STATE OF MICHIGAN

COURT OF APPEALS

HANNA S. YOUSIF,

Plaintiff-Appellee,

v

UTICA PACKING COMPANY and
CITIZENS INSURANCE COMPANY,

Defendant-Appellants,

and

WAUSAU INSURANCE COMPANY,
LEGION INSURANCE COMPANY
and ACCIDENT FUND OF MICHIGAN,

Defendants-Appellees.

UNPUBLISHED
September 13, 1996

Nos. 173664 & 179019
LC No. 91-663

Before: Saad, P.J., and Markman and W.J. Giovan*, JJ.

PER CURIAM.

The Magistrate held Citizens Insurance Company of America (hereinafter "Citizens") solely liable for payment of plaintiff's award of benefits for a bilateral carpal tunnel syndrome disability, and imposed costs and attorney fees against Citizens as sanctions for filing a "non-meritorious appeal." Defendants Utica Packing Company ("Utica") and Citizens appeal the orders of the Worker's Compensation Appellate Commission which affirmed the magistrate's decision. We affirm the substantive holding but reverse the imposition of sanctions.

I. BACKGROUND

Beginning in 1980, plaintiff worked as a meatpacker/butcher for Utica Packing Company. In addition to meat cutting and other activities, plaintiff's job duties involved the building, filling, enclosing,

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

carrying and stacking of 30 to 50-pound boxes of meat, handling between 1,000 and 1,200 boxes per work shift. Many of plaintiff's job duties, such as the task of covering "combo" tanks of meat products with sheet plastic, were performed under freezing conditions of 5 to 10 degrees Fahrenheit, seven or eight hours a day. Occasionally, he also worked in a freezer area in below zero temperatures. Virtually all of his tasks involved repetitive, hand-intensive work.

In early 1985, plaintiff developed symptoms of pain, numbness and swelling in both hands. While he received medical treatment, he continued to perform his regular job duties. But, on June 1, 1989, the severity of his hand problems prevented plaintiff from working. Although he complained of constant pain in his hands, plaintiff attempted to return to a favored job offered by his employer on one day in November of 1989. This favored job was primarily composed of some of the less strenuous aspects of plaintiff's former meat packing duties. However, plaintiff was unable to perform this job for more than two hours due to the condition of his hands.

Plaintiff filed his worker's compensation claim shortly after his last day of regular work on June 1, 1989, when defendant Citizens was the insurer on the risk. Citizens impleaded three of Utica's prior insurers: defendant Wausau Underwriters (on the risk in January, 1985), defendant Accident Fund (on the risk in September, 1985), and defendant Legion Insurance (on the risk at the time of plaintiff's attempt to return to favored work in November, 1989).

After a hearing, the magistrate granted plaintiff an open award of benefits based upon a June 1, 1989 injury date, when Citizens was the insurer. The magistrate found that Citizens failed to prove that plaintiff's disability was solely attributable to injuries occurring in 1985 when Wausau and the Accident Fund were on the risk. The magistrate also declined to impose liability on Legion, as a subsequent insurer and held that Citizens failed to show that plaintiff's brief performance of favored work for two hours on one day in November, 1989 in any way aggravated plaintiff's then-existing disability to the point of having caused any new injury or added disability.

On appeal to the WCAC, Citizens did not challenge the magistrate's underlying finding of disability, but argued that the magistrate should have held either Legion or the prior insurers liable for payment of plaintiff's benefits. Specifically, Citizens argued that the magistrate erred in failing to hold Legion liable, based upon a November 1989 injury date, because it does not matter whether plaintiff's brief two hours of work actually aggravated his disability, so long as he was engaged, on that date, in the kind of work he previously did when he first contracted his disabling occupational disease. In this regard, Citizens relied upon the language of §435 of the Worker's Disability Compensation Act (WDCA), MCL 418.435; MSA 17.237(435), which provides:

> The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If any dispute or controversy arises as to the payment of compensation or as to liability for the compensation, the employee shall make claim upon the last employer only and apply for a hearing against the last employer only.

Alternatively, Citizens argued that if some actual aggravation is in fact required, the prior insurers on the risk in 1985 should have been held liable, because the evidence shows that the pathology underlying plaintiff's disability was fully developed in 1985 and was not further aggravated over the course of his subsequent employment through 1989.

The WCAC rejected Citizens' reliance upon §435 of the WDCA, and concluded that the statute only applies to cases involving multiple employers, not to cases involving a single employer with multiple insurance carriers. The WCAC then noted that another statute, §425 of the Act, leaves the determination of the appropriate "date of disablement" for the magistrate on a hearing of the claim. The WCAC concluded that there is competent, material and substantial evidence on the whole record to support the magistrate's determination that plaintiff's disability was aggravated and accelerated throughout his employment ending on June 1, 1989, but was not further aggravated or accelerated during the two hours of favored work performed in November of 1989. The WCAC also held that Citizens could only hope to prevail in its attempt to shift liability to Legion if aggravation was a non-issue.

On its own motion, the WCAC assessed costs and attorney fees against Citizens as a sanction under MCL 418.861b; MSA 17.237(861b) for filing a "non-meritorious appeal." The WCAC reasoned that there was no evidence to support holding either the prior insurance carrier liable for aggravation ending in 1985 or the subsequent insurance carrier liable for further aggravation in November, 1989, and that Citizens' argument was based upon an inapplicable statute (§435).

II. ANALYSIS

In an appeal to the WCAC, the magistrate's findings of fact are to be regarded as conclusive if supported by competent, material and substantial evidence on the whole record, but the magistrate's legal reasoning and conclusions are not similarly conclusive on the WCAC. On judicial review, the factual findings of the WCAC are conclusive if there is any competent record evidence to support them, but the WCAC's decision is subject to reversal if the WCAC operated within the wrong legal framework or its decision was based upon erroneous legal reasoning. *Holden v Ford Motor Company*, 439 Mich 257, 263; 484 NW2d 277 (1992); *O'Conner v Binney Auto Parts*, 203 Mich App 522, 527; 513 NW2d 818 (1994); *Fraley v General Motors Corp*, 199 Mich App 280, 282-283; 500 NW2d 767 (1993).

Citizens argues on appeal that the WCAC erred: (1) as a matter of law in its determination that §435 does not apply in cases involving multiple insurance carriers for a single employer, and (2) by applying §425 which deals with the "date of disability" rather than the "date of injury." However, we find no legal error which would warrant reversal.

We begin our analysis by observing that in general, it is the date or time of "injury" which governs the setting of the applicable benefit rate and the fixing of liability between successive employers or insurance carriers. By contrast the "date of disablement" determines only when the claimant's rights accrue, when notice must be given, and when the claim must be filed. See *Joslin v Campbell*, *Wyant*

& Canon Foundry Co, 359 Mich 420, 428; 102 NW2d 584 (1960). See also *Monti v Burroughs Corp*, 398 Mich 494, 500; 247 NW2d 863 (1976) (Lindemer, J., concurring). When the claimant's disability results from disease or an injury not attributable to a single event, (e.g., disability resulting from multiple work injuries), §301(1) of the WDCA provides that the time or date of injury is the employee's "last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death." Section 301(1) thus establishes the injury date as the time the employee was last subjected or exposed to the working conditions which caused or contributed to his or her resulting disability, without necessarily requiring any further contribution or aggravation of the disability to occur on the day the employee was last subjected or exposed to those conditions at work.

In applying §301(1), this Court's focus has always been upon whether the employee was exposed to the same conditions which resulted in disability during the last day the employee actually worked, regardless of how brief that last working day may have been, and without regard to whether the employee's exposure to those conditions actually resulted in further aggravation of the disabling condition. For example, in *Pye v Chrysler Corp (On Remand)*, 190 Mich App 214; 475 NW2d 461 (1991), this Court upheld a last day of work injury date when the employee had been reassigned from favored work to his former disability-aggravating job duties on that date but did not complete a full shift. This Court found that "it could reasonably be concluded that assigning plaintiff to work under conditions already known to cause or aggravate his injury was the equivalent of his working under injury-causing conditions." *Id*. at 218. Similarly, in *LaForest v Vincent Steel Processing, Division of Letts Industries*, 59 Mich App 386, 393; 229 NW2d 466 (1975), aff'd 395 Mich 364; 235 NW2d 592 (1975), this Court declined to find a last day of work injury date on the date that an employee simply reported to work but left without doing anything, even though the employee was exposed to the same pollutants which had previously contributed to his occupational disease -- not because his exposure to pollutants on that date was not shown to further aggravate his condition, but on the ground that the employee did not actually perform any work on that date. However, discussion of §301(1) is largely academic in this case, except perhaps to expose the fallacy of the WCAC's broad conclusion that Citizens could only hope to prevail in shifting liability to Legion on the basis of a November, 1989 injury date "if aggravation was a non-issue."[1]

Moving on to plaintiff's central arguments, we find no merit in Citizens' contention that §435 applies where there are multiple insurance carriers of a *single* employer as well as cases involving multiple employers. Unlike §301(1), which simply fixes the controlling injury date for certain kinds of injuries and disease, §435 is specifically designed to allocate worker's compensation liability between multiple employers; as enacted, §435 contained numerous provisions for apportioning liability between employers, all of which were recognized as having no application to insurance carriers. See *Sosnowski v Dandee Hamburger*, 384 Mich 221, 226 n 3; 180 NW2d 761 (1970). Citizens has failed to cite any case wherein §435 was applied to fix liability between multiple insurance carriers for a single employer. To the contrary, all of the single employer and multiple insurance carrier cases cited by Citizens involve only application of §301(1), without any mention of §435, except to distinguish it. See, e.g., *Sosnowski, supra*. While we agree with Citizens that the WCAC's reliance upon the "date of disablement" instead of the "date of injury" was misplaced, see *Joslin, supra*, we find any error in this

regard to be harmless, given the fact that Citizens' argument to the WCAC was based upon §435 and did not include any argument that the magistrate's injury date determination was incorrect under §301(1).

We do find merit, however, in Citizens' remaining arguments challenging the WCAC's imposition of costs and attorney fees under §861b of the Act, MCL 418.861b; MSA 17.237(861b), for filing a "non-meritorious" appeal. Sanctions under §861b are appropriate only when an appeal is found to be "vexatious." Vexatious appeals require a determination that the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal. *McIntosh v Chrysler Corp*, 212 Mich App 461, 469-470; 538 NW2d 428 (1995). While we agree with the WCAC that the specific arguments Citizens' raised on appeal to the WCAC were unmeritorious, we do not believe that those arguments were so devoid of arguable merit as to make the appeal wholly frivolous and vexatious, especially where there are cases decided under §301(1) which arguably provide some support for Citizens' basic argument. While Citizens may have framed its argument under the wrong statute, we do not believe that the WCAC's imposition of sanctions under §861b was appropriate in this case. Cf., *Rzanca v LDI, Inc*, 209 Mich App 711, 714; 531 NW2d 836 (1995). Accordingly, we reverse that portion of the WCAC's decision imposing costs and attorney fees.

Affirmed in part and reversed in part.

/s/ Henry William Saad
/s/ Stephen J. Markman
/s/ William J. Giovan

[1] Arguably, Citizens might have argued to the WCAC that Legion should be held responsible for payment of plaintiff's benefits as the insurer on the risk on plaintiff's injury date according to §301(1), on the theory that plaintiff was last subjected to the same conditions which previously caused and aggravated his underlying carpal tunnel syndrome disability in the past, e.g., hand-intensive activities in a cold working environment. It is unnecessary for us to determine the viability of such a theory under the facts of this case because Citizens never argued such a theory to the WCAC. Instead, Citizens' argument to the WCAC was based upon §435 of the act, without so much as a single citation to §301(1). This being so, the issue of the application of §301(1) to the facts of this case is clearly unpreserved for review. MCL 418.861a(11); MSA 17.237(861a)(11).