

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

TRACEY GREENWALD,
PLAINTIFF,

V

DOCKET #01-0235

WAL-MART STORES, INCORPORATED,
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
DEFENDANTS.

APPEAL FROM MAGISTRATE HEDSTROM.

JOHN M. SIMS FOR PLAINTIFF,
VALENCIA J. JARVIS FOR DEFENDANTS.

OPINION

KENT, COMMISSIONER

This matter comes before us by way of defendant's appeal from the decision of Magistrate Richard Hedstrom, mailed May 21, 2001, granting plaintiff an open award. Defendant frames its appeal with the following statement of issue:

Magistrate Hedstrom erred in awarding benefits where such award is not supported by competent, material, substantial or a preponderance of the evidence.

By way of background, we repeat the magistrate's recital of the underlying facts:

Plaintiff testified that she completed her high school requirements and prior employment history before Wal Mart was sorting mail working, in the mail office and then attended Jackson Community College for accounting classes. The plaintiff then worked for Farmer Jacks in Coldwater as a bookkeeper and eventually went to work for IGA again doing bookkeeping, cashier but also stocking of shelves. There was some similar type employment at Kroger. The plaintiff commenced employment with Wal Mart and there was no pre-employment physical examination. The plaintiff stated that at that time she had no low back problems but previously had surgery through her upper and mid back due to scoliosis. At the time of that surgery apparently rods were inserted for stabilization and eventually when there were complaints in the upper portion of the body the Herrington rods were removed. The plaintiff stated that she listed this prior surgery on her application with Wal Mart.

Initially plaintiff was a cashier in the electronic department for less than ninety days and on that job she would be stocking shelves and had no low back complaints.

Then she was the department manager of the domestic area until April of 2000. This job required the stocking of shelves, operation of the computer and again with no low back problems. Plaintiff stated that occasionally she would be stacking boxes weighing 20 or 30 pounds but usually lighter work was performed. Eventually furniture was added to the domestic area and it was necessary to move these items of furniture.

The plaintiff stated [on] May 24, 1999 there was a pallet of furniture and it was necessary to remove an item that was stacked on top of a pallet which weighed approximately 180 pounds. This task was performed with a co-employee but unfortunately the co-employee lost control of the heavy item, it fell towards plaintiff and caused immediate low back and lower extremity pain. Plaintiff stated that she gave immediate notice to the employer was referred to Prompt Care and eventually of [sic] Dr. Schneider an orthopaedic surgeon in Jackson, Michigan.

Plaintiff stated that she returned to work in September of 1999 but "not up [to] par". Plaintiff stated that she continued to have low back pain below the belt and in both hips but more in the left lower [back]. Plaintiff stated she would work in the domestic area and other people would stock shelves or do the heavy work she could not perform.

The plaintiff on December 29, 1999 was told to build a display of candles and she was lifting the 40 pound cases of candles all day and at the end of the shift had extreme pain in the low back. Plaintiff stated that she reported the onset of an increase in pain that day to the manager and completed an accident report for the defendant. The plaintiff was again sent to Prompt Care and sought treatment of Dr. Schneider. In addition there was a prescription for physical therapy.

Then plaintiff returned to work in April of 2000 to a different part time job which entailed sitting in a cubicle answering the phone. Apparently this job was only [a]bout eighteen hours a week whereas it was previously full time, i.e. 40 hours a week. During this period of time her pain became progressively worse.

Plaintiff was asked about the medication and states that since May of 1999 there were numerous medications and numerated at least ten in number.

The plaintiff in describing this last job stated that she was required to stay in the cubicle area except during breaks and stated that she complained to management that her back complaints were increasing in severity and it was difficult for her to get up, sit, walk or stand. The first week of September of 2000 plaintiff found it extremely difficult to walk or sit and would cry when standing therefore the manager [sent] the plaintiff home. The plaintiff went to the emergency room, received some medication and the next day when she awoke she couldn't move and was admitted to the hospital.

The last day worked was that September 2000 date and Plaintiff's Exhibit #1 shows an admission September 6, 2000. Therefore the prior day would be the last day worked and is found as September 5, 2000. The plaintiff states that since the last day worked she has used a cane to stabilize herself and also a low back brace, apparently prescribed by Dr. Schneider. Plaintiff stated that she wore this back brace when she returned to work in April of 2000. Plaintiff admitted that last job at Wal Mart working in the cubicle is probably still available but in her opinion she could not perform those tasks. . . .

Defendant's argument amounts to little more than a reargument of the record, which it believes the magistrate misinterpreted, requesting this Commission reach a different conclusion after reweighing the evidence:

In this instance, it is Defendant's position that Plaintiff did not prove by a preponderance of the evidence her work at Wal-Mart caused, aggravated or contributed to her back condition. Magistrate Hedstrom found that there was a May 24, 1999 date of injury and a September 5, 2000 date of injury. In particular, he found that work caused Plaintiff's herniation on September 5, 2000. What condition did he find present on May 24, 1999? Plaintiff did not have a herniation at that time. The medical testimony is in conflict over whether plaintiff had a back strain or degenerative disc disease. There is not competent, material or substantial testimony that the back condition was work related. Defendant argues that whether the condition was degenerative disc disease in May or a herniation in September, the Magistrate erred by not applying the significant manner standard. In addition there was no support in the record for the Magistrate's finding that Plaintiff's herniation was caused by her work in September of 2000. As such, Defendant asks that the decision of Magistrate Hedstrom be reversed. Any fair review of the testimony of the "treaters" would reveal that Plaintiff did not prove her case by the preponderance of the evidence.

Plaintiff alleged a work-related lower back disability. A review of the medical testimony of her treating doctors will quickly reveal that there is a conflict as to whether Plaintiff's disability is caused by a herniated disc or degenerative disc disease. (See testimony of Dr. Gupta, Dr. Hughes and Dr. Schneider)

In addition to a conflict among the treater's over the diagnosis, the treater's "don't know" if the work incidents that were related to them by Plaintiff caused the disability, they diagnosed whether it be a back strain, degenerative disc disease or disc herniation. [sic]

Defendant believes that Magistrate Hedstrom was very disingenuous in dealing with this very serious proof issue. He determined that disability was due to a herniated disc. He points to the testimony of Dr. Gupta to support that finding. Magistrate Hedstrom simply explains that testimony the work "could" have caused a herniation

was legally sufficient. Defendant is aware that on at least one occasion this Commission has found that an expert's opinion that a work event "could" be related to the disabling condition was enough to satisfy the requirement of establishing causal relationship. To so find in this case, however, is incredible. Our statute still requires that a finding of fact be supported by competent, material and substantial evidence. It must also be based upon the whole record.

We begin by reasserting that we cannot and will not engage in wholesale de novo review of the evidence presented below, substituting our weighing of the evidence for that of the magistrate. In *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000), the Michigan Supreme Court returned us to the proper statement of our powers on review, originally spelled out in *Holden v Ford Motor Co*, 439 Mich 257 (1992), rejecting the so-called "any" evidence standard promulgated in *Goff, infra*:

The decision in *Goff v Bil-Mar Foods, Inc*, 454 Mich 507 (1997), also contains language that improperly directs the WCAC to review a magistrate's decision under the "any evidence" standard, rather than the "substantial evidence" standard. In *Goff, supra*, the majority stated:

If the magistrate's decision is reasonably supported in the record by any competent, material, and substantial evidence, then it is conclusive and the WCAC must affirm. If it does not, it is exceeding the scope of its reviewing power and impermissibly substituting its judgment for the magistrate's. [Emphasis added..]

This language conflates the separate and distinct standards of review employed at the administrative and judicial levels. The dissent's statement that the mere use of the word "any" does not have the effect of fusing or confusing the "substantial evidence" standard with the "any evidence" standard,⁴ Slip op at 4, altogether ignores the grammatical application of the adjective; the word "any," as used in *Goff*, clearly expresses an attribute of the word "evidence" that follows. Thus, while "any competent, material, and substantial evidence" may not equate with "any evidence" in the dissent's judgment, it would hardly be irrational for the WCAC, pursuant to *Goff*, to determine that, if the magistrate's finding of fact was supported by "any" evidence, it must affirm. However, this determination would be contrary to the actual statutory language of MCL 418.861a(3); MSA 17.237(861a)(3), wherein the word "any" is nowhere to be found.

While MCL 418.861a(3); MSA 17.237(861a)(3) established the "substantial evidence" standard for WCAC review over the magistrate's decision, MCL 418.861a(14); MSA 17.237(861a)(14) established the "any evidence" standard for judicial review over the WCAC's decision. These two standards of

review are clearly separate and distinct, emanating from different statutory sources and imparting different standards of review.

Therefore, unlike the unstated but effective overruling of *Holden* in *Goff*, we expressly overrule *Goff*, insofar as it contradicts the statutory language and departs from our decision in *Holden*.

* * *

The Legislature has created two very distinct standards of review for worker's compensation cases. The "substantial evidence" standard governs the WCAC's review of the magistrate's findings of fact, while the "any evidence" standard governs the judiciary's review of the WCAC's findings of fact. The WCAC enjoys statutory authority to make independent findings of fact, regarding issues that have been addressed or overlooked by the magistrate, as long as the record is sufficient for administrative review and does not prevent the WCAC from reasonably exercising its reviewing function without resort to speculation. The role of the WCAC is to ensure that the factual findings in worker's compensation cases are supported by the requisite evidence. The role of the judiciary is to ensure that the WCAC properly recognized and exercised its administrative appellate role.

We expressly reaffirm our decision in *Holden, supra*, and we overrule *Goff, supra*, in that it contradicted our decision in *Holden*. Furthermore, we overrule *Layman v Newkirk Electric Associates, Inc*, 458 Mich 494 (1998), to the extent that it clearly misstated the law with regard to the WCAC's authority to make independent factual findings.

In rejecting *Goff* and *Layman*, the Supreme Court perceptively returned us to the *Holden* standard, instructing us to perform a quantitative and qualitative review of the evidence to see if the requisite competent, material, and substantial evidence is present on the record to support the magistrate's fact findings:

The dissent would reverse the WCAC's decision on the "legal basis" that it violated the "legislative command" of MCL 418.861a(3); MSA 17.237(861a)(3), by "fail[ing] to give the appropriate deference to the properly supported factual findings of the magistrate." Slip op at 16, n 10. However, the dissent ignores the WCAC's authority, provided by MCL 418.861a(14); MSA 17.237(861a)(14), to conduct a "qualitative and quantitative" analysis of the "whole record" in determining whether the magistrate's factual findings are supported by competent, material, and substantial evidence. Thus, the WCAC cannot be accused of "violat[ing] . . . legislative command" when it attaches more or different weight or credibility to the evidence than that given by the magistrate.

Thus, we are not to blatantly disregard the Legislature's directive in MCL 418.861(a)(3) to give deference to the magistrate's fact findings, but instead, we are to review these fact findings in a qualitative and quantitative fashion to discern if in fact they are supported by competent, material, and substantial evidence, as required by MCL 418.861(a)(3).¹ Only if after that quantitative and qualitative review we determine the fact finding is not supported by the requisite evidence may we substitute our finding for that of the magistrate.²

Turning to the case at hand, we find the magistrate's analysis to be proper, and supported by the requisite evidence. For instance, defendant attempts to make much of the medical testimony of Dr. Gupta, claiming his opinion was not of a sufficient degree of medical certainty as to form the basis for a fact finding. However, the magistrate based his decision on more than just that testimony. In point of fact in reaching his ultimate conclusion, he engaged in an accurate and detailed analysis of several medical experts, and relied not only in part on the testimony of Dr. Gupta, but also on other medical experts' opinions, medical tests, and plaintiff's testimony concerning ongoing pain and inability to perform certain tasks at work. Such an analysis is certainly proper and in this case supported by the record. We affirm the magistrate, adopting his findings as our own.

¹Every member of this Commission has at one time or the other indicated in opinions that we will not on appeal "weigh" evidence contradictory to a magistrate's decision and then reverse on a theory of "the great weight of the evidence". (See for instance *Butler v General Motors Corp*, 1992 ACO #691; *Pitts v General Motors Corp*, 1989 ACO #189. We have all indicated we will adhere to our statutory review standard and affirm the magistrate so long as his or her decision is supported by competent, material, and substantial evidence on the whole record. Stated differently, we have often explained that when on appeal a defendant or plaintiff challenges the magistrate's factual determinations in such a way that their arguments in support said challenge, merely proffer a reinterpretation of the evidence presented at trial, asking us to weigh certain key portions of the record differently, we will decline as such action would not comport with our standard of review. *Jamison v General Foods Corp*, 1997 ACO #598. We have long stated we cannot substitute our assessment of the record for that of the magistrate, as long as the latter's interpretation of the record is supported by the competent, material, and substantial evidence.

²Of course, if no fact finding on an issue were made by the magistrate, such as in the *Layman* case, we may then make an independent finding of our own, in order to avoid the waste of judicial resources which would occur by remanding, much as we did in our original decision in *Layman*.

Commissioners Witte and Przybylo concur.

James J. Kent

Joy L. Witte

Gregory A. Przybylo Commissioners

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

TRACEY GREENWALD,
PLAINTIFF,

V

DOCKET #01-0235

WAL-MART STORES, INCORPORATED,
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
DEFENDANTS.

This cause came before the Appellate Commission on appeal by defendant from the decision of Magistrate Richard Hedstrom, mailed May 21, 2001, granting benefits. The Commission has considered the record and briefs of counsel, and believes that the magistrate's decision should be affirmed. Therefore,

IT IS ORDERED that the decision of the magistrate is affirmed.

James J. Kent

Joy L. Witte

Gregory A. Przybylo

Commissioners