

STATE OF MICHIGAN
COURT OF APPEALS

LAURA A. SAHR,

Plaintiff-Appellee,

v

WAL-MART STORES, INC.,

Defendant-Appellant,

and

INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA,

Defendant.

UNPUBLISHED

March 28, 2006

No. 262952

WCAC

LC No. 02-000497

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. *Sahr v Wal-Mart Stores Inc*, 472 Mich 909; 697 NW2d 154 (2005). Previously, this Court denied defendant's¹ application for leave to appeal an order of the Worker's Compensation Appellate Commission ("WCAC") reversing the magistrate's denial of plaintiff's claim for worker's compensation benefits. The WCAC concluded that plaintiff suffered a disabling work-related injury to her spine. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff worked at Sam's Club, which is owned by defendant. She worked at different jobs which required regular twisting, bending, and occasional heavy lifting. In 1997, plaintiff experienced severe lower back pain. In March 1998, Dr. Schell performed a cage fusion surgery on a herniated disc. Plaintiff returned to work in October 1998, but soon thereafter experienced a reoccurrence of back pain. In February 2001, plaintiff took a leave of absence. In August 2001,

¹ As used in this opinion, "defendant" refers to Wal-Mart Stores Incorporated.

Dr. Schell performed a second fusion surgery, known as a pedicle screw fusion, to stabilize the prior fusion. Plaintiff did not return to work

At trial, Dr. Newman testified that he diagnosed post-operative fibrosis as well as root irritation and narrowing in plaintiff's cervical spine. He opined that plaintiff's work activities precipitated or significantly aggravated her back problems, and concluded that she was disabled.

Dr. Schell could not testify to any degree of certainty as to the cause of plaintiff's initial herniation. He opined that plaintiff's work activity after the first fusion could possibly have contributed to a failure of that procedure, thereby necessitating the second fusion. He testified regarding a theory that smoking creates a higher incidence of nonunion in a fusion. Schell indicated to plaintiff that she should quit smoking in order to help the fusion. In May 2002, Schell noted that there appeared to be difficulty in the healing process around the site of the second fusion.

The magistrate determined that plaintiff failed to establish a work-related disability. The magistrate found Schell's testimony to be persuasive, noting that Schell was unable to determine the cause of the herniation which necessitated the first fusion. The magistrate found that plaintiff failed to establish that her work activities necessitated the second fusion, and concluded that plaintiff's smoking was the reason that both the first and second fusions had failed.

Plaintiff appealed, and the WCAC reversed the magistrate's decision. The WCAC concluded, after reviewing the entire record, that the magistrate's finding that plaintiff's smoking caused the fusions to fail was not supported by competent, material and substantial evidence. Having so found, the WCAC went on to make its own findings that plaintiff sustained a work related injury as the result of cumulative trauma to her lumbar and cervical spine, and that plaintiff was disabled from any employment. The WCAC awarded plaintiff weekly benefits.

This Court denied defendant's application for leave to appeal. In lieu of granting defendant's application, our Supreme Court remanded the matter to this Court. The remand order states:

In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(G)(1). The Court of Appeals shall provide an analysis of whether the Worker's Compensation Appellate Commission misinterpreted the magistrate's utilization of the testimony of plaintiff's treating surgeon, Dr. Gerald Schell, and improperly substituted its own interpretation of that testimony in violation of the commission's standard of review, MCL 418.861a(3). *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000). [*Sahr v Wal-Mart Stores Inc*, 472 Mich 909 (2005).]

The WCAC must review the magistrate's decision under the "substantial evidence" standard, while we review the WCAC's decision under the "any evidence" standard. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). Our review begins with the WCAC's decision, not the magistrate's decision. *Id.* If there is any evidence supporting the WCAC's factual findings, and if the WCAC did not misapprehend its administrative appellate role in reviewing the magistrate's decision, then we should treat the WCAC's factual findings as conclusive. *Id.* at 709-710. We review questions of law in any WCAC order de

novo. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000). A decision of the WCAC is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework. *Id.* at 401-402.

First, defendant claims that the WCAC erred by conducting a de novo review in this matter. We disagree.

The WCAC reviews the magistrate's decision under the "substantial evidence" standard. MCL 418.861a(3) requires the WCAC to evaluate the "whole record." In *Mudel, supra*, our Supreme Court stated:

The surrounding statutory provisions serve to flesh out the proper meaning and application of the "substantial evidence" standard. The "whole record," for instance, means "the entire record of the hearing including all of the evidence in favor and all the evidence against a certain determination," MCL 418.861a(4); MSA 17.237(861a)(4), and the WCAC's "review of the evidence pursuant to this section shall include both a qualitative and quantitative analysis of that evidence in order to ensure a full, thorough, and fair review." MCL 418.861a(13); MSA 17.237(861a)(13). Therefore, 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.]

The WCAC did not err in reviewing the entire record. In fact, under *Mudel, supra*, the WCAC would have committed error had it not engaged in a review of the "whole" record.

Next, defendant claims that the WCAC erred in finding that the magistrate's decision was not supported by competent, material, and substantial evidence. In particular, defendant argues that the testimony of Dr. Schell was sufficient to support the magistrate's decision. We disagree.

Our review begins with the WCAC's decision, not the magistrate's decision. We "may not substitute our own judgment for that of the WCAC by independently reviewing each magistrate's decision to determine whether there is competent, material, and substantial evidence on the whole record supporting the magistrate's findings of fact." See *Mudel, supra* at 706. Therefore, it is not for us to decide whether the magistrate's decision was supported by competent evidence. Instead:

"If it appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, did not 'misapprehend or grossly misapply' the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate, the judicial tendency should be to deny leave to appeal, or if it is granted, to affirm, in recognition that the Legislature provided for administrative appellate review by the seven-member WCAC of decisions of thirty magistrates, and bestowed on the WCAC fact-finding responsibility subject to constitutionally limited judicial review." [*Mudel, supra* at 703, quoting *Holden v Ford Motor Company*, 439 Mich 257, 269; 484 NW2d 227 (1992).]

Under this “extremely deferential”² judicial standard of review, we find defendant’s claim to be without merit.

The WCAC recited the proper standard of review, recounted substantial portions of the relevant testimony, and acknowledged that it should not substitute its judgment for that of the magistrate. As required by *Mudel, supra*, the WCAC “carefully examined the record,” and “was duly cognizant of the deference to be given to the decision of the magistrate.”

Further, the WCAC “did not ‘misapprehend or grossly misapply’ the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate.” *Id.* The magistrate’s denial of benefits was, essentially, based on a finding that plaintiff’s smoking, not her employment, was the cause of her failed fusion surgeries, and attendant disability. This finding was the product of an inference based on Dr. Schell’s testimony regarding a theory of higher incidence of nonunion in smokers, and the fact that plaintiff’s second fusion surgery had failed despite the fact that she had not worked since that surgery.³ In reversing the magistrate, the WCAC found that no evidence showed that the theory proffered by Schell explained what occurred in the instant case. The absence of such evidence, particularly in light of the fact that the theory was simply one of “higher incidence,” and not direct causation, as well as the fact that Schell indicated that it was possible that plaintiff’s work activities (i.e., twisting, bending, lifting) could have contributed to the failure of the first fusion, was an adequate basis on which to question the appropriateness of relying upon the theory in this case. The magistrate’s inference that the first fusion failed due to plaintiff’s smoking was apparently based on an inference that the second fusion failed due to plaintiff’s smoking. Since, as correctly recognized by the WCAC, Schell stated that it was too early in the recuperation process to deem the second fusion a failure, an essential premise on which the magistrate’s finding was based was without record support. The WCAC’s analysis provided “adequate reasons” for reversing the magistrate, and does not indicate a misapprehension or gross misapplication the substantial evidence test. As a result, consistent with the standard set forth in *Mudel, supra*, we affirm the WCAC’s decision to reverse the magistrate.

In our Supreme Court’s remand order, we were directed to analyze whether the WCAC “misinterpreted the magistrate’s utilization of the testimony of plaintiff’s treating surgeon, Dr. Gerald Schell, and improperly substituted its own interpretation of that testimony in violation of the commission’s standard of review, MCL 418.861a(3).” We answer the question posed in the negative.

The magistrate was not convinced that plaintiff established that her initial back problems, which prompted the first fusion surgery, were work-related. As stated by the magistrate, “[t]he question then became whether the plaintiff’s work after she returned to work in late 1998 up

² *Mudel, supra* at 703.

³ In actuality, the finding was, in part, an inference based on an inference. Since plaintiff had not worked since her second fusion surgery, the magistrate inferred that the failure of second fusion was due to plaintiff’s smoking, and then, apparently, inferred that since the second fusion failed because of plaintiff’s smoking, the first fusion must also have failed for that reason.

through her last day of work on February 2, 2001, caused or aggravated the nonunion of the [first] fusion necessitating a second fusion done in August 2001.” *Sahr v Wal-Mart Stores Inc.*, 2004 Mich ACO 92, p 6. In answering this question in the negative, the magistrate stated that perhaps the “most important” factor “was the testimony of Dr. Schell concerning the relationship between the failure of the cage fusion and the plaintiff’s smoking.” *Id.* at 6-7. The magistrate also found it “of significance” that Schell indicated that there had been “insufficient” healing around the site of the second fusion. *Id.* at 10. The magistrate then stated that, “[t]hese factors, I believe, point to smoking as the reason for the failure of the cage fusion and the pedical screw fusion.” *Id.* at 11.⁴

We interpret the magistrate’s decision as placing heavy, if not exclusive, reliance on Schell’s testimony regarding his theory of higher incidence of nonunion in smokers, and the healing status of the second fusion, to infer that smoking, and not plaintiff’s employment, was the reason for plaintiff’s failed fusions and attendant disability. The WCAC came to a similar conclusion regarding the magistrate’s utilization of Schell’s testimony, stating: “[t]he magistrate indicated that she found Dr. Schell to be persuasive in coming to the conclusion that the plaintiff’s smoking habit has caused her fusions to fail.” *Id.* at 7. We find that the WCAC’s interpretation of the magistrate’s utilization of Schell’s testimony was proper. The WCAC did not substitute its own interpretation of Schell’s testimony, but rather offered “adequate reasons” for calling the magistrate’s reliance on, and interpretation of, Schell’s testimony into question.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

⁴ The magistrate also cited the fact that, in an application for social security benefits, plaintiff stated that the heaviest weight she lifted after returning to work was ten pounds, and that such a statement was contrary to plaintiff’s testimony at trial. However, in our opinion, the magistrate’s denial of benefits was based on a finding that plaintiff failed to establish that her initial back problems were caused by her employment, and that the aggravation of her condition after the first surgery was due to her smoking, not her employment. From our reading of the magistrate’s decision as a whole, any inconsistencies in plaintiff’s testimony had little, if any, impact on the ultimate denial of benefits.