1998 ACO #680

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

MIKE R. STOREY,
PLAINTIFF,

V

DOCKET #97-0298

PARTY TIME ICE COMPANY AND
WESTFIELD INSURANCE COMPANY,
DEFENDANTS.

APPEAL FROM MAGISTRATE NOWINSKI.

MICHAEL MCNAMEE FOR PLAINTIFF,
MICHAEL T. REINHOLM FOR DEFENDANTS.

OPINION

SKOPPEK, COMMISSIONER

Defendants appeal the decision of Magistrate David W. Nowinski, mailed April 2, 1997, granting plaintiff an open award on a finding of an ongoing work-related left elbow partial disability. We affirm the magistrate's decision and adopt his findings of fact pursuant to MCL 418.861a(10).

Plaintiff Mike Storey commenced his employment with defendant Party Time Ice Company as an ice delivery driver after his graduation from high school in 1987. Although there was varying testimony, it appears plaintiff delivered roughly 1800 eight pound bags of ice, and 20-30 twenty-five pound blocks of ice on a daily basis. The ice was loaded onto a truck by other employees, and plaintiff took them off the truck at each delivery site, wheeling the ice into each establishment using a dolly or hand-truck.

On January 12, 1996, plaintiff developed a pain in his left elbow while taking ice off the delivery truck. Plaintiff continued to work for defendant employer until April 29, 1996, when the elbow pain became too much for him to continue. After April 29, 1996, defendants voluntarily paid worker's compensation benefits until July 21, 1996.

Plaintiff was sent by defendant employer to see Dr. Wilmont Kreis, with whom he treated several times for his elbow pain. The doctor's treatment included two cortisone shots, and a program of physical therapy. This treatment resulted in steady improvement, to the point where Dr. Kreis cleared plaintiff to return to work without restrictions as of July 21, 1996. Dr. Kreis testified that by this point, plaintiff was completely asymptomatic. However, when plaintiff reported to work at Party

Time after being cleared of restrictions, he was told that there was no work for him; essentially, plaintiff was laid off. Subsequently, plaintiff collected unemployment compensation for 26 weeks.

Plaintiff testified that on August 6, 1996, he was using a "weed-whacker" in his yard at home when he developed a cramp in his left elbow. At this point, his elbow complaints resumed. Plaintiff returned to see Dr. Kreis, and his arm was still sore at the hearing on January 31, 1997, to the point where, as he testified, he was physically incapable of performing his ice delivery job. However, plaintiff did go deer hunting with a bow ten to twelve times from October of 1996 through January of 1997. There was no swelling evident in plaintiff's elbow at the time of hearing.

The magistrate adopted the medical testimony of Dr. Kreis. Plaintiff's original injury was diagnosed as lateral epicondylitis of the left elbow. Although the doctor cleared plaintiff to return to work without restrictions as of July 21, 1996, he considered plaintiff's "weed-whacking" activities to have re-activated the same condition. Dr. Kreis testified that plaintiff's condition is getting worse, and that surgery is necessary to correct his problem. Although plaintiff has private health insurance, it appears this carrier will not pay for additional physical therapy or for an operation on plaintiff's elbow because Dr. Kreis maintained that his condition was caused by work. The magistrate was not persuaded by the testimony of Dr. Michael Krieg, who testified that there were no objective reasons for plaintiff's complaints and that he was fully able to resume any and all work activities.

The magistrate concluded his opinion with the following analysis:

> In a worker's compensation case, the plaintiff has the burden of proving by a preponderance of the evidence that he has a limitation in his wage earning capacity in work suitable to his training and qualifications as a result of a work-related injury or condition. I find that Mr. Storey began to experience symptoms in his left elbow in January 1996 while he was lifting bags of ice during the course of his employment with the Defendant. He continued to work, and the subsequent work caused his condition to worsen to the point where he was no longer able to work as of April 29, 1996. I further find that Mr. Storey responded positively to appropriate treatment, and his symptoms abated to the point where his treating physician authorized a return to unrestricted work effective July 22, 1996 at which point the Defendant laid him off. Mr. Storey experienced an increase in symptoms while he was performing some gardening activities at his home in August, 1996. Dr. Kreis feels that the flare-up in August was simply a continuation of same problem. He expressed the opinion that Mr. Storey probably would have experienced a similar flare-up had he actually returned to work.
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> Although the Defendants contest the existence of any continuing disability, they also argue in the alternative that any ongoing disability is the result of a new and independent injury occurring after Mr. Storey had stop[ped] working. Michigan follows the Larson rule.

> The basi[c] rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. (1 Larson, Workmen's Compensation Law, 13.11 pp 3-502, 3-503) *Feldbauer v Cooney Engineering,* 205 Mich App 284, 517 NW2d 298 (1994).
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> I believe the testimony of Dr. Kreis meets the above test.
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> Mr. Storey remains partially disabled as a result of his work-related epicondylitis. He is unable to return to his employment as an ice deliveryman. This appears to be the only work which he has performed in his adult life. Consequently, he has established that he has a limitation in his wage earning capacity in work suitable to his training and qualifications, and he is entitled to receive[ ] benefits.
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> Although he is only partially disabled, the Defendant has not identified a specific job which he is able to perform which is presently available. Consequently, he is entitled to receive benefits at the full compensation rate. *Braddock v Bellrose, Inc.*, 1994 ACO # 525 (1994).
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> The Plaintiff received unemployment compensation benefits, and the Defendants are entitled to the appropriate statutory reduction in the compensation rate for the period which he received MESC benefits.

Defendants raise two issues on appeal. The first is whether the magistrate applied the correct legal standard in placing compensation liability on them "where the record shows that plaintiff was symptom free, released to return to work without restrictions, and then suffered a new injury at home." Defendants argue that the magistrate's application of *Feldbauer v Cooney Engineering Co (After Remand)*, 205 Mich App 284 (1994), to plaintiff's claim was erroneous in light of the Michigan Supreme Court's still-precedential analysis and holding in *Adkins v Rives Plating Corp*, 338 Mich 265 (1953). Defendants argue in the alternative that if *Feldbauer* is the applicable legal standard, the magistrate erred in awarding plaintiff benefits under this standard. Defendants' argument invites us to enter the complicated world of proximate cause and natural results, of negligence and innocent behavior, and of intervening events and ongoing injury.

In order to answer the question posed by defendants, namely, whether *Adkins* (as opposed to *Feldbauer*) is the correct legal standard for a case dealing with a non-work-related aggravation of a disability, we must examine the treatment Michigan's courts have given to situations similar to plaintiff's, where an initial injury occurred at work and later, a second manifestation or aggravation of the previous injury occured away from the employment setting. Such a situation is called by two different names, according to two different commentators. Arthur Larson refers to such a situation

as the "range of compensable consequences"[1], while Edward Welch discusses it in the context of "non-work-related aggravation."[2] How have the Michigan courts dealt with these situations?

In 1953, the Michigan Supreme Court in *Adkins* looked at a factual situation where plaintiff fractured his arm at work and later broke the same bone while riding on his bicycle. Plaintiff returned to light duty work for his previous employer after partially recovering from his first left forearm fracture. A little over three months later, plaintiff was riding his bicycle on his own free time, when he fell off the bike and broke his left forearm in the same place. The court in *Adkins* evaluated plaintiff's second injury by employing a proximate-cause analysis. Although the court accepted the medical testimony that plaintiff's original fracture had not healed completely, the justices determined that plaintiff's original workplace injury could not have been a proximate cause of plaintiff's disability resulting from his second injury. Rather, the court found that the proximate cause of plaintiff's injury was his own hazardous conduct in riding his bicycle. Moreover, the court focused on the importance of plaintiff's injury not arising out of and in the course of employment. The following excerpts from the opinion serve to illustrate the court's feelings about awarding benefits for such an injury:

> There was nothing in the nature of Adkins' employment which required him to expose himself to such a hazard, and common sense would have dictated that, in his condition, he refrain from such exposure.[3]
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> The affirmation of the award in the instant case would establish a precedent allowing compensation for subsequent injuries which have not arisen out of and in the course of the employment, which bear no relationship to the scope thereof and are but remotely connected with the original injury.[4]

This analysis in *Adkins* unequivocally established that a subsequent aggravation or re-injury of an earlier compensable work-related injury is not compensable unless it is proximately caused by the first injury. Where the second injury or aggravation could have occurred regardless of the first injury, the court in *Adkins* would not award benefits. The court in *Adkins* pointed out that because of the independent intervening event of the bicycle accident, the chain of causation was broken, and thus the second injury that caused plaintiff's disability was not compensable.

Another major case in this area of the law came before the Michigan Court of Appeals with *Schaefer v Williamston Community Schools (After Remand),* 150 Mich App 186 (1986). In

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[1]Arthur Larson, Larson's Workers' Compensation Law, Volume 1, §13, 1998, Matthew Bender & Company Incorporated, New York, New York.

[2]Edward M. Welch, Worker's Compensation in Michigan: Law & Practice §10.24 (ICLE 3d ed 1996 & Supp. 1998).

[3]*Adkins* at 271.

[4]*Id*. at 273.

Schaefer, plaintiff injured his back while working as a school bus driver. Plaintiff returned to apparently unrestricted work approximately one month after his injury. A year and a half later, plaintiff was lifting boxes during a move at home when he experienced back pain that prevented him from working any longer. The court in *Schaefer* accepted earlier findings that plaintiff's conduct in picking up and moving the boxes was not unreasonable behavior in light of plaintiff not knowing specifically what was wrong with his back. In its analysis, the court refused to employ the reasoning of *Adkins* in finding that plaintiff was entitled to benefits.[5] Specifically, the court rejected defendants' suggestion that this case was indistinguishable from *Adkins* as setting forth the "proper standard for determining when an employee's non-work-related conduct constitutes an independent, intervening cause of a subsequent injury or aggravation resulting in disability."[6] Unlike the plaintiff in *Adkins*, the court felt the plaintiff in *Schaefer*, "had no reason to know the hazard to which he was exposing himself by picking up light objects".[7]

It seems clear that the court in *Schaefer* did not expressly eliminate the proximate cause analysis from situations where a subsequent non-work-related incident must be examined in the context of a previous work-related injury.[8] However, the court moved away from the *Adkins* court's

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[5]*Schaefer* at 191-92.

[6]*Id*. at 191.

[7]*Id*.

[8]Indeed, in the first *Schaefer* decision, at 117 Mich App 26 (1982), the Court found the *Adkins* case to be pertinent, explaining (at pages 35 and 37 respectively):

> We do not read *Adkins* as standing for the principle that because the claimant's second injury occurred on a Sunday and not at work, that, in and of itself, is enough to conclude that the claimant is not entitled to compensation. Rather, we view *Adkins* as standing for the principle, consistent with Larson's view, that to be entitled to compensation under the facts of that case the claimant had to prove that his subsequent injuries were the direct and natural result of his primary injury *and* that his own conduct did not act as an independent intervening cause which defeated the causal nexus between the primary and subsequent injuries. The *Adkins* Court concluded that the claimant did not establish the requisite relationship between the primary and subsequent injuries.
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> * * *
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> In light of our discussion of Larson and our interpretation of *Adkins*, in our view, where the primary compensable injury arises out of and in the course of employment compensability may be extended to a subsequent injury or aggravation of the primary injury where it has been established that the subsequent injury or aggravation is the direct and natural result of the primary injury and the claimant's own conduct has not acted as an independent intervening cause of the subsequent injury or aggravation. As to what type of conduct on the part of the claimant will defeat his right to compensation, we find that the proper standard is to determine whether the claimant's conduct was negligent in light of his knowledge of his condition. Or, as stated in *Adkins*, a claimant is not entitled to compensation for a subsequent injury or aggravation of the primary injury where the claimant engaged in an activity "and common sense would have dictated that, in his condition, he

explanation of what conduct constitutes an independent, intervening event that would break the causal connection between injury and disability, creating a broad distinction where a claimant's conduct simply does not amount to an intervening, independent event that would break the causal chain.

The issue surfaced again in *Dean v Chrysler Corp,* 434 Mich 655 (1990). In that case, plaintiff's leg was injured during an explosion at work. Plaintiff returned to restricted work one and a half months later. A little over one month after returning to restricted work, plaintiff sustained multiple injuries in a car accident while driving to see her physician for treatment of the leg that was injured during the explosion at work. The Michigan Supreme Court, in a 4-3 decision, relied on *Rucker* v *Michigan Smelting & Refining Co*, 300 Mich 668 (1942), to reject plaintiff's claim. In *Rucker*, the plaintiff was initially injured at work, and then suffered an unrelated eye injury while riding home in an employer taxicab following a visit to the doctor for treatment of the initial workplace injury. The court in *Rucker* denied plaintiff benefits for the eye injury based on a proximate cause analysis. Specifically, the court in *Rucker* held:

> But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment.[9]

The majority in *Dean,* over a vehement dissenting opinion assertion that *Rucker* had been overruled for purposes of employing a proximate cause analysis by *Whetro v Awkerman*, 383 Mich 235 (1970), affirmed the lower court's ruling rejecting the awarding of benefits. The majority noted that *Whetro* was a plurality decision, and that it did not address a second/subsequent injury. Interestingly enough, however, the court in *Dean* did find Arthur Larson's "range of compensable consequences" analysis in determining whether benefits should be awarded for a second injury or aggravation to be a helpful analytical tool. The court recognized Larson's position, that if the second injury or aggravation was a "direct and natural result" of the first injury, without any independent, intervening cause by the plaintiff, then the later injury/aggravation would be compensable. That being said, the court pointed to Larson's "quasi-course of employment" analysis in this area[10] and felt that in light of the controlling precedent from *Rucker*, combined with legislative intent regarding allocation of costs for such cases, Larson's theory was insufficient, standing on its own, to carry the day for plaintiff.

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refrain from such exposure". *Adkins*, 271.

[9]*Dean* at 660 (quoting *Appelford v Kimmel*, 297 Mich 8, 12 (1941), cited in *Rucker v Michigan Smelting & Refining Co*, 300 Mich 668 (1942)).

[10]This will be discussed later in the opinion. See footnote 15.

The dissent in *Dean,* authored by Justice Dennis Archer, stated that *Rucker* “no longer expresses the present state of the law in this area.”[11] The dissent analyzed the claim in terms of whether plaintiff’s injuries suffered in the automobile accident arose out of and in the course of employment. The dissent also discussed Larson’s theory of “quasi-course-of-employment” and its applicability to the claim. Citing *Schaefer*, the dissent suggested that because plaintiff’s injuries were a “direct and natural result” of her initial workplace injury, she should receive benefits, regardless of a causal connection between the explosion at work and the car accident suffered on the way to the doctor for treatment of those injuries. Moreover, because plaintiff’s trip to the doctor was “reasonable and necessary” in light of her first injury, the dissent would award benefits. Finally, the dissent maintained that even plaintiff’s negligence would not prevent her from receiving benefits, so long as that conduct did not rise to the level of intentional conduct that would be “expressly or impliedly prohibited by the employer.”[12]

One year later, the Michigan Court of Appeals denied a claimant an open award of benefits in a case somewhat instructive for purpose of our review, *Siders v Gilco, Inc,* 189 Mich App 670 (1991). Plaintiff there suffered from severe scoliosis. He complained of pain in his back, which he testified would get worse while working, and then would subside when he was not working. After a period of not working, plaintiff was released to return to restricted work status. Plaintiff was given a closed award of benefits for the period he had been off work. However, earlier findings by the appeal board indicated that these restrictions were due to plaintiff’s congenital scoliosis and surgery, rather than to pain or symptoms caused by his employment.

Approximately three months after being released to work, plaintiff Siders was involved in a car accident, “which did not engender any pathological changes with respect to the scoliosis but did cause a recurrence of his symptoms of pain.”[13] The appeal board granted plaintiff an open award of benefits after finding that plaintiff was not negligent in causing the accident. The Court of Appeals, however, reversed that decision. The court opined that once plaintiff was given a closed award, the last day of that closed award meant that plaintiff’s symptoms had fully abated. Thus, plaintiff was not suffering from a continuing work-related disability or injury. Therefore, the court held that:

> Although case law illustrates an intervening event cannot alone justify the discontinuation or reduction of current benefits, it does not support a finding that an unrelated intervening event itself can *create* a compensable disability.[14]

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[11]*Dean* at 670.

[12]*Id*. at 679. Such conduct could include, in this case, driving under the influence of alcohol or driving recklessly. *Id*. at 684.

[13]*Siders* at 672.

[14]*Id*. at 674.

Finally, in 1994, the Michigan Court of Appeals issued its decision in *Feldbauer, supra.* Plaintiff in that case had fractured his right thighbone at work, which never healed completely. Eleven years later, he broke the same bone while tripping over a chair in a bar. At that time, plaintiff had gone to work for another employer. The court stated that Michigan follows Larson's view(s) in such matters. Specifically, the court cited the "direct and natural result" language regarding compensability for subsequent injury or aggravation, along with examining plaintiff's conduct. Citing *Schaefer,* the court adopted the following test:

> The *Schaefer* court accepted the two-part test suggested by Larson. That test requires a showing that (1) the subsequent injury was the "direct and natural result" of the primary injury and (2) that the claimant's own conduct did not act as an independent intervening cause.[15]

Employing this two-part test, the court adopted earlier findings that plaintiff's subsequent injury was a direct and natural result of his unhealed first injury, and that plaintiff's conduct in tripping over the chair was not enough to amount to an independent intervening cause. Thus, the court awarded plaintiff benefits, assigning liability to the employer for whom plaintiff worked when he was first injured. The court went on to distinguish *Adkins*, opining that unlike that case, the cause of plaintiff's injury in the bar was the unhealed first injury, not plaintiff's intentional or grossly negligent conduct, as demonstrated by the plaintiff in *Adkins* by riding his bicycle.

Where does this leave us in terms of an established legal standard for determining whether a non-work-related second manifestation or aggravation of an earlier work-related injury is compensable? *Adkins* and *Dean* are still good law. However, the Michigan Court of Appeals, in *Schaefer* and *Feldbauer*, seems to have moved substantially toward Larson's analysis of this problem, employing the two-part test from *Schaefer* described above, but not going so far as to endorse Larson's "quasi-course-of-employment" approach to second injuries or aggravations of prior injuries that take place outside of the workplace, for purposes of determining compensability.[16]

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[15]*Feldbauer* at 289.

[16]Larson announces from the outset of his analysis of this area of the law that it is not possible to establish a formula or policy that will adequately cover every fact situation regarding a second injury or aggravation away from the workplace. Larson provides several examples that attempt to establish a framework for analyzing this problem. On one extreme are the cases where plaintiff suffers a broken arm at work; he then beats his wife at home during recovery, causing a re-fracture. Under the California worker's compensation system, for example, such an injury would be compensable because unless the first injury plays no part whatsoever in bringing about the second injury, the second injury or aggravation is compensable. At the other extreme, according to Larson, are the cases where plaintiff is injured at work; he then goes home that day and the next day is injured when he negligently falls down at the doctor's office when treating for his workplace injury. Some courts would hold that plaintiff's negligence is enough to cut off a causal connection and deny plaintiff benefits on account of his own negligence.

In response to this problem, Larson has developed a "quasi-course of employment" concept. Larson explains that if the non-work activity that brought on the second injury or aggravation is a necessary or reasonable activity, "that would not have been undertaken but for the compensable injury", then the subsequent injury or activity should be

This brings us back to defendants' first argument, that the magistrate should have employed the reasoning of *Adkins* instead of *Feldbauer*, which, if correctly applied, means that plaintiff's original work-place injury could not be the proximate cause of the second injury to the elbow at home. In the alternative, defendants argue that if *Feldbauer* is determined to be the controlling legal standard, plaintiff should be denied benefits because the second injury due to yard weeding was not a "direct and natural result" of plaintiff's first injury at work. It is important to note that in both of these arguments, defendants maintain that plaintiff suffered an entirely new injury outside the workplace, instead of an aggravation of the first injury.

Did the magistrate apply an incorrect legal standard in relying upon *Feldbauer*, instead of *Adkins*? Although the dissenting opinion in *Dean* argues otherwise, the Michigan Supreme Court has never expressly overruled the proximate cause analysis in this area of the law, beyond a plurality decision in *Whetro*. However, to insist that there is a contradiction between the two cases focused on by defendants is really to give too extreme an interpretation to both. It is entirely reasonable to view the two cases as representational of two sides of the same coin. Such a view helps explain what would otherwise be viewed as an impermissible divergence from governing precedent by the Michigan Court of Appeals. In practical effect, when an intervening event becomes the true proximate cause source of ongoing complaints, *Adkins* provides the legal foundation for denying benefits. When the ongoing complaints are really just a continued manifestation of the original injury, such that the original injury remains a proximate cause, *Feldbauer* provides the legal foundation for awarding benefits. When viewed in this manner, a case can be resolved in the context of a happy coexistence between the two sides of the coin.

Viewed in this way, it makes no difference which legal foundation we rely upon to resolve defendants' issue in this case. Whether we employ the proximate cause analysis from the Michigan Supreme Court (*Dean*, *Adkins*, etc.)[17], or the Court of Appeals approach of "direct and natural result", we conclude that plaintiff should be awarded benefits on the basis of the factual determinations reached by the magistrate. The manifestation of permanent elbow pain suffered by plaintiff as of the time of the weeding was not a new injury, as defendants contend. The magistrate expressly denied this argument.[18] Because this finding by the magistrate is one of fact and not law,

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deemed compensable. Larson defines "reasonable" to mean the category of activity engaged in by the plaintiff. (See note 1, at §13.11(d).

The problem that we encounter under this analysis is acknowledged by Larson himself. Larson would not award benefits to the injured employee above who beats his wife, but would award benefits to the injured employee who falls in the doctor's office, absent misconduct by the employee. Any case in between these extremes, Larson refers to as a borderline case. Even with Larson's ideas, he does not suggest a clear-cut solution to a borderline claim, like the one here.

[17]We are not unmindful of the Supreme Court's extensive discussion of proximate cause in *Hagerman v GenCorp Automotive*, 457 Mich 720 (1998), but believe *Hagerman* to be inapplicable to the facts of this case.

[18]Magistrate's opinion at 5.

we will accept this finding provided it is supported by competent, material, and substantial evidence on the whole record.[19] Here, Dr. Kreis testified that plaintiff's incident at home was a recurrence of the injury to his elbow at work, and not a new problem.[20] This testimony is sufficient evidence to support the magistrate's conclusion that plaintiff suffers from the same condition now as he originally incurred at work; the incident at home did not cause a new injury.

Therefore, even if we employ a proximate cause analysis, plaintiff is entitled to benefits. Dr. Kreis was asked if plaintiff had fully recovered from his work-place injury when he was released back to unrestricted work. Dr. Kreis responded as follows:

> Well, he was no longer symptomatic. Whether you can say that he's strong enough -- the problem with somebody with a job like that is that it's very difficult to duplicate their entire day's work schedule in physical therapy. And there's always a level of uncertainty when you send somebody back to work on a job that has been involved in the original problem whether they're going to have a recurrence or not. I always tell people when they go back, if you're getting in trouble, call me. Sometimes I'll tell them to come back and see me in two or three weeks and make an appointment. It depends on the particulars. But with this kind of condition, especially one that's taken a little while to get him to this -- to get him healed to guarantee on the first day out that he's never going to have a problem again is -- it would be naive. All these people go back on a somewhat tentative basis. If I had to guarantee an employer that they would never have the same problems, I would after twenty-one years still be waiting to send my first patient back to work.[21]

Dr. Kreis' testimony reveals that it could not be said with certainty that plaintiff had fully recovered from his injury when he was released to work. Dr. Kreis was clearly of the opinion that plaintiff had not recovered from the workplace condition because, if he had, 30 minutes of "weed-whacking" would not have brought on a recurrence of his symptoms. Further, there was no intervening, independent event that signaled a break in the causal link between plaintiff's initial work-place injury and subsequent recurrence of the problem. Defendants suggest that when Dr. Kreis released plaintiff to work, this cut off any causal link between plaintiff's workplace injury and the weed-cutting episode at home. This reasoning is not persuasive. First, Dr. Kreis testified that it was not medically certain that plaintiff was fully recovered when he was released to work. In fact, Dr. Kreis testified he would not have released plaintiff to work at all, had he known that 30 minutes of "weed-whacking" would have brought back plaintiff's symptoms. Second, there is no independent event defendant can point to, in any of plaintiff's activities, that broke the causal connection. By weed-cutting, plaintiff was not aware that his conduct would cause a recurrence of his

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[19]MCL 418.861a(3).

[20]Dr. Kreis' deposition at 14.

[21]*Id*. at 24-25.

symptomology, nor was this conduct negligent. For both of these reasons, under a proximate cause analysis, plaintiff should be awarded benefits for his ongoing elbow complaints.

When analyzed under the "direct and natural result" test utilized by the magistrate, plaintiff is of course also entitled to benefits. There is no question that the incident while "weed-whacking" was a "direct and natural result" of plaintiff's initial work-place injury. Dr. Kreis testified in support of this argument at page 14 of his deposition, by stating that the weed-whacking aggravated plaintiff's symptoms. The result of plaintiff's weed-cutting was the exact same type of symptoms, in the exact same place on his body, as did the earlier work-place injury. The only logical conclusion that can be drawn under these facts is that plaintiff's present condition is the "direct and natural result" of his initial work-place injury. Thus, plaintiff is entitled to benefits for his present condition on the basis of the legally appropriate analysis employed by the magistrate.

The second argument advanced by defendants on appeal is that the magistrate erred in failing to determine if plaintiff was compensably disabled. Defendants maintain that they refuted the causal connection between plaintiff's injury and his wage loss under the standard announced in *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997). Specifically, defendants argue that the evidence they put on at trial was sufficient to refute the connection between plaintiff's ongoing unemployment and his elbow complaints. We are not persuaded by this argument. Although defendants correctly assert that *Haske* allows an employer to offer evidence that a claimant's unemployment was due to factors other than his ailments, such as malingering or avoidance of work, defendants in this case failed to adequately provide persuasive affirmative evidence tending to show that plaintiff's unemployment was due to such other factors.

A thorough examination of the trial transcript reveals that there was minimal evidence brought forth by defendants to show that plaintiff's continuing unemployment was not the consequence of his disabling elbow condition. Other than testimony by plaintiff that he went bow hunting on several occasions after his date of injury, that he collected unemployment, and that he mows his lawn, watches television, and takes rides in his car, the record provides no hooks upon which defendants can even attempt to hang their argument. These limited offerings are clearly not enough to be considered evidence of malingering or avoidance of work in this case. Defendants offered no affirmative proof that plaintiff was offered or had refused a reasonable offer of employment, or had avoided work available to him.

The findings of the magistrate are supported by the record, and based upon those findings, the magistrate properly applied the law. His decision must therefore be affirmed.

Commissioner Witte and Chairperson Miller concur.

Jürgen Skoppek

Joy L. Witte

Donald G. Miller, Chairperson Commissioners

STATE OF MICHIGAN
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MIKE R. STOREY,
PLAINTIFF,

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PARTY TIME ICE COMPANY AND
WESTFIELD INSURANCE COMPANY,
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This cause came before the Appellate Commission on appeal by defendants from the decision of Magistrate David W. Nowinski, mailed April 2, 1997, granting plaintiff an open award on a finding of an ongoing work-related left elbow partial disability. 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.

Jürgen Skoppek

Joy L. Witte

Donald G. Miller, Chairperson Commissioners