

STATE OF MICHIGAN  
WORKERS' COMPENSATION APPELLATE COMMISSION

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MICHAEL A. REITER,  
PLAINTIFF,

V

DOCKET #05-0290

ABSOPURE WATER COMPANY,  
INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA AND  
SECOND INJURY FUND (PERMANENT  
& TOTAL DISABILITY PROVISION),  
DEFENDANTS.

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APPEAL FROM MAGISTRATE GUYTON.

MARGARET A. O'DONNELL FOR PLAINTIFF,  
MICHAEL T. REINHOLM FOR DEFENDANTS ABSOPURE  
WATER COMPANY AND INSURANCE COMPANY  
OF THE STATE OF PENNSYLVANIA,  
MORRISON R. ZACK FOR DEFENDANTS SECOND  
INJURY FUND (PERMANENT & TOTAL DISABILITY PROVISION).

OPINION

PRZYBYLO, COMMISSIONER

Defendant appeals the decision of Magistrate Carol Guyton, mailed August 25, 2005, granting plaintiff benefits for his back injury. Defendant supports its appeal with two allegations of error. First, defendant contends that the magistrate erred because she failed to decide whether plaintiff's back injury resulted from his willful and intentional misconduct. In addition, defendant argues that the magistrate misstated facts and misconstrued the law when she evaluated the disability issues. Defendant extended its disability argument and requested application of *Stokes v DaimlerChrysler Corp*, 272 Mich App 571 (2006).

FACTS

Plaintiff's education and work experience include several degrees and a wide variety of jobs. Plaintiff graduated from high school and then obtained an associate degree in accounting. After several decades, he returned to school and earned a bachelor of business administration

degree in 1998. After plaintiff obtained his degrees, he accepted a number of accounting and management jobs. Plaintiff worked accounting clerk jobs, bank teller jobs, and a tax preparer job. He also worked as a cook, dispatcher, and store manager.

Plaintiff injured his back several years before he worked for defendant. In 1994, he sought medical treatment for severe low back pain. He attempted physical therapy. The therapy failed to improve his symptoms. In January 1995, he underwent a lumbar laminectomy surgery. Following his surgery, plaintiff's doctors imposed a ten pound lifting restriction. He used a cane to walk and an Amigo motorized scooter when traversing longer distances. However, by 2001, plaintiff stopped using his cane.

In 2003, plaintiff injured his back when lifting boxes that weighed between 50 and 100 pounds. Plaintiff testified that his supervisor ordered him to lift and move the boxes. In contrast, his supervisor, David Giordano, testified that he ordered plaintiff to use a temporary worker to lift boxes. The lifting incident produced pain. While treating the pain, plaintiff learned that he suffered lumbar disc herniations at two levels.

To assist the magistrate's understanding of plaintiff's back condition, each party offered expert medical testimony. Plaintiff offered Dr. Steven Newman's opinion. Defendant offered Dr. Jeffrey Lawley's opinion. The magistrate wrote a summary of those opinions that consists of the following:

**Dr. Steven Newman** examined plaintiff on December 13, 2004. Plaintiff informed Dr. Newman about his prior back problems and the April 26, 2003 incident. He complained of burning and stabbing pain in the low back, along with radiation into both extremities. These symptoms have been present since 1994. He has used a four-prong cane for the last three years. He has experienced alternating diarrhea and constipation.

The physical exam showed evidence of reduced range of motion in the lumbar spine. Plaintiff had an antalgic gait and used a four-prong cane. Straight leg raising on the right was limited to 45 degrees and 70 degrees on the left. The test was accompanied by lower back pain and radiation into the right leg. Reflexes on the right side were diminished. An EMG was positive for excessive polyphasic activity coming from the right S1 nerve. Those changes are consistent with long-term nerve root damage, p 50. An x-ray of the lumbar spine showed evidence of the prior L5-S1 hemi-laminectomy, along with narrowing at L4-5 and L5-S1 and a suggestion of a left-sided spondylitic defect at L5-S1.

Dr. Newman diagnosed plaintiff as suffering from a traumatic aggravation of right S1 nerve root irritation and precipitation and/or aggravation of disc space narrowing at L4-5 and L5-S1 in a postoperatively, structurally weak lumbar spine.

Dr. Newman reviewed two MRI's. One, without contrast – done May 27, 2003 and the second, with contrast, done June 20, 2003. The first scan showed changes at L4-5. It was difficult to determine if these changes were postoperative in nature or from a recurrent disc herniation. The second MRI

reflected there was potentially a right-sided herniated disc at L5-S1, which is consistent with plaintiff's clinical presentation.

Dr. Newman thought the April 2003 injury was a significant aggravating or precipitating factor in the recurrent disc herniation and nerve root impingement. That injury created the need for greater activity restrictions. Dr. Newman did not think plaintiff could perform his regular job with defendant, which was described as being sedentary, with occasionally lifting up to 10 pounds. Dr. Newman restricted plaintiff from prolonged walking, sitting, standing, climbing, lifting, bending, stooping, turning, twisting, etc. He thought plaintiff would have difficulty performing a sedentary job. Plaintiff can only sit for half an hour. He needs to frequently change his position, including lying down. Dr. Newman related the loss in plaintiff's functions to the herniated disc in his back. He wrote prescriptions for plaintiff to have a ramp at his home, safety rails in the bathroom, a raised toilet seat, a power lift for his van, and a wheeled walker, with a seat. Dr. Newman also thought a motorized walker would benefit plaintiff when he shopped.

On cross-examination, Dr. Newman admitted he could not tell the exact date that the disc herniation occurred. However, there was no evidence of calcification, which means it was not present for years, but probably existed for more than a few months. There was no evidence of consistent atrophy in the lower extremities. Without a history of an additional trauma, the postoperative MRI changes could have occurred as a direct result of the first injury.

Plaintiff is able to drive his van without using special hand controls. He did not complain of safety issues with ambulation.

**Dr. Jeffrey Lawley** examined plaintiff on December 8, 2003. Plaintiff informed Dr. Lawley about the April 26, 2003 injury. He complained of constant low back pain, extending into his legs, along with numbness and tingling. The right leg was more painful than the left. The numbness and tingling in the right leg had been present since 1995, when plaintiff had a lumbar laminectomy. Plaintiff used a cane full-time. Dr. Lawley reviewed a portion of plaintiff's current medical records, including the MRIs performed in 2003.

The straight-leg-raising test was negative bilaterally. The right Achilles reflex was absent, the left Achilles reflex was 2+/4. Both patellar reflexes were symmetrical. There was no evidence of muscle atrophy in either lower extremity. The sensory exam showed a near-complete loss of sensation to sharp pinpoint that did not follow a specific dermatomal pattern. There was marked decreased active range of motion in the lumbar spine; however, he was able to easily sit in a chair, which required bending to 85 to 90 degrees. X-rays showed evidence of postoperative changes and disc degeneration at L5-S1. The MRI showed evidence of disc herniations at L4-5 and L5-S1.

The clinical exam did not show any evidence of radiculopathy. Dr. Lawley ordered an EMG. Dr. Lawley thought plaintiff could work if he had a sit/stand/walk option, performed no excessive or repetitive bending at the waist,

which included no reaching or excessive, twisting or lifting objects greater than 10 pounds.

After reviewing the EMG, performed by Dr. Middeldorf, Dr. Lawley allowed plaintiff to return to work as an account specialist, without specific restrictions. Dr. Lawley admitted plaintiff may need prophylactic restrictions because of the laminectomy. The inconsistencies during the exam led Dr. Lawley to think plaintiff was embellishing his symptoms. He saw no residuals from the April 26, 2003 injury. He thought plaintiff could perform some lifting, such as was required in his job at Absopure. Later in the deposition, he testified it would be best for plaintiff to avoid excessive twisting and bending and lifting over 25 pounds.

On cross-examination, Dr. Lawley agreed that hearing or feeling a pop in the back is a common description of injury. A complaint of increased symptoms with prolonged sitting could be consistent with a disc or nerve problem. Historically, plaintiff had not returned to baseline. Dr. Lawley agreed that individuals with longstanding chronic pain, can have a psychological basis for inconsistent presentations.

At the deposition, the MRI films were not available. Other than what he said in his report, he did not have a clear recollection of the films. He testified that even with a contrast MRI, scar tissue can resemble a disc herniation. He agreed the presence of calcification usually indicates the abnormality has been present for a longer period of time. And, the incident plaintiff described, along with the popping sound and the onset of symptoms could produce a herniated disc. However, because the electrodiagnostic study did not show any new changes, he did not think the herniated discs were a significant problem [Magistrate's opinion, pp 7-8.]

## LAW

The Worker's Disability Compensation Act requires the Appellate Commission to perform two essential functions when reviewing a magistrate's decision under two entirely different standards. First we examine the magistrate's fact findings under the substantial evidence standard. We must review the entire record. MCL 418.861a(4). The review must include both a qualitative and quantitative analysis of the evidence. MCL 418.861a(13). After our review of the record, we must determine whether a reasonable person would find the evidence adequate to support the magistrate's findings. MCL 418.861a(3). We expounded on these statutory mandates in *Isaac v Masco Corp*, 2004 ACO #81, where we wrote the following:

The magistrate's credibility determination is entitled to deference because the hearing officer has the opportunity to view and judge witnesses. Moreover, the magistrate is not obligated to deal with the credibility issue like a light switch, turning it either on or off.

The magistrate's choice of which medical expert opinion or opinions to adopt is within his or her discretion and we defer to that choice, if it is reasonable. The

magistrate need not adopt expert opinions in their entirety but may give differing weight to different portions of testimony. And, although a magistrate may give preference to a treating expert's opinion, she need not do so. (Footnotes Omitted).

In addition to our review of the magistrate's fact findings, we also examine the magistrate's statements and applications of the law. We do so under a de novo standard.

This case requires a remand. The magistrate issued her decision after the Court of Appeals published its decision in *Stokes*. In fact, the *Stokes* decision post-dated defendant's brief to the Appellate Commission. Then, as we noted earlier, defendant filed a supplemental request asking the Appellate Commission to apply the Court of Appeals *Stokes* decision to the facts in this case. While we agree that *Stokes* must be applied, we allow the magistrate to make the application. In so doing, we appreciate that the magistrate's disability analysis may change only slightly or perhaps not at all. However, after *Stokes*, every disability analysis should acknowledge the *Stokes* decision and whether the decision alters the original disability analysis.

In addition, the magistrate must perform additional fact-findings and legal analysis. The additional fact-finding must resolve the conflicting evidence concerning the circumstances of plaintiff's injury. More specifically, the magistrate must decide whether defendant instructed plaintiff to refrain from lifting boxes. Likewise, she must decide whether defendant told plaintiff that a temporary employee would lift boxes for plaintiff. After the magistrate makes the necessary findings, she must also analyze the legal impact of her findings.

Although we remand this case for additional analysis, neither party presented an argument that would justify opening the record. Thus, we forbid the introduction of additional proofs. But, the magistrate, at her discretion, may allow the parties the opportunity to present briefs.

#### CONCLUSION

Therefore, we remand this case to the magistrate for a supplemental decision. We retain jurisdiction.

Commissioner Grit concurs.

Gregory A. Przybylo

Commissioner

Donna J. Grit

Commissioner

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GLASER, CHAIRPERSON, DISSENTING

The majority remands this case for two purposes. First they express concern that the recent shifting case law in *Stokes v DaimlerChrysler*, 272 Mich App 571 (2006) would have changed the disability analysis and possibly the magistrate's outcome. I disagree. While there certainly may be cases where application of *Stokes* could affect the disability determination, this case is not one. The magistrate explained her rationale as follows:

In order to receive wage loss benefits, plaintiff must demonstrate that he has suffered a limitation in his earning capacity in work suitable to his qualifications and training. Plaintiff earned his highest wages while working as an accounts receivable specialist. That position is basically a sedentary job. But for plaintiff's need to periodically lie down, he would be employable. There was no indication that work is available within his restrictions. Plaintiff has looked for work within his restrictions, but has not found employment. Ms. Carol Marks, a vocational rehabilitation consultant, testified there were jobs available, as a bookkeeper and accounting clerk that would allow plaintiff to gradually return to work. However, there was no indication this information was shared with plaintiff for him to determine the availability of the jobs. Plus, there was no clear indication that these jobs would accommodate all of plaintiff's restrictions. Therefore, I find plaintiff has shown, by a preponderance of the evidence, that he has an impairment in his maximum earning capacity, that is directly attributable to the April 26, 2003 injury. He is entitled to benefits in accordance with the attached Order. [Magistrate's decision, p 11.]

There is nothing in the above analysis that would change, even slightly, whether the magistrate applied *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997), *Sington v Chrysler Corp*, 467 Mich 144 (2002), *Stokes v DaimlerChrysler*, 2006 ACO #24, or *Stokes v DaimlerChrysler*, 272 Mich App 571 (2006). The magistrate found that plaintiff had established that he could not perform any work within his qualifications and training. Although she declined

to find that he had established permanent and total disability pursuant to MCL 418.361(3)(g), it was clear from her opinion that she was not convinced that his total disability was permanent. The magistrate's analysis is sound and her finding of total disability is supported by Dr. Newman's testimony that plaintiff frequently needs to change positions, including lying down. The magistrate relied on that testimony to find that there is no evidence of work available within his restrictions.

The magistrate is free to accept the medical evidence she finds most persuasive and where, as here, there is a reasonable basis for her choice, we will not displace it. *Miklik v Michigan Special Machine Co*, 415 Mich 364 (1982).

The magistrate's finding that plaintiff is totally disabled is supported by competent, material and substantial evidence. I would affirm it.

The majority's second purpose in remanding is to have the magistrate make a specific credibility determination to establish whether the plaintiff's version of the events or the supervisor's version was accurate. They also ask for a legal analysis on the impact of such a finding. In so ordering, the majority indicates that the magistrate must decide whether defendant instructed plaintiff to refrain from lifting boxes, and whether defendant told plaintiff that a temporary employee would lift boxes for him. This instruction from the majority is based on defendants' claim that MCL 418.305 could be applicable to preclude plaintiff's receipt of benefits, if in fact his supervisor told him not to lift boxes and provided a temporary helper. There is no legal basis for defendant's assertion.

The dispute between plaintiff and his supervisor, David Giordano, is best summarized by a review of Mr. Giordano's testimony regarding the disputed conversation:

- Q. Okay. Did Mr. Reiter's job involve any lifting?
- A. No.
- Q. Mr. Reiter has testified that he injured his back doing lifting at Absopure and th -- he indicated that he was told by you that if he did not do the lifting or moving of boxes required that he would lose his job; do you recall that conversation?
- A. I recall a conversation but not exactly that way; I did not say that.
- Q. Okay. Can you -- what conversation do you recall having with Mr. Reiter regarding his lifting?
- A. Michael needed to pull some proof of deliveries for a customer that we needed to get s -- to prove that they owed a debt to Absopure.
- Q. Okay and what is a proof of delivery just so we're clear?

A. A proof of delivery is actually, it's a little slip that comes like if you were at Kohl's or a department store and you sign a credit card that type of little slip. Those are kept in packets by route driver. Each route driver has their daily slips and it's filed by date, by month, by year.

Q. Okay and where, and those are stored how?

A. At that point in time they were stored in our upstairs annex, I guess you would call it, in banker boxes.

Q. Okay. And did you have a discussion with Mr. Reiter then about going and getting these proofs of delivery out of storage?

A. Yes.

Q. And what did that c --

MAGISTRATE GUYTON: Did you say they were banker boxes?

THE WITNESS: Banker boxes about -- like this.

Q. -- about two and a half feet long, maybe a foot high?

A. Approximately, yes.

Q. Okay. And again, what conversation did you have with him regarding pulling these proofs of delivery from the banker's boxes?

A. I told Michael that we needed to get that taken care of, we needed to find these, these and, and Mike had mentioned to me that you know, the ones that are on the floor, he could open up and find but ones that were higher up on shelves that because of his back, he wouldn't be able to pull 'em and I had told Mike, I says, I understand that -- his, his health problem were well documented and I said that we had a temporary worker at the time. I said Mike, take the temporary worker with you, I says actually we'll get the job done a little bit quicker, you'll have an extra set of eyes, and my last words to him were Mike, do not lift any boxes.

The magistrate stated that whether plaintiff was advised not to lift the boxes is immaterial. She found that there was no indication that he violated an enforced safety regulation or that he intentionally injured himself. This finding is legally sound and supported by competent, material and substantial evidence. There is nothing in Mr. Giordano's testimony, even if he were found to be totally credible, that would establish plaintiff's actions in lifting the box to be intentional and willful misconduct pursuant to MCL 418.305, as it has been interpreted by our courts.

The leading case on "intentional and willful misconduct" is *Daniel v Department of Corrections*, 468 Mich 34 (2003). *Daniel* reaffirmed that whether misconduct was "intentional

and willful” is a finding of fact. *McMinn v C. Kern Brewing Co*, 202 Mich 414 (1918); *Day v Gold Star Dairy*, 307 Mich 383 (1943). In *Daniel*, the major issue was whether plaintiff’s injury arose by reason of his misconduct. That is not an issue here. If in fact lifting a box was misconduct, there is no dispute that the injury arose by reason of that lifting.

The majority in *Daniel* restated the case law defining “intentional and willful misconduct”:

**Our case law has consistently distinguished “intentional and wilful misconduct” from acts of negligence and gross negligence. Benefits are awarded despite 151 45 M.C.L. § 418.305 where an employee is injured by his own negligence. See, e.g., *Gignac v. Studebaker Corp.*, 186 Mich. 574, 152 N.W. 1037 (1915); *Day, supra*. However, this Court has held that benefits are precluded under the statute where an employee was injured by conduct of a quasi-criminal nature. *Fortin v. Beaver Coal Co.*, 217 Mich. 508, 510, 187 N.W. 352 (1922). *Fortin* described “quasi-criminal” conduct as “involving the intentional doing of something with knowledge that it is dangerous and with wanton disregard of consequences....” *Id.***

There is nothing in Mr. Giordano’s testimony that would support a finding that plaintiff’s actions in lifting the box were anything more than negligence, albeit, perhaps gross negligence. As indicated by the magistrate, there is no indication that plaintiff violated an enforced safety regulation or that he intentionally injured himself. Mr. Giordano did not even testify that he forbade plaintiff from lifting the boxes. He simply said “Mike, do not lift any boxes.”

Surely, if the testimony of Mr. Giordano establishes intentional and willful misconduct by plaintiff, then the testimony of plaintiff establishes an intentional tort by defendant. Neither the action of plaintiff nor defendant rises to those levels. The magistrate found that plaintiff’s actions did not constitute intentional misconduct. That finding is reasonably grounded in the facts of this case. I would affirm her finding.

Martha M. Glaser

Chairperson

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This cause came before the Appellate Commission on a claim for review filed by defendants Absopure Water Company and Insurance Company of the State of Pennsylvania from Magistrate Carol R. Guyton's order, mailed August 25, 2005, granting an open award of benefits. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be remanded to the Board of Magistrates. Therefore,

IT IS ORDERED that the magistrate's order is remanded to the magistrate for supplemental findings and a supplemental decision in accordance with the attached opinion. Transcript/brief filing requirements shall be issued by letter from the Commission to counsel as soon as the magistrate's supplemental decision is filed with the Commission. We retain jurisdiction.

Gregory A. Przybylo

Commissioner

Donna J. Grit

Commissioner