

STATE OF MICHIGAN
COURT OF APPEALS

CRAIG S. BRAUN,

Plaintiff-Appellant,

and

MARY FREE BED HOSPITAL,

Intervening Plaintiff,

v

SECURE PAK a/k/a SAME DAY DELIVERY,
and AMERISURE INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED

August 10, 2006

No. 260118

WCAC

LC No. 03-000058

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order of the Worker's Compensation Appellate Commission (WCAC) reversing a magistrate's supplemental decision to grant plaintiff benefits for his neck injury. We reverse the WCAC's decision and remand the matter to the WCAC for further proceedings consistent with this opinion.

Plaintiff, one of defendant's delivery drivers, applied for worker's compensation benefits after suffering injury from a fall on his employer's premises. At issue at trial was whether plaintiff fell while waiting for another dispatch assignment or whether he fell while enjoying a cigarette with his co-workers after work was done for the day. In his original opinion, the magistrate denied plaintiff benefits on the ground that plaintiff had "clocked out, albeit with the hope of yet returning for another run" when the injury occurred.

Plaintiff appealed to the WCAC, which remanded the matter to the magistrate for a supplemental decision. The WCAC observed that "resolution of the legal question critically depends on the resolution of the conflicting lay testimony." The WCAC instructed the magistrate to set forth "a detailed summary of the lay testimony as well as resolution of the factual conflicts regarding the usual practice of delivery runs after 6 PM and on the day of injury, in particular." The WCAC further instructed the magistrate to determine (1) whether the major purpose of the activity at the time of injury was social or recreational, and (2) if the major

purpose of this activity was not social or recreational, whether plaintiff's fall was a mistake in judgment in leaning against the door frame or whether it arose from an idiopathic cause.

On remand, the magistrate reversed his original position and held that plaintiff sustained a compensable work-related injury. Regarding the first question on remand by the WCAC, the purpose of plaintiff's activity at the time of the injury, the magistrate concluded that plaintiff was going to or from his work while on his employer's premises within a reasonable time before or after his working hours and that the major purpose of plaintiff's presence was not for social or recreational purposes.

In support of his conclusion, the magistrate found that plaintiff "stayed on the premises with the hope that the dispatcher might call on him for belated run" and that "[i]t was common practice for plaintiff to pick up work after regular hours." The magistrate noted that his latter finding of fact was "placed in question" by Emil ("Ed") Savoy, defendant's senior dispatcher, but the magistrate found that "[i]n contrast to plaintiff's matter-of-fact testimony, Savoy's testimony was not convincing; note his hesitancy and stammering as indicated by hyphens in the records, sprinklings of unconvincing 'you knows' and a slip of the tongue where he admits 'It's a very rare chance that I get anything around 6:50—or 5:55.'" The magistrate observed that "[r]are or not," the chance that Savoy would receive another call "bolstered plaintiff's hope for more work and was the primary reason why he was still on the premises within the meaning of MCL 418.301(3)." The magistrate further observed that plaintiff did "not impress me as the kind of guy who would stand around chatting to advance his social graces for fun and relaxation."

On the second question posed by the WCAC, the cause of plaintiff's fall, the magistrate concluded that plaintiff's fall was "a leaning mistake in judgment and was not caused by an idiopathic cause." The magistrate held that plaintiff's testimony is "clear that he did not pass out before he fell against [sic], and there is no medical testimony to account for such a theory." The magistrate recognized that there were suggestions in medical histories to support such a conclusion but concluded that "they are out-gunned by other proofs." The magistrate found that although the description of the fall offered by Douglas Robertson, a semi-truck driver for defendant who was standing near plaintiff when he fell, "left some room for debate," the magistrate was convinced that plaintiff's description of the injury was accurate, i.e., that plaintiff's "own misguided momentum propelled him faster than an idiopathic swoon as advocated by defendants."

A majority of the WCAC reversed the magistrate's supplemental decision. The majority observed that in deciding the first issue on remand (the purpose of plaintiff's activity at the time of the injury), the magistrate "did not discuss or even refer to the testimony of plaintiff's co-worker." The majority made its own findings of fact that (1) Robertson's testimony agreed with Savoy's testimony, (2) that Robertson's testimony was "forthright and without hesitation or other indicia of contrivance," and (3) that there was nothing elicited during Robertson's examination that suggested bias.

Regarding Savoy's testimony, the majority held that the magistrate had misconstrued Savoy's testimony in finding that Savoy testified that an employee would only rarely receive a delivery run after 6:00 p.m. The majority found that "[i]n reality, this witness testified it was rare for a delivery run to come in just prior to 6 PM."

Regarding plaintiff's testimony, the majority concluded that it "need not give the same deference to [the magistrate's] view of plaintiff's testimony as we would ordinarily [because] the magistrate accepted plaintiff's testimony without considering Mr. Robertson's testimony" and he "relied on the transcript and not his observations of the witnesses." The majority found that the magistrate's factual conclusion that plaintiff was waiting for a potential additional delivery run was not supported by competent, material, and substantial evidence on the whole record. The majority made its own finding of fact that plaintiff was finished with his duties for the day at the time of his injury, "[g]iven the neutral and forthright testimony of Robertson and its congruence with Savoy's testimony."

The majority held that based on Robertson's testimony that plaintiff and his co-workers were talking about fishing when the injury occurred, it was "uncontroverted" that plaintiff was engaged in social or recreational activity at the time of injury. And, the magistrate's contrary conclusion had "no support in the record." Finally, the majority held that its conclusion that plaintiff did not sustain an injury in the course of his employment rendered moot the issue of whether his fall had an idiopathic cause.

The dissenting member of the panel would have affirmed the magistrate's decision, pointing out that the magistrate had expressly found plaintiff's testimony more credible than Savoy's testimony. The dissenting member opined the following:

The magistrate quite clearly formulated his credibility findings by comparing the testimony of witnesses concerning the key issue of this case, i.e., whether plaintiff was still in the course of employment when injured. He ultimately found the testimony of plaintiff on that issue more credible than that of senior dispatcher, Mr. Emil Savoy. We have had a strong tendency to defer to the magistrate's credibility findings because of his superior vantage point in the courtroom to view and judge witnesses. It is this advantage we do not have, to look a witness in the eye and make what is often a "gut-level" call as to whether the witness appears truthful and sincere as opposed to dishonest and duplicitous. Magistrate Block made that very difficult and sensitive call in this case. His findings are due the deference normally accorded to such issues.

Plaintiff filed an application for leave to appeal in this Court, which this Court granted. We agree with plaintiff and the dissenting member of the Commission that the majority misapprehended its administrative appellate role in reviewing the magistrate's decision.

WDCA section 301(1) provides that "[a]n employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act." MCL 418.301(1).

WDCA section 301(3) provides that "[a]n employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment." MCL 418.301(3). "Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act." *Id.*

“The question whether a plaintiff was engaged in ‘an activity the major purpose of which is social or recreational’ is necessarily one of fact.” *Angel v Jahm, Inc*, 232 Mich App 340, 344; 591 NW2d 64 (1998). The WCAC reviews the magistrate’s findings for compliance with the substantial evidence standard in accordance with MCL 418.861a(3). *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 703; 614 NW2d 607 (2000). Specifically, “findings of fact made by a worker’s compensation magistrate shall be considered conclusive by the commission if supported by competent, material, and substantial evidence on the whole record.” MCL 418.861a(3). “Substantial evidence” means “such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion.” *Id.*

The WCAC must conduct “a qualitative and quantitative analysis” of the evidence before the magistrate to “ensure a full, thorough, and fair review.” MCL 418.861a(13). The WCAC’s review of the magistrate’s decision involves “reviewing the whole record, analyzing all the evidence presented, and determining whether the magistrate’s decision is supported by competent, material, and substantial evidence.” *Mudel, supra* at 699. “[A]pplication of the clear and plain language of MCL 418.861a(13) [] does not connote a de novo review by the WCAC of the magistrate’s decision.” *Mudel, supra* at 700. “[I]t would be improper for the WCAC to engage in its own statutorily permitted independent fact finding if ‘substantial evidence’ on the whole record existed supporting the decision of the magistrate.” *Id.*

The judiciary’s review of the Commission’s findings is more limited and is designed solely to ensure the integrity of the administrative process. *Mudel, supra* at 701. The WCAC’s findings of fact are reviewed under the “any evidence” standard, to wit, “[a]s long as there exists in the record any evidence supporting the WCAC’s decision, and as long as the WCAC did not misapprehend its administrative appellate role (e.g., engage in de novo review; apply the wrong rule of law), then the judiciary must treat the WCAC’s factual decisions as conclusive.” *Id.* at 703-704; see, also, MCL 418.861a(14). This Court does not independently review the question whether the magistrate’s findings of fact are supported by substantial evidence. *Mudel, supra* at 700-701. Rather, this Court’s review is at an end once it is satisfied that the WCAC has understood and properly applied its own standard of review. *Id.* at 703-704.

Here, the magistrate made the following findings of fact: (1) that plaintiff “stayed on the premises with the hope that the dispatcher might call on him for belated run” and (2) that “[i]t was common practice for plaintiff to pick up work after regular hours.” The magistrate characterized plaintiff’s testimony as “matter-of-fact” and dismissed Savoy’s contrary testimony as “not convincing.” Based on his findings of fact, the magistrate concluded that plaintiff suffered a compensable injury because he was going to or from his work while on his employer’s premises within a reasonable time before or after his working hours and that the major purpose of plaintiff’s presence was not for social or recreational purposes.

The WCAC did not defer to the magistrate’s findings of fact. The two members signing the majority opinion asserted that they need not defer to the magistrate’s view of the record but could instead engage in their own fact finding because (1) the magistrate did not consider Robertson’s testimony and (2) the magistrate relied on the transcript and not his observations of the witnesses. Neither basis proffered by the majority for its independent fact finding is sound.

While the magistrate did not mention Robertson’s testimony in his discussion of the first issue on remand, there is no indication that the magistrate missed or overlooked Robertson’s

testimony rather than made a conscious (albeit implied) decision not to consider it because it was unpersuasive or lacked credibility. Indeed, the magistrate referred to Robertson’s testimony in his discussion of the second issue on remand. The magistrate’s opinion may have been better written if it had included his assessment of Robertson’s testimony as to both issues, but we are not convinced that the absence of an express assessment of Robertson’s testimony within discussion of the first issue opened the door to independent fact finding by the WCAC. As one commentator points out, the WCAC has “repeatedly held that a magistrate need not ‘explain away every aspect of evidence tending to militate against his decision.’” Welch, *Worker’s Compensation in Michigan*, §20-39 (“Conduct of Trial”), pp 20-38.

The WCAC’s second stated basis for making its own findings of fact—that the magistrate relied on the transcript and not his observations of the witnesses—is similarly unsound. The magistrate had the benefit of observing in person the demeanor of the three trial witnesses. The magistrate found Savoy’s testimony unconvincing and directed the reader to “note the hyphens in the records, sprinklings of unconvincing ‘you knows’ and a slip of the tongue where he admits ‘It’s a very rare chance that I get anything around 6:50—or 5:55.’” The magistrate’s reference to the transcript was made for the benefit of the reader of the cold record and does not indicate that the magistrate himself “relied on the transcript” rather than his observations of the witnesses.

Because neither of these bases adequately explains why the record did not support the magistrate’s credibility determinations, it was improper for the WCAC to engage in its own fact finding and substitute its judgment for that of the magistrate. See *Mudel, supra* at 700. Neither this Court nor the WCAC is authorized to identify “alternative findings” that could have been supported by substantial evidence. *Angel, supra* at 344-345. Because the WCAC misapprehended its administrative appellate role in reviewing the magistrate’s decision and this Court’s post-*Mudel* role is to ensure the integrity of the administrative process, we reverse the WCAC’s decision.

Despite plaintiff’s urging otherwise, this Court’s role simultaneously prevents it from finding that the magistrate’s supplemental decision was supported by competent, material, and substantial evidence on the whole record. This Court does not independently review the magistrate’s findings of fact. *Mudel, supra* at 700-701. Rather, we reverse the WCAC’s decision and remand this matter to the WCAC for further proceedings consistent with our opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Michael J. Talbot