1998 ACO #481

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

DANIEL C. GANHS,
PLAINTIFF,

V

DOCKET #96-0847

ALL STAR VENDING, INCORPORATED,
CONTINENTAL NATIONAL AMERICAN CASUALTY,
CITIZENS INSURANCE COMPANY OF AMERICA AND
FRANKENMUTH MUTUAL INSURANCE COMPANY,
DEFENDANTS.

APPEAL FROM MAGISTRATE COPE.

FREDERICK F. SWEGLES FOR PLAINTIFF,
MARTIN L. CRITCHELL FOR FRANKENMUTH MUTUAL INSURANCE COMPANY,
PAUL F. PATERNOSTER FOR CONTINENTAL NATIONAL AMERICAN CASUALTY AND
MICHAEL T. REINHOLM FOR CITIZENS INSURANCE COMPANY OF AMERICA, DEFENDANTS.

OPINION

LESLIE, COMMISSIONER

Defendants All Star Vending Inc and Frankenmuth Mutual Insurance Co appeal a decision of Magistrate Susan B. Cope mailed November 7, 1996 granting plaintiff an open award for aggravation of a work related right knee injury. Defendants claim that there is no evidence in the record to support the finding of aggravation. Plaintiff and CNA request affirmance of the magistrate's decision. Citizens argues that no party has sought to place liability on a date of injury under their coverage, so the Commission has no jurisdiction to do so. In a supplemental brief, CNA makes a similar argument with respect to their liability for the original injury. We affirm the magistrate.

Plaintiff worked for All Star as a vending route salesman. He would load his truck with snack foods and drinks. He would then drive to the various locations to refill vending machines. At the end of the day he would turn in the cash and unload the truck. He would make about six to eight stops a day. At each stop he would open the vending machines and restock the machine. This work required sitting, standing and carrying products. The heaviest items would be cases of pop and syrup. He would have to get down on his hands and knees to clean out coffee machines.

On August 7, 1989, plaintiff slipped as he got out of the truck and twisted his right knee. He first saw Dr. Nebel and then was treated by Dr. Gerald Jerry. Plaintiff returned to work but continued to have problems with his right knee. He also had left knee problems which the doctor felt were unrelated to work.

Confronted with the classic battle between carriers, the magistrate found that plaintiff's continued work aggravated the knee condition and fixed liability for continuing weekly and medical benefits on Frankenmuth, the carrier on the risk on plaintiff's last day of work. Only plaintiff's treating doctor testified in the case. He expressed the opinion that plaintiff had a serious knee injury and that his continued work had aggravated the knee condition. Plaintiff himself characterized his knee condition being about the same.

The magistrate succinctly set out her findings and reasoning behind the award:

> On August 7, 1989, plaintiff slipped as he was stepping out of his truck and twisted his right knee. Plaintiff said he was sent to Dr. Nebel for treatment. His condition improved after remaining off work for two weeks and taking anti-

inflammatory medications. The records of Dr. Gerald Jerry reflect he first saw plaintiff on September 9, 1989. Plaintiff was placed on limited right quad exercises and Motrin but his right knee problems were resolving nicely by that time.

Plaintiff had continuing complaints relating to a pre-existing problems with his left knee, but was not seen again for right knee pain until April 11, 1991. At that time, he said he had trouble getting in and out of his truck and difficulty kneeling. Plaintiff gave a history of pain, clicking and catching developing over the prior month. When Dr. Jerry saw him on June 6, 1991, plaintiff had a snapping, clicking sensation, a positive reverse McMurray's, medial and lateral joint tenderness and mild effusion. Right knee arthroscopy with near complete total meniscectomy was performed on July 15, 1991. Plaintiff made excellent progress with therapy and was released to return to work without restrictions after September 19, 1991.

Mr. Ganhs continued working with intermittent exacerbations of knee pain with twisting.

By August 1993, he again had trouble kneeling and getting in and out of his truck. On August 9, 1993, Dr. Jerry noted plaintiff had periodic giving way episodes and medial joint line pain. An x-ray of the right knee showed wear to the medial joint compartment of approximately 30% of the joint surface. Dr. Jerry suggested surgery consisting of arthroscopy, debridement and high tibial and fibular osteotomy. Plaintiff saw Dr. Jerry again on December 21, 1993 and December 5, 1994.

When plaintiff returned to Dr. Jerry on August 23, 1995, he right knee pain had worsened. Plaintiff was finding work markedly more difficult in terms of lifting, squatting, pushing and pulling. X-rays showed 40% joint loss on the medial side. Dr. Jerry again advised arthroscopic debridement and a high tibial osteotomy. Plaintiff continued working until he ultimately decided to have that surgery performed on August 12, 1996. At the time of trial, plaintiff was still recovering from surgery and was walking with an obvious limp. He had just had his cast off three weeks earlier and stopped wearing his brace the day before trial.

Plaintiff stipulated at trial he had been paid all the wage loss benefits and medical benefits to which he was entitled through August 1993. The issues in this case are whether plaintiff is entitled to any benefits beyond that date and if so, which of the carriers is liable for payment of those benefits. Plaintiff testified his knee was not too bad following his surgery in 1991, but he still bothered himself when he had to twist it. When he returned to Dr. Jerry in August 1993, he said his condition was as bad as when he originally sought treatment. Plaintiff continued to work without restrictions and activities such as manually loading and unloading the truck and bending and kneeling made his legs sore and worsened his condition. His knee gradually hurt more through his last day of work on August 9, 1996. On cross-examination by defendants Citizens and Frankenmuth, plaintiff indicated he had pain and clicking in his knee since 1989.

The only medical evidence presented in this case is the testimony of Dr. Jerry and his records, attached to the deposition as Plaintiff s Exhibit 2. In addition to the treatment he gave plaintiff for his right knee, the doctor also treated his left knee for a nonoccupational injury and the natural progression of that injury. When questioned about the etiology and worsening of plaintiff s right knee, Dr. Jerry stated the twisting motion involved in getting out of the truck could cause the meniscal tear to develop and the injury characterized by that mechanism on August 7, 1989 would typically develop advancing arthritic changes. Dr. Jerry added that if plaintiff continued to work, as he did here, twisting, torquing, bending, squatting and lifting more than 50 pounds could aggravate his condition and accelerate the progression of his arthritis.

The Workers' Disability Compensation Act provides that the time or date of an injury not attributable to a single event shall be the last day of work in the

employment in which the employee was subject to conditions that resulted in disability. MCL 418.301(l). The testimony of Dr. Jerry establishes that plaintiff's deteriorating knee condition was the result of both a natural progression of arthritis from the original injury in 1989, as well as an aggravation or acceleration of that condition due to continued work activities through his last day of work.

Continental National American Casualty apparently paid plaintiff wage loss and medical benefits through August 9, 1993 when plaintiff returned to Dr. Jerry and Citizens Insurance Company of America was on the risk. I would find Citizens liable for the cost of plaintiff's medical treatment at that time. However, defendant affirmatively raised the two-year-back rule, MCL 418.381(2), at trial. Because plaintiff never filed a claim for benefits against Citizens and because Continental's application was not filed until August 24, 1995, I decline to order reimbursement for medical benefits incurred prior to that date. Since plaintiff did not claim any wage loss between August 24,1993 and December 1993, I additionally decline to award any weekly benefits during that period of time.

I find Frankenmuth Mutual for plaintiff's right knee medical expenses incurred after December 1993 when it was on the risk. I additionally find Frankenmuth liable for weekly in benefits payable to plaintiff beginning August 10, 1996.

Frankenmuth contends that the determination of aggravation is based on speculation and conjecture contrary to the teaching of *Ginsberg v Burroughs Adding Machine Co*, 204 Mich 130 (1918) and similar cases. It also claims that the magistrate's decision could only be arrived at by drawing a factual inference from two equally plausible alternatives, an exercise of fact finding prohibited by such cases as *Demann v Hydraulic Engineering Co,* 192 Mich 594 (1916), *Trumble v Michigan State Police,* 325 Mich 237 (1949) and more recently *Lane v Jones,* 5 Mich App 525 (1967).

Upon review of the lay and medical testimony we do not find defendants' argument persuasive.

We begin by noting that Dr. Jerry testified that plaintiff's current knee problem was a combination of the original injury and work aggravation.[1] On cross-examination by counsel for Frankenmuth the doctor candidly acknowledged that quantifying aggravation by subsequent work is a speculative endeavor.[2] He did not state, as Frankenmuth implies, that his entire opinion regarding aggravation was speculative.

We know of no requirement that the amount of aggravation be specifically quantified, and, thus, do not see this testimony as contradicting or vitiating his direct examination testimony that subsequent work aggravated plaintiff's condition.

Defendant also relies on plaintiff's testimony that the only specific injury he sustained was the original one in 1989. Such testimony is not controlling in a case where the second injury results from aggravation by work activity. The employee's testimony that he had no new injury is not determinative. Legally if the fact finder determines that the subsequent work worsened the condition, then a date of injury as of the last day of work follows automatically.[3]

In this case the magistrate's conclusions were supported not only by the opinions of Dr. Jerry, but also by his treatment notes which showed that plaintiff had come for treatment on August 23, 1995 complaining that continued work was "becoming markedly more difficult in terms of lifting and squatting, pushing and pulling." This testimony is competent, material and substantial evidence for

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[1]Deposition transcript of Dr. Jerry at 22-23, 25.

[2]*Id.* at 31.

[3]MCL 418.301(1).

the magistrate's conclusion that plaintiff's subsequent work aggravated his condition such that Frankenmuth is liable for weekly and medical benefits.

There was nothing speculative about the magistrate's opinion and her conclusions were based on substantial evidence and not improper inferences. We affirm her decision.

Commissioner Kent and Wyszynski concurs.

Richard B. Leslie

James J. Kent

James Edward Wyszynski, Jr. Commissioners

S T A T E O F M I C H I G A N
WORKERS' COMPENSATION APPELLATE COMMISSION

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This cause came before the Appellate Commission on appeal by defendants, All Star Services and Frankenmuth Insurance Company, from the decision of Magistrate Susan B. Cope, mailed November 7, 1996, granting an open award. 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.

Richard B. Leslie

James J. Kent

James Edward Wyszynski,Jr. Commissioners