STATE OF MICHIGAN

COURT OF APPEALS

CALLIE HOARD,

Plaintiff-Appellee,

v

ARA SERVICES, INC., and RELIANCE INSURANCE COMPANY,

Defendants-Appellants,
Cross-Appellees,

and

SERVOMATION CORPORATION and HOME INDEMNITY INSURANCE COMPANY,

Defendants-Appellees,
Cross-Appellants

and

HARTFORD FIRE INSURANCE COMPANY and EMPLOYERS MUTUAL CASUALTY COMPANY,

Defendants-Appellees.

UNPUBLISHED
September 20, 1996

No. 179213
LC No. 91-000147

Before: Sawyer, P.J., and Bandstra and M.J. Talbot,* JJ.

PER CURIAM.

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

Defendants ARA Services and Reliance Insurance appeal by leave granted the August 31, 1994, order of the Worker's Compensation Appellate Commission (WCAC), which affirmed the magistrate's award granting plaintiff benefits payable by these defendants. Servomation and Home Indemnity Insurance cross appeal. We affirm.

I

Plaintiff began working for defendant Servomation as a cook in October 1984. She testified that the work often required her to lift, stoop and bend. Sometimes the lifting involved frozen foods weighing up to 70 lbs. Plaintiff testified that she had no particular problems until she sustained an injury at work on February 25, 1985, when she slipped and fell, injuring her right knee. She missed seven weeks of work. In April 1986 plaintiff injured her back and left shoulder after slipping on ice that had been spilled by a coworker. Plaintiff testified that she began to experience low back pain for the first time in October 1987 while carrying a large kettle of water.

Although plaintiff testified that she felt pain in her back, shoulder and knee as a result of the above incidents, she continued her regular work for Servomation through November 22, 1989. At that time Servomation lost its contract to provide food services for a local automotive plant. Plaintiff was then laid off. However, she was almost immediately reemployed by ARA Services, which had won the contract. She continued to do the same sort of work for her new employer as she had done for her old one. However, she testified that she experienced increased pain symptoms in her left shoulder, back and right knee while working for ARA. On February 7, 1990, plaintiff told her supervisor that she could not tolerate the pain any longer. She has never returned to work since.

Plaintiff filed a petition for hearing claiming continuing disability as a result of the work-related injuries. She named as her employer Servomation, and noted that she was then working for ARA at a lower wage rate. In April 1990 Servomation filed a petition for determination of rights, contending that plaintiff's subsequent employment at ARA caused or aggravated any disabling condition.

In an opinion and order mailed February 6, 1991, the magistrate found plaintiff disabled as of her last day of work for ARA on February 7, 1990. The magistrate found that there was no real dispute that plaintiff was disabled, at least partially, because all doctors who testified by way of deposition indicated that plaintiff could only return to work with certain restrictions, such as lifting no more than 20 lbs. and doing no repetitive bending, stooping or lifting. The main question in dispute was whether plaintiff's work for ARA contributed to her condition, or whether plaintiff's disability was caused solely by her work for Servomation. The magistrate found as fact that plaintiff was injured as of her last day of work, February 7, 1990, and held that ARA and Reliance Insurance were responsible for payment of benefits:

> While plaintiff sustained specific injuries in 1985 and 1986, the testimony clearly establishes a worsening of symptoms through February 1990. Dr. Wessinger testified that he did not believe plaintiff's brief employment period with ARA Services, Inc. aggravated any underlying pathological conditions. Even if this should be the case,

> plaintiff did not discontinue work activity because of an increase in an underlying pathological condition. She discontinued her work activity because of an increase in pain. Pain was the disabling factor. And we are persuaded that the work activity through February 1990 aggravated and accelerated the pain syndrome which ultimately caused plaintiff to discontinue her work activity. Unfortunately there has been little improvement in that pain syndrome through the date of hearing. Plaintiff testified that, if anything, her symptoms have worsened.
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> With only a sight variation, plaintiff essentially performed her regular work activity through February 7, 1990. While it could be no doubt argued that justice would be better served if an earlier injury date was determined, we cannot ignore the facts as they present themselves. And the facts in this instance strongly suggest that plaintiff performed essentially the same type of work activity through February 7, 1990 when her physical condition became such that she was simply unable to continue. And the facts also strongly suggest that the nature of that work activity aggravated and accelerated the symptom complex in the back, left shoulder, knee and ankle, ultimately forcing plaintiff to discontinue her work activity.
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> It is therefore found that the submitted proofs establish a compensable injury date of February 7, 1990 at which time plaintiff was employed by ARA Services, Inc., which was insured by Reliance Insurance Company.
>
> It is therefore found that Reliance Insurance Company is responsible for the weekly benefits awarded herein.

ARA and Reliance appealed. In an opinion and order dated August 31, 1994, the WCAC affirmed, holding that the magistrate's findings were supported by substantial evidence and refusing to address certain claims of error because they were not properly raised below.

II

ARA and Reliance argued in their brief filed with the WCAC that plaintiff should be denied benefits because she willfully falsified her employment application regarding her past injuries, and because she knowingly performed work which exceeded her medical restrictions. These defendants also argued that they cannot be liable for benefits because plaintiff never made a claim against them. The WCAC refused to address these issues, holding that they had not been properly raised below and so were not preserved for appellate consideration.

Defendants argue that the magistrate and WCAC erred in failing to address these issues. They contend that they were implicitly, if not explicitly raised below. In particular, defendants note that in the answer they filed to the petition for determination of rights, they explicitly raised as an affirmative defense § 431 of the Worker's Disability Compensation Act, MCL 418.431; MSA 17.237(431),

which prohibits the payment of compensation for an occupational disease "if the employee at the time of entering into the employment of the employer by whom the compensation would otherwise be payable...willfully and falsely represents in writing that he has not previously suffered from the disease which is the cause of the disability or death." Defendants argue that by raising the issue as an affirmative defense, and by asking plaintiff relevant questions at the hearing before the magistrate, they properly raised the issue, and it was therefore error for the magistrate and WCAC not to address it. Defendants make similar arguments regarding the other two issues found to be unpreserved by the WCAC.

Although we recognize that worker's compensation hearings are somewhat informal and fluid, and that it is not standard practice to make opening or closing statements or to file briefs with the magistrate, we nevertheless agree with the WCAC in the instant case that defendants have only themselves to blame for the magistrate's failure to address the issues in question. Defendants never apprised the magistrate of the need for findings and conclusions regarding these issues. Although it is true that at least one of the issues was explicitly raised as an affirmative defense by these defendants, we note that defendants listed eleven distinct affirmative defenses, as well as a catch-all reservation of the right to raise additional defenses in the future. Moreover, all of the other defendants likewise raised numerous defenses, one carrier going so far as to file a response consisting of thirty-eight separately numbered paragraphs. The filing of boilerplate answers and affirmative defenses does not generally inform the factfinder of the actual issues in dispute. Defendants cannot seriously suggest that a worker's compensation magistrate must make findings and conclusions on every affirmative defense listed by a party. Just as it is defendants' burden to prove the applicability of an affirmative defense, *Brown v Beckwith Evans Co*, 192 Mich App 158, 167-168; 480 NW2d 311 (1991), we hold that it was defendants' burden in the instant case to apprise the magistrate of the need for findings and conclusions on these issues. We note in this regard that it is not uncommon for representatives of parties at the commencement or end of a hearing to inform the magistrate of the stipulations which have been reached or the issues which can be addressed mechanically, such as the computation of the average weekly wage. Defendants offer no excuse for failing to apprise the magistrate of the need for findings on the issues in question.

We believe that his holding is in accord with the amendments to the Worker's Disability Compensation Act, which substituted magistrates for hearing officers and the WCAC for the appeal board. If defendants' position were accepted, the hearing before the magistrate would become a mere formality, just as the hearing before the hearing officer used to be. The magistrate hearing would be reduced in function to the mere creation of a record, and the "real action" would be before the WCAC. We believe that a hearing before a magistrate should be more than a mere formality, and that appeals to the WCAC should not be taken as a matter of course.

Finally, we note that at least two of the three issues are without merit. Section 431 applies only in cases involving an "occupational disease," a worker's compensation term of art. Because plaintiff was found disabled as a result of a last day of work personal injury, and not an occupational disease, § 431 does not apply. *Dressler v Grand Rapids Die Casting Corp*, 402 Mich 243; 262 NW2d 629 (1978), *Acox v General Motors Corp (On Remand)*, 192 Mich App 401, 404-405; 481 NW2d 748

(1991). There is likewise no merit to the argument that these defendants cannot be held liable for payment of benefits because they were not named in plaintiff's petition for benefits. These defendants were properly brought into the case when plaintiff's previous employer and one of its insurance carriers filed a petition for determination of rights. Defendants appeared, filed affirmative defenses, and fully participated in all proceedings. We know of no authority prohibiting an award of benefits payable by these defendants under the circumstances.

III

ARA Services and Reliance Insurance argue that even if plaintiff is entitled to benefits, she should receive them from Servomation's insurer who was on the risk at the time of the most recent injury which caused or aggravated the pathological condition from which plaintiff's disabling pain arose. We disagree. We understand the magistrate to have found that plaintiff's work for ARA caused her to experience increased pain, and that the increased pain was the disabling factor. It does not appear that the magistrate found the plaintiff's work for ARA in any way aggravated or contributed to her underlying pathological condition. This Court has held that when a plaintiff's symptoms, and not the underlying condition, have been aggravated by employment, benefits may be awarded so long as the symptoms have not abated to their previous level. Defendants remain free to petition the Bureau of Worker's Disability Compensation to stop payment of benefits with an offer of proof that the symptoms have abated. *Laury v General Motors Corp (On Remand, On Rehearing)*, 207 Mich App 249, 251; 523 NW2d 633 (1994), *McDonald v Meijer, Inc.*, 188 Mich App 210, 215-216; 469 NW2d 27 (1991). Because plaintiff's symptoms had not returned to their preexisting level by the time of hearing, the magistrate did not err in entering an open award.

We find it unnecessary to address the argument of cross-appellants Servomation and Home Indemnity Insurance in light of the above holdings.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Michael J. Talbot