICHIGAN  
COURT OF APPEALS

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COLLEEN J. RUDD,

Plaintiff-Appellant,

v

BEDFORD PUBLIC SCHOOLS,

Defendant-Appellee.

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UNPUBLISHED

March 27, 2007

No. 266633

WCAC

LC No. 04-000094

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the October 21, 2005, order of the Worker's Compensation Appellate Commission (WCAC), which affirmed the magistrate's ruling that plaintiff had not shown that her disc herniation resulted from a work-related injury to her back. We reverse.

Plaintiff began working part-time for defendant in 1986 as a custodian and began full-time work in 1988. From 1988 until 1999, plaintiff worked without incident as the head custodian at Douglas Road Elementary School. Her work was very physically demanding, as it included cleaning classrooms, mopping, sweeping and dusting. Every August, plaintiff and three other custodians would deep-clean the building. Also, plaintiff maintained the school walkways, including shoveling, using a snowblower and salting the sidewalks.

In August of 1999, plaintiff felt pressure in her low back as she was moving a tall file cabinet at the school. She continued to work that day, but on the following day, worked only a half day because of the increasing pain. She sought medical treatment from her treating physician and obtained physical therapy. After ten days, plaintiff's doctor released her to unrestricted work. In October of 1999, however, plaintiff experienced the onset of back pain while vacationing in Las Vegas. She did not report a new injury and related the pain to her injury while moving the file cabinet. Upon her return to Michigan, plaintiff complained of numbness in her right foot. She returned to work, but the pain in her back and foot increased. She underwent a lumbar discectomy in March of 2000. She had sustained a herniated disc.

Plaintiff returned to work in July of 2000. Although she continued to experience back discomfort, she could continue to work. On January 20, 2001, she slipped on ice while operating a snow blower at work. She was off of work for about a month and then returned to unrestricted work, although her back and foot pain continued to increase.

On January 3, 2002, plaintiff was sweeping a hallway when she experienced the onset of intense back pain. She left work immediately due to unbearable pain. She has not returned to work since that date because her pain allegedly is too intense for her to return to work as a custodian.

Dr. S.A. Colah, a neurosurgeon, examined plaintiff twice for a neurosurgical independent medical examination (IME) and concluded that plaintiff had sustained a lumbar strain while moving the file cabinet in August of 1999. He opined that the August 1999 strain had resolved, however, such that plaintiff's herniated disc was due to degenerative changes. In March of 2003 he recommended that plaintiff return to work, with restrictions of no excessive bending and a weight lifting restriction of 30 pounds.

Dr. Robert Krasnick, who is board certified in physical medicine and rehabilitation, examined plaintiff in an IME on January 30, 2003. He concluded that plaintiff's initial injury in August of 1999 caused accelerated degeneration and deterioration at the injury site. He believed that plaintiff could not return to work as a custodian, but could return in a sedentary capacity eventually. He related her ongoing problems to her work injury of August 1999.

After trial, Magistrate Mary C. Brennan ruled:

Upon consideration of the evidence presented, I find plaintiff sustained an injury to her back on August 19, 1999, while moving a cabinet at work. However, I am unable to find sufficient support in the record to establish that this injury resulted in plaintiff's disc herniation and ongoing limitations. I note that plaintiff specifically stated that after her injury in August, she returned to unrestricted work and worked "pain-free" until she developed spontaneous back pain while vacationing in Las Vegas, sometime in late October 1999, over two months after her August injury and at least six weeks after her successful return to unrestricted work. Moreover, it was only after this subsequent onset of pain that she developed any radicular symptoms, and it was only after this lapse of time that a disc herniation was suspected or diagnosed. While plaintiff denied any specific incident in Las Vegas, and I accept her testimony, she nonetheless bears the burden of establishing a relationship between the disc herniation and the August 19, 1999 work event. I find the evidence fails to satisfy this burden. I am aware of Dr. Krasnick's testimony linking the work event and the injury, however, his opinion is premised on the history he obtained from plaintiff to the effect that her symptoms never completely resolved between her injury in August and the onset of back pain in Las Vegas. This is simply not the testimony presented at the hearing. Accordingly, while I found plaintiff to be a very credible and pleasant witness, I am unable to find that she has established a continuing work-related disability raising out of her 1999 injury.

I also accept plaintiff's testimony that she fell at work on January 2, 2001 and reinjured her back. However, based on Dr. Krasnick's testimony, plaintiff's current condition is the result of the disc herniation, not the subsequent fall. Therefore, I am unable to find plaintiff's current problem related to the 2001 incident. Plaintiff's petition is denied.

Plaintiff appealed and defendant cross-appealed the magistrate's decision. Two members of the WCAC affirmed, noting that a doctor's opinion based on a faulty history constitutes incompetent evidence. The WCAC ruled:

In this case, plaintiff complains that the magistrate improperly rejected Dr. Krasnick's testimony. Plaintiff alleges that the magistrate could not reject the doctor's opinion based on the inaccurate historical information because the doctor did not specify the importance of the correct historical information in his testimony.

We reject plaintiff's factual assertion and her legal conclusion. At least four specific times during Dr. Krasnick's testimony, he unambiguously stated that he relied on the history plaintiff presented when forming his opinion. (Krasnick Deposition, pp 23, 35, 36, 48). The history included plaintiff's statement that she experienced continuous pain following the August 19, 1999, incident. Plaintiff erroneously suggests that the magistrate could not reject the doctor's opinion because the doctor did not specify that the inaccuracies would alter his opinion. The law . . . required plaintiff to rehabilitate the doctor's opinion and explain that the inaccuracies would not alter his opinion. Plaintiff did not rehabilitate the doctor's testimony. The magistrate properly rejected Dr. Krasnick's testimony.

We disagree with our colleague's assessment of plaintiff's argument on appeal. Plaintiff does not challenge the magistrate's findings regarding plaintiff's return to work without pain. Rather, plaintiff argues that "[t]he magistrate found it dispositive that Dr. Krasnick had a history that plaintiff's pain did not resolve after her original injury." [Plaintiff's brief, p 8.] Plaintiff then suggests that cessation of pain was not central to Dr. Krasnick's opinion, and the magistrate erred when she rejected his opinion despite the inaccurate history. Thus, plaintiff agrees that the history was inaccurate, but argues that an inaccurate history fails to provide legal basis for rejecting an expert opinion. *Bartlett [v GTE Corp, 2000 ACO #369]*, provides the legal basis for the magistrate's ruling. MCL 418.861a(11) prevents the Commission from evaluating a finding that a party expressly concedes.

WCAC Commissioner Martha Glaser dissented. She noted that the magistrate had stated that plaintiff had returned to unrestricted work and worked "pain-free" until her back pain in Las Vegas and stated:

I fail to find any testimony that plaintiff worked "pain free" after returning to work without restrictions following the August 19, 1999 injury. I find the testimony of plaintiff to be consistent with the information given to Dr. Krasnick.

The medical record indicates that plaintiff was under physical therapy at Bedford Village Physical Therapy and discharged September 17, 1999. At that time she was reporting ache to the lumbar spine with either sitting in the car or after work. It was noted that sometimes she was able to go days without the ache occurring. [Dr. Krasnick's deposition, p 18.] Dr. Krasnick relied on history, his examination and the review of records. He further related the back condition to

injuries that occurred while working at the School System, not just the August 19, 1999 incident. [Id. p 36.]

A return to work without restrictions does not equate to “pain free.” Dr. Krasnick was aware that plaintiff had returned to work without restrictions through the fall of 1999. That information did not affect his opinion as to work relationship. [Id., p 50.]

I cannot affirm this decision as it stands. The basis for the magistrate’s rejection of Dr. Krasnick’s opinion is simply not supported on this record. His opinion was given in response to an accurate hypothetical question. If the magistrate had found the plaintiff to be less than credible, then the doctor’s opinion may have been premised on a faulty history. As the record stands here, it was not.

Review under the WDCA is limited. *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003). The WCAC reviews the magistrate’s findings for compliance with the substantial evidence standard in accordance with MCL 418.861a(3). *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 703; 614 NW2d 607 (2000). “Substantial evidence” means “such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion.” *Id.* This Court, however, does not independently review whether the magistrate’s findings of fact are supported by substantial evidence. *Id.* at 706. Rather, this Court’s review is complete once it is satisfied that the WCAC has understood and properly applied its own standard of review. *Id.* at 709.

The magistrate’s decision here was internally inconsistent such that the WCAC should not have affirmed it. The magistrate ruled that plaintiff injured her back at work in August of 1999 and that plaintiff had a sudden onset of pain eight weeks later in Las Vegas. Despite ruling that plaintiff was credible and that plaintiff did not reinjure herself in Las Vegas, the magistrate did not find that the pain plaintiff experienced in Las Vegas arose from the work injury in August. The magistrate noted that plaintiff testified at the hearing that, in the interim between the August injury and the Las Vegas trip, she had been “pain free.” The magistrate thus concluded that plaintiff had given an inaccurate history to Dr. Krasnick by stating that her symptoms had not resolved. As pointed out by the WCAC dissenting commissioner, however, the record reflects that contradictory evidence was also introduced that plaintiff continued with physical therapy after returning to work following the August injury, which tends to support that plaintiff’s pain continued and, more importantly, comports with Dr. Krasnick’s history that her symptoms had not resolved.

Nonetheless, the magistrate rejected Dr. Krasnick’s testimony linking the August work event and the herniation because Dr. Krasnick’s opinion allegedly was premised on an inaccurate history from plaintiff. The dissenting WCAC commissioner, however, noted that Dr. Krasnick was aware of the accurate facts—that plaintiff had continued physical therapy after she had returned to work following the August injury. Further, at deposition Dr. Krasnick noted that plaintiff’s back injury “did improve” and that she had “minimal residual symptoms.”

Nevertheless, two WCAC commissioners affirmed the magistrate’s opinion, citing the commission’s earlier decision in *Bartlett, supra*. *Bartlett* analyzed whether the plaintiff’s work

injuries significantly contributed to his preexisting back condition. See MCL 418.301(2). However, the facts in *Bartlett* are materially distinguishable from this case. In *Bartlett, supra* at 11, the doctors upon whose testimony the magistrate relied had a “completely incorrect understanding” of the plaintiff’s progressive back condition because the plaintiff had failed to inform both doctors of the substantial back problems suffered by him before his work injuries. Further, the plaintiff failed to tell one doctor, Dr. Dall, about a work-related back injury that had occurred just days before Dr. Dall’s examination and counsel for the plaintiff did not attempt to rehabilitate the doctors’ testimony after the misunderstanding was revealed. *Id.* at 6. On those facts, the WCAC concluded that “because both of [the plaintiff’s] experts misunderstood his medical history and therefore opined significant contribution on a fundamentally flawed foundation,” the record contained no competent evidence on the question of significant contribution to the plaintiff’s back problems by his employment. *Id.* at 7.

In contrast to *Bartlett*, here there is no indication, and the magistrate did not find, that plaintiff withheld key medical information necessary to afford Dr. Krasnick the ability to form a proper opinion concerning the work-related nature of plaintiff’s disability. Rather, the record indicates only that plaintiff misrepresented her condition to Dr. Krasnick by stating that her symptoms had not resolved although she testified at trial that she had been pain free. However, even assuming that plaintiff was “pain free,” as found by the magistrate, Dr. Krasnick’s rendition of plaintiff’s history does not contradict that finding. Dr. Krasnick indicated that plaintiff had “minimal residual symptoms,” had improved, and was only taken off work temporarily. Also, Dr. Krasnick observed that the Las Vegas emergency room notes reference the August incident that had occurred six weeks earlier, without mention of any pain in the interim. Further, unlike the *Bartlett* doctors, who were not aware of the plaintiff’s preexisting injury, here Dr. Krasnick was aware that plaintiff had experienced an incident of back pain that predated her August 1999 injury. Thus, the record supports that Dr. Krasnick’s opinion was based on information that was factually the equivalent to that described by plaintiff in her testimony. The WCAC, however, failed to address or otherwise explain how, in light of these facts, the disinformation cited by the magistrate rendered Dr. Krasnick’s opinion so “fundamentally flawed” that it must be rejected as incompetent. *Bartlett, supra* at 7.

The WCAC similarly failed to address contrary evidence of record in concluding that the magistrate properly rejected Dr. Krasnick’s testimony because plaintiff’s counsel failed to “rehabilitate” Dr. Krasnick’s testimony. Plaintiff’s counsel specifically asked Dr. Krasnick whether plaintiff’s full condition might not be appreciated at the time of injury:

*Q.* Is this something that is progressive, meaning, at the time the disc is herniated you may not appreciate it immediately but it takes a prolonged impingement or a prolonged irritation to appreciate symptomatically these types of foot symptoms?

\* \* \*

*A.* In this case she had an injury, injury to the back, initially had mostly back pain and then stated she developed more numbness in the foot. And I think, likely, whatever happened in August, she injured the disc. She probably at that time had some disc herniation and that problem progressed over time. You know, frequently people will only complain of back pain for awhile and then whether

it's weeks or months later will just then develop leg pain or leg symptoms. So it's not unusual to have symptoms develop over a number of weeks.

MCL 418.861a(3) requires the WCAC to evaluate the "whole record." This requires that the commission consider "the entire record of the hearing including all of the evidence in favor and all the evidence *against* a certain determination." MCL 418.861a(4) (emphasis added); see also *Mudel, supra* at 699. Because, in failing to consider evidence contrary to the magistrate's conclusion the WCAC failed to engage in the analysis required by MCL 418.861, we are not satisfied that the commission properly applied its standard of review. *Mudel, supra* at 709. Consequently, we reverse and remand this matter to the commission for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Joel P. Hoekstra