

STATE OF MICHIGAN  
WORKER'S COMPENSATION APPELLATE COMMISSION

LINDA JOSEPH,  
PLAINTIFF,

V

DOCKET # 95-0839

ALBAR INDUSTRIES, INCORPORATED, AND  
THE ACCIDENT FUND COMPANY,  
DEFENDANTS.

ON REMAND FROM SUPREME COURT.

ROBERT F. JAMES FOR PLAINTIFF,  
RICHARD R. WEISER FOR DEFENDANTS.

OPINION

WITTE, COMMISSIONER

By remand order of the Supreme Court, we are directed

to reconsider plaintiff's motion to dismiss in the light of the undisputed fact that the defendants promptly paid the 70% interim benefits, owed to the plaintiff pursuant to MCL 418.862; MSA 17.237(862), after receiving proof that the plaintiff's weekly postinjury wages had declined below the amount she was earning when she was injured.

By way of background, plaintiff moved to dismiss defendants' appeal because it failed to pay 70% benefits. Plaintiff's motion was filed on June 4, 1997 and supplemented June 6, 1997. In correspondence to the Commission received June 11, 1997, defendants promised to provide proof by July 5, 1997 that it was, in fact, paying interim benefits. When no proof was provided by that date the Commission dismissed the appeal by order dated July 30, 1997.

In their motion to reinstate their appeal before the Commission, filed October 24, 1997, defendants' attorney frankly admitted proof was never provided the Commission as promised:

11. That Richard R. Weiser intended to send documentation to the Worker's Compensation Appellate Commission that the defendants had fulfilled their legal obligations but did not do so.

However, attached to that motion is documentation, apparently also considered at the Supreme Court, found to evidence “prompt” payment to plaintiff. Further, attached to the motion is plaintiff’s counsel’s signed affidavit that as of October 27, 1997, “the Accident Fund Company has paid 70 percent of partial benefits owed to my client, Linda Joseph, and the Accident Fund Company continues to pay partial benefits.”

This affidavit, in conjunction with the receipt of plaintiff’s appellee’s brief on the merits, received on January 20, 1999, leads us to believe that plaintiff is satisfied to withdraw her motion and permit the appeal to proceed. Therefore, the Commission will vacate its order of July 30, 1997 and will reinstate the defendants’ appeal.

Defendants claim three points of error:

## ARGUMENTS

### I

If the plaintiff had a sensitivity to industrial alcohol, that sensitivity did not cause a disability as defined by MCL 418.301(4) and MCL 418.401(1) as those sections are interpreted by *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201 (1995), and *Michales v Morton Salt Company*, 450 Mich 479 (1995).

### II

There was no competent, material, and substantive evidence on the whole record demonstrating that the plaintiff had a sensitivity to industrial alcohol.

### III

The grandson of an injured employee cannot become a dependent after the employee’s date of injury pursuant to MCL 418.353(3).

We reverse the award of weekly benefits based on issue II.

Plaintiff began employment with defendant on October 3, 1989. As concerns her alleged allergy, the magistrate found as follows:

By December, 1991, plaintiff noted that when she was working with *isopropyl* alcohol she would get a headache. Because of the inability to fit her properly with a respirator, they kept her away from areas involving alcohol. In April of 1992, she was working on a job that required her to wipe the parts with alcohol. She became ill, and went to the ladies restroom where she collapsed on the floor. This incident was

confirmed by Diane Herman, who was a supervisor for defendant at that time. Ms. Herman no longer works for this employer.

On November 5, 1993, she was placed in a work position near a work station that was using *isopropyl* alcohol. She once again became ill, primarily nausea and frontal headaches with general weakness. She was taken to Lapeer Regional Hospital Emergency Room.

Her employer was notified regarding her apparent sensitivity to *isopropyl* alcohol. As long as she worked in an area that did not have these vapors, she got along nicely. When she was exposed, she typically recovered in a short time when she was away from the fumes. During her employment she was treating with Dr. Dittrich, D.O. He had given her a restriction of no contact with industrial alcohol. He later changed this so that she was not to work in an area within 40 feet of a location where the alcohol was being used. After plaintiff had another episode on November 5, 1993, the plant advised her that she should go on medical leave.

Plaintiff freely admits that she is capable of employment where she is not exposed to alcohol fumes. . . . There is an issue as to whether or not she had this preexisting sensitivity prior to commencing her employment with defendant. There is absolutely no prior history of any nausea, lightheadedness, etc. prior to her employment with this defendant. Dr. Dittrich has been her family physician, and it is his belief that based on the history that this is the most likely etiology of her sensitivity to alcohol. Dr. Kopmeyer, who examined the plaintiff at the request of the insurance carrier, disagrees. At the time Dr. Kopmeyer evaluated the plaintiff, she was asymptomatic. Plaintiff freely admits that when she is not exposed to this substance, that she has no physical problem. She is willing to work at defendant's plant as long as she is working in an area that contains no alcohol fumes. Since she has a fairly good work record when in areas not containing these fumes, it would seem a logical approach to offer her employment without alcohol exposure. (Emphasis in original.)

Plaintiff has since returned to work for defendant employer.

As concerns plaintiff's causation burden, the magistrate concluded:

I find that the plaintiff's sensitivity to industrial strength alcohol was arising out of and in the course of her employment at defendant. I make this finding based on the fact that the plaintiff did not have a sensitivity to alcohol prior to her commencing this employment. She has support for this from Dr. Dittrich, her treating physician. During plaintiff's testimony, I found her to be extremely credible. She would very much like to work, and given the opportunity to work in an area that was free from alcohol fumes, she would gladly accept the employment.

The magistrate was careful to distinguish between plaintiff's earlier exposure to rubbing alcohol, which caused her no problems, and her Albar-related exposure to isopropyl alcohol:

At one time she worked with horses, and recalls that she has [sic] given a horse an alcohol bath. This was the standard rubbing alcohol that one purchases at a retail store. She never had any reaction when using this chemical. It was not until she was exposed to what she referred to as industrial strength alcohol when she had her first problem.

We address defendants' second issue first, since it is dispositive and renders moot the first and third issues. Defendants argue that:

The defendants in this case are well aware that "CMS" arguments (competent, material, and substantial evidence) are disfavored by the Appellate Commission. Nevertheless, the record in this case cries out for such an argument. The evidence in this case simply does not support the conclusion that the plaintiff was sensitized to industrial strength alcohol by her employment with Albar. . . .

Apparently, the magistrate concluded that the plaintiff was sensitized to industrial strength alcohol based upon the testimony of Dr. Dittrich. At page nine of his deposition, Dr. Dittrich was asked about his reasons for concluding that the plaintiff was sensitized to this alcohol:

*Q.* Before we leave that, Doctor, I would like you to assume for a minute that Linda Joseph worked at Albar from about 10/3/89, so it would have been two, two and a half years that she had worked without problems that we know of; although, there might have been some minor problems back in '91 which would have been about a year after she started. Can you tell us how that works, in other words the sensitivity or problem with something such as alcohol, how that works, why she wouldn't have a problem right away with it?

MR. SEVERYN: Subject to proof at the time of trial and speculation on the doctor's part.

THE WITNESS: Any allergy to anything you normally have to be exposed to it that you eventually become allergic to it for a period of time, and over that period of time your body builds autogenous (sic) to this and then when you are exposed the autogenous (sic) react with that substance and cause an allergic reaction. [D:9,10]

This argument for the proposition that the plaintiff was sensitized to the industrial strength alcohol assumes that the plaintiff initially did not have problems with the alcohol. That clearly was not the case. At page 18 of the transcript, the plaintiff testified that every time that she was around alcohol fumes at Albar, they made her nauseous. At no time did the plaintiff testify that she initially was able to work around the fumes and then developed an inability to work around the fumes. The reason that the plaintiff did not have significant problems earlier was that she was working in other areas of the plant. Implicit in the plaintiff's argument that she was sensitized to industrial strength alcohol is the assumption that she was once able to work around that substance. There is simply no support for that conclusion in the record of this case.

The plaintiff did testify that at a previous employer, she had used rubbing alcohol to bathe a horse. She had no reaction. The plaintiff herself recognized that this was a different substance from the substance to which she was exposed at Albar. At trial, the plaintiff stated that she told her foreman:

... I shouldn't be having any problem with [regular alcohol], because I've used regular alcohol before.

It was only after I seen the data sheet that I realized how strong the strength of alcohol was that Albar used. [47]

Interestingly, at no time during trial did the plaintiff testify that she was no longer able to work around the rubbing alcohol that she had used before.

Dr. Dittrich's testimony demonstrated that he was not considering the plaintiff's problems analytically. The doctor's initial restriction dated April 27, 1992, concluded that the plaintiff had a skin sensitivity to industrial alcohol, that the plaintiff should avoid skin contact with the alcohol, and that the plaintiff could return to work as long as she avoided such skin contact. Although throughout his direct examination, Dr. Dittrich operated under the assumption that the plaintiff had developed a skin dermatitis when exposed to industrial alcohol, the record in this case was devoid of any evidence suggesting that the plaintiff developed a skin condition when exposed to alcohol. Late in his deposition, at page 22, Dr. Dittrich acknowledged that the plaintiff never exhibited any reaction on the skin either at her visits to his office or in the hospital.

What symptoms did the plaintiff display which caused Dr. Dittrich to diagnosis an allergy to alcohol? During direct examination, Dr. Dittrich said that when the plaintiff was seen on November 9, 1993, she displayed a runny nose (rhinorrhea) and a stuffy nose. The doctor stated that the runny nose probably was related to the exposure to alcohol (D:12). During cross-examination, Dr. Dittrich said:

- A. She had a history of rhinitis and allergic rhinitis prior to the history [of] alcohol allergy, so she did have rhinitis as an ongoing problem. [D-.20]

If the plaintiff did not have a skin reaction to alcohol and her runny nose predated the exposure to alcohol, what symptoms were caused by the alcohol? When the plaintiff was seen at the hospital in 1992, she felt flushed and experienced pressure in her head. Dr. Dittrich acknowledged that those were not typical symptoms of an allergic reaction[.]. The flushed feeling and pressure in the head could be caused by heat exhaustion or an anxiety reaction (D:21).

If none of the plaintiff's symptoms were typical of an allergic reaction to alcohol, what tests did Dr. Dittrich perform to support his conclusion that the plaintiff had an allergic reaction to alcohol? Dr. Dittrich, who readily acknowledged that he was not an allergist, admitted that he did not perform any patch tests or similar tests. However, he did refer the plaintiff to another physician, Dr. Lepor, for blood studies. Those studies revealed that the plaintiff's immunoglobulin levels were normal. Dr. Dittrich admitted that if an individual had a chronic allergy, usually the immunoglobulin tests were not normal. Thus, the one test that Dr. Lepor performed weighed against the diagnosis of an allergic reaction to alcohol (D-.19).

For all of the proceedings reasons, the defendants submit that this truly is one of those cases where there is no competent, material, and substantial evidence to support a key finding of the magistrate. There is no evidence demonstrating that the plaintiff was sensitized to industrial alcohol. What was shown by the record was that the plaintiff developed nausea and syncope whenever she was exposed to concentrations of industrial alcohol. However, according to the plaintiff's own testimony, this caused only temporary symptoms which resolved almost immediately. Such a temporary aggravation of symptomatology is compensable only while the temporary symptoms disable the employee. As the Court of Appeals stated in *Thomas v Chrysler Corporation*, 164 Mich 549, 555 (1987):

In all successful workers' compensation cases, the claimant must establish by a preponderance of the evidence both a personal injury and a relationship between the injury and the workplace. *Miklik v Michigan Special Machine Co*, 415 Mich 364, 367; 329 NW2d 713 (1982); *Devault, supra* at 769. Where it is only plaintiff's symptoms, not his underlying condition, which have been aggravated by his employment, plaintiff is entitled to a closed award of benefits only. See *Carter v General Motors Corp*, 361 Mich 577, 594; 106 NW2d 105 (1960).

The Supreme Court set forth the criteria for a compensable injury in *Kostamo, supra* at 116:

The workers' compensation law does not provide compensation for a period afflicted by an illness or disease not caused or aggravated by his work or working conditions. Nor is a different result required because debility has progressed to the point where the worker cannot work without pain or injury. . . . Unless the work has accelerated or aggravated the illness, disease or deterioration and, thus, contributed to it, or the work, coupled with the illness, disease or deterioration, in fact causes an injury, compensation is not payable.

The WCAB found that plaintiff had not met his burden of proving that his employment caused or aggravated his underlying condition; that at most it caused an exacerbation of symptomatology.

*Thomas* affirmed the award of a closed period of benefits only.

In the instant case, when the plaintiff was hospitalized in 1991, by the time that a physician saw her at the hospital, she was totally recovered. She returned to work that day. Accordingly, the plaintiff did not even have one day of disability associated with her exposure to the industrial alcohol at work. (Emphasis ours.)

Plaintiff's brief in response does not meet defendants' arguments head on. Plaintiff emphasizes that she truly had a sensitivity and illustrates this by reciting the anecdote in the trial record that a fellow employee, secretly and on the orders of a supervisor, began sending parts washed with isopropyl alcohol down plaintiff's line to see if she would react without knowing alcohol was present in the area. She did. Further, plaintiff underlines this point by saying that while Dr. Kopmeyer saw no allergy symptoms in plaintiff, Dr. Dittrich witnessed a runny nose which he traced to the alcohol exposure. (Like defendants, we find the alleged work-related presence of the runny nose a number of days after plaintiff's last day worked incongruous with both the doctor's testimony and the plaintiff's testimony. The doctor did not include a runny nose as a type of symptom he would expect if a true alcohol allergy were present. The plaintiff testified that within minutes of ceasing exposure, her symptoms disappeared. The runny nose mentioned in Dittrich's records was witnessed four days after her last day worked.) Finally, plaintiff asks us to honor the magistrate's choice of medical testimony.

The issue of whether plaintiff had a work-related allergic reaction to alcohol, as defendants correctly state, must be supported in the record for plaintiff to succeed on her claim. We have studied all transcripts submitted in this matter; nowhere does anyone outline an increase in symptoms on plaintiff's part, nor is there any representation that when plaintiff arrived at defendant's plant she was initially able to tolerate exposure to isopropyl alcohol, but with repeated exposures, she became

sensitized. Her symptoms are recorded in the trial transcript (references are to pages from the hearing of September 13, 1995):

December 1991: plaintiff develops a headache packing fenders. Says, “Before that, I had been around it and I had complained. . . . The alcohol fumes kind of made me nauseous.” (18) “Several times” before December 1991, she had been asked to work around the alcohol and developed a “bad headache.” (18)

April 21, 1992: she felt faint, flushed and dizzy; pressure in the head. Says, “I cannot be around that alcohol.” “It made me sick.” (20)

April 28, 1992: Plaintiff testified she got sick and “collapsed” on the bathroom floor. After applying cold compresses, the medic believed she was OK and plaintiff declared herself ready to return to work. (23)

Sometime in September 1993, plaintiff said she felt “light-headed and dizzy” after exposure while working with door handles. (48)

On October 25, 1993, plaintiff had “a headache” and thought she was “going to throw up.” (26 – 28)

November 1, 1993, on second assembly, plaintiff “got sick” at the truck dock outside, said her “head hurts” and threw up. (28-29)

November 2, 1993, plaintiff testified she was “getting a headache” but cleared head in bathroom. (30-31)

November 5, 1993: last day worked; again on second assembly. Felt sick, got a headache, felt “very shaky,” taken to an emergency room. One-half hour after arriving at the hospital, she was ready to return to work. (34)

These facts do not support plaintiff’s treater’s theory of an allergic reaction. Instead, they track a pre-existing but unknown sensitivity to isopropyl alcohol. Her testimony describing her earliest reactions indicates she responded adversely to the alcohol from the beginning of her exposure at defendant employer’s.

These symptomatic aggravations might be compensable under *Thomas, supra*, but, because each was so brief and plaintiff was so soon able to return to work, we agree with defendants that plaintiff has not stated a compensable claim under the Act for weekly benefits. On the other hand, while the symptomatic aggravations were too brief to require weekly benefits, plaintiff is entitled to the medical benefits necessitated by those aggravations.

Therefore, the magistrate's decision is reversed as to weekly benefits. There is no competent, material and substantial evidence on the whole record for a finding of work-related alcohol allergy on this record. However, because there is support for the accompanying finding that plaintiff was made briefly ill by a substance to which she was exposed at work, she is entitled to the associated medical expenses.

Commissioners Garn and Wyszynski concur.

Joy L. Witte

Marten N. Garn

James Edward Wyszynski, Jr.                      Commissioners

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This cause came before the Appellate Commission on remand from the Michigan Supreme Court by order dated November 24, 1998. Upon review of counsel's briefs and of the record, the Commission believes the decision of Thomas E. Lengauer mailed October 2, 1995, granting an open award, should be reversed in part. Therefore,

IT IS ORDERED that the magistrate's decision is reversed as to weekly benefits. The balance of the decision is affirmed.

Joy L. Witte

Marten N. Garn

James Edward Wyszynski, Jr.

Commissioners