

STATE OF MICHIGAN
COURT OF APPEALS

JAMES N. COTTONGIM,

Plaintiff-Appellant,

v

WALTER TOEBE CONSTRUCTION
COMPANY and TRANSPORTATION
INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED

April 19, 1996

No. 179696

LC No. 91-000708

Before: Murphy, P.J., and Griffin and E.R. Post*, JJ.

PER CURIAM.

Plaintiff appeals a January 14, 1994, opinion and order of the Worker's Compensation Appellate Commission, which reversed a magistrate's decision awarding plaintiff worker's compensation benefits for a low back disability attributed to a work injury on May 27, 1987. We affirm.

Plaintiff testified that on May 27, 1987, he was removing bolts securing forms where a concrete wall had been poured when he experienced a sudden onset of severe pain down the entire right side of his body and blacked out for a few seconds. Specifically, plaintiff referred to feeling "something snap" at the time. Plaintiff missed work for about a month. He explained that he had neck and shoulder pain for about three weeks and continued pain in his right hip and leg.

When plaintiff first sought treatment from Dr. Kellams on May 29, 1987, he complained of nausea and chest and arm pain. He described his work injury as a "catch" in his chest and arm. He again saw Dr. Kellams on June 8, 1987. At that time, he complained of pain running from his right lumbar area down the back of his right leg.

*Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff was next examined by Dr. Kazmers, a vascular surgeon who had performed vascular surgery upon plaintiff in the past. However, Dr. Kazmers doubted that plaintiff's symptoms were vascular in origin. Thereafter, plaintiff treated with a Dr. Taylor, a chiropractor, for low back and leg problems through October of 1987. During that time, he briefly returned to work for Walter Toebe until being laid off approximately two weeks later. He did some lighter carpentry work for another employer, Store Fixtures, Inc., for approximately five weeks in the fall of 1987. When plaintiff began treating with Dr. DeBruin in mid-October of 1987, he described having a gradual onset of low back pain of approximately one years' duration.

Plaintiff began seeing Dr. DelaCruz in May of 1988. Although initial myelograms and CAT scans had failed to reveal substantial herniation of the discs in plaintiff's back at that time, Dr. DelaCruz eventually performed low back surgery on April 26, 1990, after later diagnostic studies indicated worsening disc herniation. The surgery revealed a relatively large extruded "free" disc fragment in plaintiff's lower back.

Plaintiff testified that his leg pain has been much better since the surgery, but he continues to have a lot of hip and back pain. Plaintiff also underwent a quadruple heart bypass in August of 1989 and a femoral artery bypass in October of 1990.

In response to a hypothetical question describing plaintiff's May 27, 1987, work injury as a "snap in his low back" followed by severe pain in his "low back and down his right side," Dr. DelaCruz opined that plaintiff's work injury caused his herniated disc.

Approximately one year prior to his back surgery, plaintiff was examined by defendants' medical expert, Dr. Corbett, in March of 1989. At that time, Dr. Corbett found no orthopedic or neurological disability, opining that plaintiff's clinical findings were not consistent with a disc problem, but were possibly attributable to vascular problems. When advised of the discovery of an extruded disc fragment during plaintiff's back surgery in April of 1990, Dr. Corbett opined that the disc herniation probably occurred some time in early 1990.

In addition to the testimony of Dr. DelaCruz, plaintiff presented the testimony of Dr. Maxim, who examined plaintiff in June of 1989. He diagnosed plaintiff to be suffering from herniated lumbar disc and chronic pain syndrome at that time. Like Dr. DelaCruz, he believed that plaintiff's pathology was causally related to the May 27, 1987, work incident, which plaintiff had reported as a snap in his back followed by severe pain in the lower back and right groin area.

Without expressly indicating any witness credibility determinations, the magistrate summarized the testimonial record and then set forth his relevant conclusions as follows:

The record indicates that the plaintiff's job duties involved heavy, strenuous work setting up and constructing concrete forms. On May 27, 1987, the plaintiff testified that the plaintiff was reaching up to get a bolt when he felt something snap and

experienced severe cramps down the entire right side of his body. The plaintiff was working in extreme heat and temporarily passed out, the plaintiff's testimony indicates that he did feel a snap in his back before he fainted. Although the plaintiff initially treated with his family doctor for heat exhaustion and nausea, the plaintiff shortly thereafter again contacted his doctor relative to pain in the right lower back and right leg. The medical proofs indicate that the plaintiff had a prior and subsequent underlying medical problems relating to his cardiovascular system. The proofs indicate that the plaintiff did sustain a specific injury to his back on May 27, 1987. Further, the medical proofs indicate that the plaintiff did undergo subsequent medical treatment for his back which resulted in Dr. Cruz performing a lumbar laminectomy on April 26, 1990.

* * *

Therefore, based on a careful review of the whole record, the undersigned finds that the plaintiff has established by a preponderance of evidence that he is disabled as result of an injury to his back on May 27, 1987, arising out of and in course of his employment with the defendant Walter Toebe Construction Company.

Defendants appealed to the WCAC, arguing that there is not substantial evidence on the whole record to support the magistrate's award of benefits because the causal connection between plaintiff's herniated disc and his May 1987 work incident is speculative at best. Plaintiff cross-appealed, challenging the magistrate's failure to order reimbursement of the Carpenter's Health & Welfare Fund for its previous payment of plaintiff's medical expenses and weekly benefits. In a supplemental brief, defendants added a judicial estoppel argument based upon plaintiff's application for and receipt of unemployment compensation benefits.

In a two-opinion plurality decision, the WCAC reversed the magistrate's award of benefits. Although there was some disagreement between the WCAC panel members as to whether plaintiff's application for and receipt of unemployment compensation judicially estopped his claim for compensation benefits, both the "controlling" and "dissenting" opinions agree that the magistrate's finding of work-relatedness or "compensability" is not supported by the requisite competent, material and substantial evidence on the whole record. The WCAC's reasons for reaching this conclusion are set forth in the "controlling" opinion as follows:

According to plaintiff at hearing, May 27 was a very hot day. He was stripping walls and dismantling panels when he "felt something snap" and "had severe cramps down my entire right side of my body". Medical records indicate that plaintiff went to his personal physician, Dr. Walter Kellams, two days later for medical treatment. At that time, he complained that his right arm and chest had a "catch" in it two days earlier. He complained that he was nauseated and felt pressure over his chest, but did not report feeling a snap in his low back, nor any problems involving his low back or lower

extremities. Only much later did he claim feeling a “snap” in his back. As stated earlier, once plaintiff testified at hearing, he only talked about feeling “something snap”, without specific reference to his back.

Plaintiff acknowledged that the claim he made to defendant insurer asserted “heat exhaustion” for the events of May 27, not a problem with his back. Two weeks after the May event, plaintiff first complained of problems with his right leg. What followed was many months of conflicting diagnoses of what might be wrong with plaintiff. Sometimes mild disc problems were found, while at other times the tests were normal. Neurological tests were often normal. Ultimately, in April of 1990, Dr. Theodore C. Dela Cruz, while operating on plaintiff, found a large disc fragment floating free, and that this fragment had migrated over to a nerve and was compressing the nerve.

Plaintiff's medical history shows vascular problems both before and after the May 27 event, including surgery in 1983 and heart by-pass surgery in 1989. Plaintiff also had low back complaints as early as 1981 and chiropractic treatment in 1984 and 1985. While being examined by Dr. John A. DeBruin, Jr., plaintiff complained of low back pain of approximately one year's duration. Thus, plaintiff already had problems with his back prior to the May 27 event.

Given plaintiff's history of vascular problems prior to the May event, plaintiff's history of back complaints prior to the May event, his contemporaneous explanation of the May event as involving his chest and arm or due to heat exhaustion (consistent with his vascular problems), and the equivocal nature of subsequent medical diagnoses, plaintiff's assertion of a “snap” to his back, upon which a finding of work-relationship becomes dependent, does not constitute competent, material and substantial evidence on the whole record to support a finding of a work-related May 27, 1987 injury. As a result, the decision of the magistrate, granting benefits, must be reversed. MCL 418.861a(3).

Because the WCAC reversed the magistrate's award of benefits altogether, it also rejected plaintiff's cross appeal as moot.

Plaintiff's application for leave to appeal was originally denied by this Court, but our Supreme Court subsequently remanded the case to this Court for consideration as on leave granted. See 447 Mich 993 (1994).

On appeal, plaintiff argues that the WCAC exceeded its appellate review powers by substituting its own findings of fact with those made by the magistrate. We disagree. The WCAC acted in a manner consistent with the concept of administrative appellate review that is less than de novo review by carefully examining the record and giving cogent and adequate reasons grounded in the record for

reversing the magistrate. See *Holden v Ford Motor Company*, 439 Mich 257, 267-269; 484 NW2d 227 (1992). For example, the WCAC noted that the way plaintiff described his injuries to Dr. Kellams in May of 1987 and Dr. DeBruin in October of 1987 was inconsistent with his claim of sudden low back pain. The WCAC also correctly noted that plaintiff had initially described the injury as “heat exhaustion,” that plaintiff’s initial symptoms following the work incident were consistent with his pre-existing nonoccupational vascular problems, and that there was an absence of reliable diagnostic evidence of the disc herniation problem for more than a year after the work incident. Moreover, the WCAC noted that there was evidence that plaintiff had chronic back problems well before the work incident, arguably providing further support for the conclusion that the herniated disc developed gradually over time rather than as a result of a sudden work injury. This distinguishes the WCAC’s decision in the instant case from cases where the WCAC’s purported application of the less than de novo substantial evidence test is belied by a lack of competent record evidence to support the WCAC’s stated reasons for reversing the magistrate. Cf., *Illes v Jones Transfer Company (On Remand)*, 213 Mich App 44, 51; 539 NW2d 382 (1995); *Kovach v Henry Ford Hospital*, 207 Mich App 107, 110; 523 NW2d 800 (1994).

Plaintiff also contends that he was deprived of a fair and impartial hearing before the WCAC because of the alleged pro-employer bias of one or more of the WCAC panel members. We conclude that this issue is not properly before us because plaintiff failed to preserve the issue by raising it below. See *Illes, supra*, at 56 n2, and cases cited therein.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Edward R. Post