

STATE OF MICHIGAN
COURT OF APPEALS

NORMA ROBINSON,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 180960
WCAC No. 91-0902
ON REMAND

BLUE CROSS AND BLUE SHIELD OF
MICHIGAN and VIGILANT INSURANCE CO,

Defendants-Appellees.

Before: Smolenski, P.J., and Markey and P.J. Sullivan,* JJ.

SMOLENSKI, P.J. (dissenting).

I respectfully dissent.

The credibility of witnesses testifying live is always a matter at issue and is for the trier of fact to decide. *Woody v Cello-Foil Products*, 450 Mich 588, 603; 546 NW2d 226 (1996) (Weaver, J., dissenting) (citing *Thomas v Chrysler Corp*, 164 Mich App 549, 557; 418 NW2d 96 [1987]); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990); *Thompkins v Dep't of Social Services*, 97 Mich App 218, 223; 293 NW2d 771 (1980). As explained in *People v Sammons*, 191 Mich App 351; 478 NW2d 901 (1991):

“Demeanor is of the utmost importance in the determination of the credibility of a witness. The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words.” [*Id.* At 365 (quoting *People v Dye*, 431 Mich 58, 65; 427 NW2d 501 (1988).]

The WCAC should generally give great deference to the magistrate regarding credibility issues as to witnesses who appeared live before the magistrate. *Aaron v Michigan Boiler & Engineering*, 185 Mich App 687, 702; 462 NW2d 821 (1990), *aff'd sub nom Holden v Ford Motor Co*, 439 Mich 257, 287; 484 NW2d 227 (1992); *Thompkins, supra* at 222-223.. This is in accord with the

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

general rule that appellate courts will not resolve the issue of credibility anew on appeal but rather will give special deference to the trier of fact's determination of credibility. *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993); *Vaughn, supra* at 380; *Stanton v Dachille*, 186 Mich App 247, 255; 463 NW2d 479 (1990). However, the WCAC is not required to give a magistrate's reading of deposition testimony the same degree of deference that it is required to give a magistrate's determination of the credibility of live testimony because the magistrate is in no better position than the WCAC to assess the evidence. *Holden, supra* at 284, 286. Moreover, the WCAC can disagree with the magistrate's findings on the credibility of live witnesses because its review is both qualitative and quantitative, provided that the WCAC has given deference to the magistrate's superior position in viewing the witness. *Aaron, supra* at 702. If the WCAC finds that a magistrate's decision regarding witness credibility is not supported by substantial evidence, it must clearly explain why. *Woody, supra* at 603 (Weaver, J., dissenting) (citing *Holden, supra* at 267, n 19).

In this case, the plaintiff's testimony was not patently incredible nor was her credibility absolutely destroyed by the conflicting medical testimony. In redetermining the issue of plaintiff's credibility, the WCAC cited no unusual or unique facts.¹ Rather, the WCAC simply weighed the testimony differently than the magistrate, who had the advantage of observing plaintiff live. Moreover, even after reweighing the conflicting evidence the WCAC could only conclude that plaintiff's credibility was "questionable" or "at issue." The purpose of the WCAC's legislatively-mandated standard of review is to decrease the backlog of appeals "by giving greater deference to the magistrate's findings." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212, 218; 501 NW2d 76 (1993). The current system for appeals of decisions of a magistrate was designed to give very limited power to the WCAC, and the decisions of the magistrates are to be final in most cases. *Gretel v Worker's Compensation Appellate Commission (On Remand)*, 217 Mich App 653, 657; 552 NW2d 532 (1996).

I conclude that the WCAC did not act in a manner consistent with the concept of administrative appellate review in resolving anew on appeal the issue of plaintiff's credibility and then using that determination as a reason to reject the medical testimony of Dr. Goldman. The WCAC's erroneous legal analysis caused it to grossly misapply the substantial evidence standard with the result that the WCAC simply, and erroneously, substituted its opinion for that of the magistrate. *Kovach v Henry Ford Hosp*, 207 Mich App 107, 111; 523 NW2d 800 (1994).

For the foregoing reasons, I would reverse the WCAC.

/s/ Michael R. Smolenski

¹ In redetermining the issue of plaintiff's credibility, the WCAC specifically noted that "Dr. Higginbotham found no objective reason plaintiff appeared at his office using crutches. A careful review of the entire record fails to disclose any mention of the crutches by any other doctor, including Dr. Goldman." However, the "HISTORY OF PRESENT COMPLAINTS" portion of Dr. Endress' April 8, 1991 written evaluation of plaintiff, which was read into the record at Dr. Endress' deposition, states that plaintiff "apparently used crutches for the hip sprain until December of 1990." Thus, it appears that the WCAC's determination that plaintiff's credibility was questionable because, in part, no other doctor had acknowledged her use of crutches, is, at the very least, not supported by adequate reason

grounded in the record. *Illes v Jones Transfer Co (On Remand)*, 213 Mich App 44, 50-51; 539 NW2d 382 (1995).