

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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NELL MILLS,

Plaintiff-Appellant/Cross-Appellee,

v

HARDEE'S FOOD SYSTEM, INC., AND  
NATIONAL UNION FIRE INSURANCE CO.,

Defendants-Appellees/Cross-  
Appellants.

UNPUBLISHED  
December 12, 2000

No. 216748  
WCAC  
Nos. 96 000158; 96-0782;  
98-0127

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Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the December 10, 1998 order and opinion of the Workers' Compensation Appellate Commission (WCAC) reversing the magistrate's open award of benefits on the ground that there was no evidence in the record to support the magistrate's finding that defendants were not prejudiced by plaintiff's failure to provide notice of her injuries. We affirm.

I

Plaintiff was the assistant manager of a Hardee's store. On September 20, 1993, plaintiff filed an application for mediation or hearing alleging that she "suffered injuries to left knee and lumbosacral back with radiation into lower left extremity during the course of her employment." The petition alleged injury dates of June 8, 1992 and October 11, 1992, but stated that plaintiff did not become disabled until June 16, 1993.

Plaintiff testified at the hearing that on June 8, 1992, she injured her back when she slipped and fell on a freshly mopped floor. Plaintiff acknowledged that she only told her supervisor that she had fallen and did not report having injured her back. She continued to work her regular hours and perform her usual duties after this date. The only medical treatment she sought was from a chiropractor. Plaintiff stated that her condition worsened on October 11, 1992, when she felt pain in her back and down her leg after unloading boxes from a truck. Again, plaintiff acknowledged that she did not report the injury. She saw a doctor on one occasion, when he gave her a cortisone injection that she said provided relief for about a week.

She continued to work her regular hours and perform her usual duties until June 16, 1993, when she claimed the pain became too intense for her to continue.

Peter Krenitsky, D.O., plaintiff's family physician, treated plaintiff on June 16, 1993 for complaints of pain in her lower back and left leg, using pain medication and heat packs. On November 12, 1993, Dr. Krenitsky diagnosed plaintiff as suffering from lumbar fibromyositis arising out of her work-related injuries. Krenitsky referred plaintiff to Dr. Clark J. Okulski, who diagnosed a lateral disc herniation at L4-L5. On July 22, 1994, Okulski performed a laminectomy and removed fragments of plaintiff's herniated disc. After the surgery, Okulski opined that plaintiff's condition improved significantly, but imposed restrictions against lifting more than fifteen pounds. As of Okulski's last examination of plaintiff on November 2, 1994, his only restriction was against heavy lifting.

Dr. Michael E. Tofteland examined plaintiff on two occasions on behalf of defendants. He opined both before and after the surgery that plaintiff's problems were a result of arthritis in her spine and left knee. He recommended that plaintiff be restricted to sedentary work with limited standing and walking because of her arthritic condition.

Mary Morawski stated that she worked with plaintiff and that plaintiff never mentioned any injuries to her. Morawski explained that assistant managers did not usually unload trucks, but assigned other employees to do that job. Robert Starke, a district manager for defendant, testified that plaintiff never reported a work-related injury to him and he did not witness any job-related injuries involving plaintiff. Plaintiff testified that she mentioned her injury to the store's general manager, Dave Binder; however, Binder had left defendant's employ over a year before the hearing.

The magistrate found that although plaintiff did not report either her June 8, 1992 or her October 11, 1992 injury to her employer, defendant had not shown any prejudice as a result of plaintiff's failure to provide notice.<sup>1</sup> The WCAC reversed the award of benefits, determining

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<sup>1</sup> The magistrate concluded that plaintiff became totally disabled as of June 16, 1993, and remained so until November 4, 1994, at which time she improved to the point where she was only partially disabled. The magistrate awarded benefits for this period, but ordered the parties to return for a second hearing to determine plaintiff's residual wage earning capacity.

The second hearing was held on May 16, 1996, with a second decision mailed on September 30, 1996, in which the magistrate concluded that he erred in ordering a second hearing, and stated that the proper procedure by which an employer may offer evidence of a post-trial earning capacity is through a petition to stop benefits. The magistrate also reversed his previous finding of partial disability and granted plaintiff an open award of full benefits.

Defendants then filed a petition to stop, which was heard by a different magistrate. In an opinion mailed January 20, 1998, the magistrate concluded that defendants had not met their burden of proof to demonstrate a change in plaintiff's condition or an unreasonable refusal of an offer of favored work.

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that the magistrate's finding that defendants had not shown prejudice was not supported by competent, material and substantial evidence on the record. The WCAC stated:

Obviously prejudice from lack of timely notice must be determined on a case-by-case basis. Here, it is clear that defendants could have verified, by checking records and questioning employees, whether plaintiff was working, whether a delivery was received, whether anyone saw plaintiff fall, etc. The issue of whether these injuries in fact occurred existed because of the facts listed above (that plaintiff missed no work, did not reduce her duties nor did she complain of the incidents), but was also complicated because, as an assistant manager, plaintiff knew that injuries were to be reported in written form, which these injuries were not. Moreover, because she had both pre-existing back problems, dating back to at least 1988, and concurrent non work-related complaints, which she attributed to "packing up" at home, the etiology in this matter was more clouded.

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Because the record only supports the conclusion that defendants have demonstrated prejudice which the plaintiff has not counteracted, we must reverse the magistrate's prejudice finding.

The WCAC went on to address the parties' remaining arguments on appeal for the sake of judicial economy.<sup>2</sup>

## II

Plaintiff argues that the WCAC erred in finding that defendants had been prejudiced where defendants' allegations of prejudice were not raised or argued before the magistrate, and were raised for the first time on appeal to the WCAC. Plaintiff asserts that defendants denied that prejudice was an issue in the parties' stipulations, and that there was no evidence on the record to support a finding of prejudice.

Defendants contend that the WCAC correctly reviewed the issue of notice and prejudice because those issues were properly presented and preserved by defendants. Defendants assert that it was understood by trial counsel that items not admitted by both parties were subject to proofs at trial, and that the fact that the magistrate ruled on those issues shows that the issues were in dispute. Defendants assert that plaintiff did not argue that notice and prejudice were not issues at trial when she filed her briefs with the WCAC, and that she should be precluded from

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The WCAC consolidated all three opinions for review.

<sup>2</sup> The WCAC concluded that plaintiff was not entitled to reimbursement for the chiropractic treatments she received because she did not provide defendants with copies of the medical records and did not include the doctor's name on her application. However, the WCAC rejected defendant's claim that plaintiff was not disabled, deferring instead to the magistrate's finding in this regard. The WCAC agreed with plaintiff that she would have been entitled to full benefits had she provided defendants with the requisite notice.

arguing that now. Finally, defendants assert that they were prejudiced because they were prevented from conducting an investigation by plaintiff's late notice; the inconsistent medical histories increased the prejudicial effect by giving defendants misinformation; had defendants been given notice of plaintiff's injury in June 1992, steps could have been taken to ensure that plaintiff was not required to do the lifting that resulted in her October 1992 injury; and defendants were not given detailed information about the injuries until the time of trial, nearly three years after the injuries occurred. By that time, plaintiff's immediate supervisor had left the employer and delivery and shift records were no longer available.

This Court's review of worker's compensation cases is limited to whether the WCAC exceeded its authority or committed an error of law. *Luster v Five Star Carpet*, 239 Mich App 719, 725; 609 NW2d 859 (2000). As long as there is any evidence supporting the WCAC's decision in the record 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)," this Court must treat the WCAC's factual decisions as conclusive. MCL 418.861a(14); MSA 17.237(861a)(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 703-704; 614 NW2d 607 (2000).

MCL 418.381(1); MSA 17.237(381)(1) provides in relevant part:

The employee shall provide a notice of injury to the employer within 90 days after the happening of the injury, or within 90 days after the employee knew, or should have known, of the injury. Failure to give such notice to the employer shall be excused unless the employer can prove that he or she was prejudiced by the failure to provide such notice.

"The purpose of the notice provision is to give an employer an opportunity to investigate an alleged accident and injury while facts are accessible and also to provide care for the injured employee so as to speed the employee's recovery and minimize loss." *Williams v Chrysler Corp (On Remand)*, 209 Mich App 442, 446-447; 531 NW2d 757 (1995). A defendant must prove "prejudice unique to the facts and circumstances involved in a particular case;" mere generalized allegations of prejudice are insufficient. *Id.*, 448. "Prejudice can arise . . . when untimely notice actually prevents an employer from investigating an accident and injury or prevents an employer from providing essential medical treatment." *Id.* The question of prejudice is a factual determination that must be affirmed if there is any evidence in the record to support it. *Id.*

An issue must be raised at the hearing in order to be preserved for appellate review. *Alford v Pollution Control Industries of America*, 222 Mich App 693, 699; 565 NW2d 9 (1997). In this case, the magistrate made a finding of fact with regard to the issue of prejudice. Additionally, the parties' stipulations sheet stated "denied" in reference to the printed inquiry:

COUNSEL, MAY IT BE STIPULATED:

\* \* \*

That the employer had notice of the alleged personal injury within the statutory period? If denied, defendant to prove prejudice?

It thus appears that the issue was contested. The fact that defendant did not specifically argue that certain facts proved prejudice is not compelling in view of the absence of opening statements, closing arguments or trial briefs in this matter. Although defendants did not identify specific facts at the hearing as giving rise to prejudice, facts were presented demonstrating that prejudice did occur.

Plaintiff does not dispute that there was testimony that her immediate supervisor, to whom she claimed to have reported having back pain after her fall, quit working for defendant over a year before the hearing. There is also no dispute with regard to the fact that the medical histories related by the various experts do not clearly show when or how plaintiff was injured, and no doctor made a finding that plaintiff's complaints were work-related until more than a year after the first injury. Dr. Krenitsky, who first determined that plaintiff's problems were work-related, stated in a deposition taken in February 1994 that plaintiff first injured herself in a slip and fall while unloading a truck in June 1992. According to the history related by Dr. Okulski, plaintiff did not begin to have symptoms until six months after her slip and fall; there is no mention of a lifting injury. Finally, Dr. Tofteland testified that plaintiff told him that she slipped and fell on a wet floor and hurt her left knee and did not begin to experience back pain until two months later. The WCAC relied on this evidence to conclude that defendants were prejudiced because there was no way to determine exactly what occurred.

We conclude that plaintiff has not established that the WCAC operated within the wrong legal framework, that its decision was based on erroneous legal reasoning, or that it failed to correctly apply the law. *DiBenedetto, supra*.

In light of our disposition, defendants' cross-appeal is moot, as is plaintiff's motion to dismiss cross-appeal.

Affirmed.

/s/ Helene N. White  
/s/ Martin M. Doctoroff  
/s/ Peter D. O'Connell