

STATE OF MICHIGAN
COURT OF APPEALS

HOWARD E. LINDROTH, Deceased, MARY LOU
LINDROTH, Widow,

UNPUBLISHED
September 26, 1997

Plaintiff-Appellant,

v

No. 186181
WCAC
LC No. 93-000901

MICHIGAN BOILER & ENGINEERING and
UNITED STATES FIDELITY & GUARANTY
COMPANY,

Defendants-Appellees,

and

MICHIGAN BOILER & ENGINEERING and
CONTINENTAL CASUALTY INSURANCE,

Defendants-Appellees,

and

SILICOSIS & DUST DISEASE FUND,

Defendant-Appellee.

Before: O'Connell, P.J., and Smolenski and T. G. Power*, JJ.

PER CURIAM.

Plaintiff Mary Lou Lindroth appeals by leave granted a decision by the Worker's Compensation Appellate Commission (WCAC) reversing the decision of the magistrate and denying benefits. We vacate and remand for further proceedings.

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

Decedent Howard Lindroth, a journeyman boilermaker, worked for defendant Michigan Boiler & Engineering continuously from 1958 through 1981, and then on a periodic basis until January 19, 1985. Decedent was exposed to asbestos during the course of his employment. He stopped working due to breathing problems.

Decedent had a history of heart and lung problems. He underwent surgery for lung cancer and arteriosclerosis. Decedent smoked heavily for 40 years. He quit smoking in 1989.

Decedent's petition for worker's compensation benefits alleged that exposure to asbestos and other pollutants during the course of his employment for defendant resulted in compensable asbestosis and lung disease. An amended petition added an injury date of January 19, 1985. Decedent died on July 30, 1991, before his case came to trial. Thereafter, plaintiff filed a petition seeking death benefits.

The magistrate found that the evidence showed that exposure to asbestos contributed to decedent's condition. Medical testimony established that smoking and exposure to asbestos accelerated the development of cancer in smokers. The magistrate found that because decedent became aware of the relationship between his employment and his condition in January, 1987 and filed his claim in March, 1988, the claim was timely under MCL 418.441(2); MSA 17.237(441)(2) (requiring that an occupational disease claim be filed within two years of date of awareness of relationship between employment and condition). The magistrate awarded death benefits for 500 weeks from the date of decedent's death.

All parties appealed, and in a 2-1 decision the WCAC reversed the magistrate's decision and denied all benefits. Initially, the WCAC majority rejected plaintiff's claim that the magistrate erred by failing to award decedent benefits for a period in his life in addition to death benefits. Dismissing the dissent's suggestion that it was raising the issue of the applicability of § 441 *sua sponte*, the majority observed that the magistrate provided no legally proper reason for failing to award decedent benefits for the period between his last day of work and the date of his death. Therefore, the WCAC reasoned, it was obligated to make the necessary findings of fact and apply the relevant law. Noting that pursuant to § 441(2) a claim must be filed within two years after the employee or his dependents "had knowledge, or a reasonable belief, or through ordinary diligence could have discovered that the occupational disease or death was work related," the WCAC stated that the issue was whether, through ordinary diligence, decedent could have become aware of the work-relatedness of his condition prior to January 29, 1987. The magistrate did not consider the issue of ordinary diligence. The WCAC concluded that plaintiff did not show that through ordinary diligence decedent could not have become so aware. The evidence showed that decedent had a history of lung problems and worked in a dusty atmosphere. Decedent had to quit working on January 19, 1985 because he was having difficulty breathing. The WCAC held that had the magistrate properly applied § 441(2), he would have concluded that plaintiff's claim was not timely.

The WCAC majority next considered the issue, raised by defendant and the Silicosis & Dust Disease Fund, of whether the magistrate erred by awarding death benefits based on an "any contribution" standard instead of on the "proximate cause" standard in MCL 418.375(2); MSA 17.237(375)(2). That section reads in relevant part:

(2) If the injury received by such employee was the proximate cause of his or her death, and the deceased employee leaves dependents, as hereinbefore specified, wholly or partially dependent on him or her for support, the death benefit shall be a sum sufficient, when added to the indemnity which at the time of death has been paid or becomes payable under the provisions of this act to the deceased employee, to make the total compensation for the injury and death exclusive of medical, surgical, hospital services, medicines, and rehabilitation services, and expenses furnished as provided in sections 315 and 319, equal to the full amount which such dependents would have been entitled to receive under the provisions of section 321, in case the injury had resulted in immediate death.

Citing *Kapala v O Frank Roofing Co*, 172 Mich App 724; 432 NW2d 417 (1988), the WCAC held that because decedent's claim was pending at the time of his death, the proximate cause standard of § 375(2) was applicable. The majority rejected the dissent's position that the proximate cause standard becomes applicable only after an adjudication of liability and payment of benefits. After reviewing the evidence regarding decedent's history of lung problems, smoking, and exposure to pollutants, and the medical testimony, the WCAC concluded that there could be no finding that decedent's death was proximately caused by his work as a boilermaker.

Findings of fact made by a magistrate are conclusive on the WCAC if they are supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3); MSA 17.237(861a)(3). If a magistrate's decision is supported by the requisite evidence, the WCAC need go no further in its review. If the WCAC finds that the magistrate did not rely on competent evidence, it must detail its findings and the reasons therefore as grounded in the record. The WCAC may then make its own findings. Those findings are conclusive if the WCAC was acting within its powers. Appellate review is limited to a determination of whether the WCAC exceeded its authority. *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507; 563 NW2d 214 (1997).

First, plaintiff argues that the WCAC erred as a matter of law and exceeded its statutory powers by raising and deciding this issue of the timeliness of decedent's claim. The magistrate failed to render findings regarding the claim filed by decedent during his lifetime. The various defendants did not argue that decedent's claim was untimely. Pursuant to § 861a(11), the WCAC is empowered to review "only those specific findings of fact or questions of law that the parties have requested be reviewed." See also *Weems v Chrysler Corp*, 201 Mich App 309, 316; 505 NW2d 905 (1993), rev'd in part on another ground 448 Mich 679 (1995). Plaintiff acknowledges that this Court has held that the WCAC may render findings of fact in the absence of same in the magistrate's decision, *Williams v Chrysler Corp*, 209 Mich App 442; 531 NW2d 757 (1995), but contends that in those cases, the WCAC was simply filling in findings regarding an issue raised on appeal.

We disagree. The magistrate distinguished between decedent's claim for "life" benefits and plaintiff's claim for death benefits. Contrary to plaintiff's assertion, the magistrate made findings regarding decedent's claim. The magistrate acknowledged, in part, the requirements of § 441(2), and found that because decedent first became aware of the possible relatedness of his condition to his employment on or about January 29, 1987, his claim, filed in March, 1988, was timely. However, the

magistrate did not consider the issue of due diligence. After reviewing the lay and medical testimony, which was essentially undisputed, the WCAC concluded that plaintiff had not established that through due diligence, decedent could not have discovered the work-relatedness of his condition at a much earlier time. The WCAC was acting within its powers; thus, its findings are conclusive. *Goff, supra*.

Plaintiff's contention that the WCAC raised this issue *sua sponte* is inaccurate. In her appeal to the WCAC, plaintiff argued that because decedent filed a claim for benefits during his lifetime, benefits were payable for a period prior to his death. By contending that the magistrate erred by failing to award benefits, plaintiff sought a determination of whether such benefits were payable. Such a determination necessarily included a review of the magistrate's finding that decedent's claim was timely under § 441(2).

Next, plaintiff argues that the WCAC erred in finding that the proximate cause standard in § 375(2) applied in this case. Plaintiff maintains that the language of § 375(2) indicates that the proximate cause standard applies only when a claimant dies prior to the end of a work-related disability for which he or she was receiving benefits. See, e.g., *Noble v Ford Motor Co*, 152 Mich App 622; 394 NW2d 50 (1986), and *Barnes v Campbell, Wyant & Cannon Foundry Co*, 188 Mich App 46; 469 NW2d 7 (1991). Plaintiff acknowledges that *Hagerman v Gencorp Automotive*, 209 Mich App 667; 531 NW2d 832 (1995), held that no adjudication of liability is necessary to trigger the applicability of the proximate cause standard in § 375(2), but asserts that the decision in *Hagerman, supra*, is erroneous because it is inconsistent with prior law and fails to give effect to the language of § 375(2).

Moreover, plaintiff argues that the WCAC erred in applying the proximate cause standard in this case. The WCAC stated that no expert testimony "conclusively" linked decedent's cancer to his exposure to asbestos at work. Plaintiff asserts that conclusive proof was not required; rather, the burden of proof in a worker's compensation case is by a preponderance of the evidence. MCL 418.851; MSA 17.237(851). Plaintiff emphasizes that an injury can have more than one proximate cause, and states that in this case the evidence showed that decedent's exposure to asbestos combined with his history of smoking to cause cancer.

While we conclude that the proximate cause standard in § 375(2) applies in this case, we vacate the WCAC's decision and remand for further proceedings. In *Hagerman*, we held that no adjudication of liability is necessary to trigger the applicability of § 375(2), and that a contrary finding was not a part of the holding in either *Noble* or *Barnes*. See *Hagerman, supra* at 671-673. However, in light of our recent decision in *Hagerman v Gencorp Automotive (On Remand)*, 218 Mich App 19; 553 NW2d 623 (1996), lv gtd ___ Mich ___ (Docket No. 107059, issued 8/1/97) (hereinafter referred to as *Hagerman II*), we vacate the WCAC's decision and remand for further proceedings. In *Hagerman II*, we held that the WCAC correctly denied benefits because the evidence showed that the plaintiff's husband's death "did not flow in a natural and continuous sequence" from his injury, i.e., was not "proximately caused" by the injury. *Id.* The *Hagerman II* Court stated that in determining proximate cause, "among the factors to be considered is whether the actor's conduct created a force or series of forces that were in continuous and active operation up to the time of the harm, or created a situation harmless in itself unless acted upon by other forces for which the actor is not responsible." *Id.* In contrast to the application of a substantial factor test for proximate cause in

Hagerman II, the WCAC in the instant case seemingly applied an either/or approach when determining whether exposure to asbestos proximately caused decedent's lung cancer. Specifically, the WCAC framed the question as whether decedent's death was proximately caused by his exposure to asbestos during his employment, or whether his death was proximately caused by other factors, such as smoking. The WCAC observed that no expert witness conclusively linked decedent's cancer to his exposure to asbestos. The lack of such testimony is not determinative. Medical testimony need not be stated with absolute certainty in order to sustain a burden of proof. *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 136-137; 274 NW2d 411 (1979). Here, decedent's exposure to asbestos was not harmless in itself. Furthermore, evidence demonstrated the existence of a synergistic effect of exposure to asbestos and smoking. In employing an either/or approach, the WCAC did not consider whether decedent's exposure to asbestos was a substantial factor in his development of cancer.

The WCAC analysis of proximate cause was erroneous under *Hagerman II*. We vacate the WCAC's decision and remand for reconsideration in light of *Hagerman II*.

Vacated and remanded. We do not retain jurisdiction.

/s/ Michael R. Smolenski

I concur with the majority's result to remand this case in light of this Court's recent decision in *Hagerman v Gencorp Automotive (On Remand)*, 218 Mich App 19; 553 NW2d 623 (1996), lv gtd ____ Mich ____ (Docket No. 107059, issued 8/1/97).

/s/ Peter D. O'Connell

Judge Thomas G. Power not participating.