2013 ACO # 56

STATE OF MICHIGAN
MICHIGAN COMPENSATION APPELLATE COMMISSION

HEATHER R. JENSEN,
PLAINTIFF,

V DOCKET #11-0118

EXPRESS LLC AND
ACE AMERICAN INSURANCE COMPANY,
DEFENDANTS.

ON APPEAL FROM MAGISTRATE MCAREE.

MICHAEL P. MCDONALD FOR PLAINTIFF,
LEONARD M. HICKEY FOR DEFENDANTS.

OPINION

WYATT, COMMISSIONER

This matter comes before the Commission (MCAC) by virtue of plaintiff's timely appeal from the opinion and order of Magistrate Timothy M. McAree, mailed September 14, 2011. The magistrate's decision awarded benefits to plaintiff. Defendant has filed a timely cross appeal.

Proceedings commenced with the Agency's receipt of plaintiff's application on March 2, 2010. It contained allegations of disabling work injuries occurring December 16, 2008, and February 1, 2009, to the cervical spine and the right shoulder. Defendant's Form C application, alleging non-cooperation by plaintiff with vocational rehabilitation efforts, was received by the Agency on June 6, 2011.

This matter was tried before Magistrate McAree on July 13 and August 5, 2011. His decision, dated September 1, 2011, contained a finding of a December 16, 2008, personal injury arising out of and in the course of plaintiff's employment with defendant. The magistrate found total disability for the period February 2, 2009, through March 31, 2010, and ordered payment of a full weekly wage loss benefit of $602.20. He found plaintiff to continue to suffer partial disability on and after April 1, 2010. As a consequence, he ordered payment of a partial weekly wage loss benefit of $296.98 from April 1, 2010, through the date of the second hearing, August 5, 2011, and continuing pending further order.

ISSUES

Plaintiff asserts that the magistrate erred legally and factually as to his finding of partial disability on and after April 1, 2010. She seeks as remedy modification to the magistrate's findings to one of full disability on and after April 1, 2010, seeking alternatively a remand for further analysis of disability during that period. Defendant asserts that personal injury was proven neither as per *Rakestraw v General Dynamics Land Systems, Inc*., 469 Mich 220 (2003), nor within the requirements set forth by MCL 418.301(2), the so called "significant manner test." Defendant further argues that the disability findings of the magistrate lack the requisite factual underpinnings of competent, material, and substantial evidence on the whole record. Defendant further argues that, if the disability finding does have the requisite factual basis, (and, presumably, if the personal injury finding is likewise sound) the finding that disability on and after April 1, 2010, is likewise legally and factually sound. Plaintiff argues in opposition to each claim of error advanced by the defendant. We find for the defendant-cross appellant as to the personal injury claim of error and reverse the magistrate's award of benefits on that basis. We do not reach the remaining issues raised by the parties as they are moot absent a finding of a personal injury arising out of and in the course of plaintiff's employment with defendant.

STATEMENT OF FACTS

Stipulations at the outset of trial narrowed the issues to those of a personal injury on December 16, 2008, and resultant disability and quantification of same.

The issue of proof of personal injury is, as stated above, dispositive of this appeal. Therefore, while we adopt in general the magistrate's summary of the record evidence found at pages 3-14 (lay), and pages 17-24 (medical and vocational), of his decision, pursuant to MCL 418.861a(10), we will summarize here the evidence we find germane to the question of personal injury arising out of and in the course of plaintiff's employment with defendant.

Plaintiff testified that she slipped and fell at a designated parking area in the mall where she worked after concluding her work shift with defendant on December 16, 2008. Her legs went up in the air and she landed on her neck and right shoulder. She was scheduled off the next two days and remained at home resting and taking Ibuprofen as her neck and shoulder were beginning to feel sore. She returned to work December 19, 2008, as scheduled. She began to experience a tingling sensation. Due to the busy nature of the holiday season in retailing she first sought medical attention on December 29, 2008. She was examined, underwent x-rays and was prescribed pain medication and physical therapy. She continued to work but was less productive due to pain in her neck and shoulder. Therapy did not resolve her symptoms. She underwent an MRI and subsequently went off work February 1, 2009. She was referred to Dr. Easton who performed surgery on March 17, 2009. Recovery was slow and plaintiff eventually underwent a shoulder MRI due to continued symptoms and was prescribed more therapy. Pain persisted even after she returned to work. Her symptoms have worsened between November 10,

2010, and the August 5, 2011, trial date. She sought emergency room care in July 2011. She continued to treat with a Dr. Mankoff as of the time of trial. She was scheduled for unspecified surgery with Dr. Easton as of August 10, 2011, five days after the second trial date.

Plaintiff's co- worker Michelle Tubergen testified that plaintiff told her of another fall she sustained close in time to the described parking lot slip and fall. She was called as a witness by defendant. Plaintiff told her about the fall of December 16, 2008, within a few days of it happening. Within a period of up to ten days subsequent thereto, she was told by plaintiff of a second fall. Plaintiff was on her day off, going to get the mail. She described to Ms. Tubergen how she fell forward, hitting her shoulder and then her head. Ms. Tubergen did not report this information to the employer until long after plaintiff went off work for her surgery, only when conversing with defense counsel who was investigating the claim in November 2010.

Plaintiff denied ever telling Ms. Tubergen that she fell outside of work. She testified that she never had any event at home during the time period referenced by Ms. Tubergen in which she fell.

Board certified orthopedic spine surgeon Kenneth Easton, M.D. testified by deposition for plaintiff on February 17, 2011. He described seeing plaintiff on referral for her neck and shoulder complaints attributed by history to a slip and fall on December 16, 2011. He described what he believed to be the mechanism that caused plaintiff's symptoms:

> I think it's likely that she had an arthritic neck, she fell and the arthritic neck moved beyond its normal motion, pinching the nerve roots as a result of the preexisting narrowing and then the subsequent inflammation of the nerve roots is what led to her to have arm symptoms. [Dr. Easton's deposition at 9.]

He testified that the arthritis becoming symptomatic is what led to the surgery he performed. Describing the pathology he believed led to the inflammation, he stated:

> . . . the findings might have been the same had we operated prior to that, but the symptoms were not present. [*Id*. at 10.]

Further questioning as to pathologic change associated with the described fall brought this exchange:

> *Q*. And is it also your opinion that there was new - - there was no new objectively verifiable pathology or change in the underlying condition that occurred as a result of the fall, but it was the fall that made the nerve roots symptomatic; is that true?
>
> *A*. That's true. [*Id*. at 27.]

He testified that it was arthritis that he surgically removed. *Id*. at 11. Indeed, his surgical report, exhibit three to his deposition, does not describe the presence of a herniated disc or non-arthritic pathology. Per Dr. Eason, arthritis is generally associated with genetics and the aging process. It is normal in persons over age thirty. Plaintiff gave the doctor a history that both her parents suffer from arthritis and her father from back pain. The doctor also believes environmental factors such as activity can accelerate the advancement of arthritis.

The doctor could not offer an explanation for the later occurrence of a disc at C6-7 which was subsequently reabsorbed. The neck surgery he performed was successful. He does not know why plaintiff continues to complain of neck pain.

Daniel Mankoff, M.D., is board certified in anesthesiology and practices in the area of pain management. He testified by deposition about his treatment of plaintiff between March 15 and November 11, 2010. He was under the impression that Dr. Easton had operated for two herniated discs.

Dr. Mankoff believes the subsequent disc at C6-7 developed from increased pressures occasioned by the fusion surgery plaintiff underwent. His neurologic examination on March 15, 2010, was normal and was supported by normal EMG testing. He did not repeat a physical exam on subsequent patient visits. He believes the current predominantly left sided symptoms for which he treats the plaintiff relate to the fall she described as occurring on December 16, 2008. He admits that plaintiff suffers from degenerative disc disease and that age and genetics are factors in this condition.

Medical records and reports placed into evidence by plaintiff are of limited relevance to the personal injury question. Per plaintiff's exhibit 4, Dr. Berneking felt as of January 8, 2009, that history provided by the plaintiff suggested a causation relationship between a fall on December 16, 2008, and his preliminary diagnosis of a C5 cervical neuropathy. Plaintiff placed into evidence the October 12, 2010, IME report of board certified orthopedic surgeon Philip Mayer, M.D. He deemed plaintiff's identified pathologies to be primarily degenerative, felt the described fall may have caused a C6 nerve root compression and that plaintiff's symptoms led to the decision by Dr. Easton to operate.

Board certified orthopedic surgeon Jeffrey Lawley, D.O., testified by deposition for the defendant on June 28, 2011. He had performed a medical examination of the plaintiff at defendant's request on November 6, 2009. He received a history of the December 2008 fall consistent with that provided to other testifying physicians. He was also asked to review imaging and electro-diagnostic reports of tests performed prior and subsequent to his examination. He deemed findings on an MRI performed January 29, 2009, to be non-acute. He was aware that plaintiff underwent a two level decompression and fusion surgery by Dr. Easton in March 2009 at C4-5 and C5-6 and that plaintiff reported a lack of relief from this surgery. He was aware that an MRI of September 16, 2009, revealed the presence of a herniated disc at C6-7. In November 2009 plaintiff was describing symptoms similar to those which precipitated

surgery the previous March. Plaintiff had not seen Dr. Easton since September and her only treatment regimen was 800 mg Motrin two to three times per week.

Dr. Lawley's examination results were largely unremarkable. He deemed a slightly decreased right upper extremity reflex to be a post-operative change lacking clinical significance. He deemed the surgery made necessary by degenerative disc disease. He did not believe the plaintiff's work activities or the December 2008 fall caused, contributed to or aggravated any pathology exhibited by plaintiff. He believed the surgery would have been needed absent the described fall, but acknowledged that surgery would likely not be undertaken until the plaintiff was symptomatic. Based upon history, the symptoms began after the fall.

Dr. Lawley deemed the subsequent emergence of a C6-C7 disc to be sequela of the surgery. An MRI report of February 1, 2010, indicated a significant dessication and regression of the disc noted by MRI on September 16, 2009, along with a significant improvement in spinal cord compression. Multi-level degeneration was noted at levels above the fusion and the fusion appeared stable. Dr. Lawley also noted that a right upper extremity EMG performed March 2, 2010, was negative for signs of radiculopathy.

Dr. Lawley stated that plaintiff's arthritis of the spine predated the December 2008 fall. Despite plaintiff's age, the changes could be part of the aging process. Genetics would also be a factor in the degree of arthritis found. Neither the two level fusion nor the subsequent C6-7 herniation were work related.

Magistrate McAree explained his finding of a work related injury:

> I do believe that the Plaintiff was truthful in indicating that the slip and fall event occurred on December 16, 2008, and in spite of misgivings noted about (sic), I accept Plaintiff's testimony over that of Ms. Tuburgen on the issue of whether there was a second, nonoccupational significant event. I find that Ms. Tuburgen most likely fell victim to rumors and gossip.
>
> The next question is whether or not the requirements of *Rakestraw* are met when a preexisting asymptomatic condition is rendered symptomatic to the point that the condition now becomes a surgical condition. More precisely, the question is, does the development of a surgical condition equate to a new condition or a new pathology? I find that, pursuant to the credible testimony of Dr. Easton, that the event caused inflammation in the already narrowed nerve root, resulting in nerve root irritability, which represented a new pathology, which in turn resulted in the necessity for the surgery. [Magistrate's opinion at 28-29.]

Among other issues raised by the defendant at trial were whether plaintiff's proofs as to a work related personal injury met the requirements of *Rakestraw/Fahr* [Transcript II at 65-66], and the requirements of MCL 418.301(2), *Id*. at 60-61, and whether there existed an intervening non occupational event to explain plaintiff's complaints and her medical treatment. *Id*. at 57-58.

These issues as to proof of personal injury were thus preserved for later assertion as issues on appeal.

STANDARD OF REVIEW

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 Corporation*, 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.

We review the question of a personal injury against a backdrop of case and statutory law. In the presence of a pre-existing condition, proof of symptoms or symptom change is insufficient to establish the occurrence of the personal injury required by MCL 418.301(1) to be eligible to receive workers' compensation benefits. *Rakestraw v General Dynamics Land Systems, Inc*., 469 Mich 220, 230 ((2003). To prove the "medically distinguishable condition" required to satisfy *Rakestraw* and thus § 301(1), plaintiff must preponderate in showing a pathologic change in the underlying or pre-existing condition that is distinct from progression of the underlying condition itself. MCL 418.851; *Fahr v General Motors Corporation*, 978 Mich 922 (2007). These rules prevail whether the pre-existing or underlying condition is in origin occupational or non-occupational. *Simpson v Borbolla Construction & Concrete Supply, Inc*, 480 Mich 964, vacating 274 Mich App 40 (2007).

Where it appears from the record that the pre-existing condition is a condition of the aging process, plaintiff must prove that it has been contributed to or aggravated or accelerated by work in a significant manner. MCL 418.301(2). Proving significant contribution is illuminated by the weighing of occupational and non-occupational factors or contributors. *Farrington v*

Total Petroleum, Inc., 442 Mich 201 (1993); *Martin v City of Pontiac School District*, 2001 ACO # 118 (en banc).

ANALYSIS

Defendant's cross appeal argument challenging the magistrate's credibility analysis and rejection of Ms. Tubergen's testimony is readily disposed of in light of *Isaac*, *supra*. The magistrate was afforded the chance to see both plaintiff and Ms. Tubergen testify. He considered the credibility of both within the context of the whole record. He found Ms. Jensen's testimony credible on the subject of the occurrence of the December 16, 2008, slip and fall. He found Ms. Tubergen's testimony less reliable. We likewise find that the testimony of Ms. Jensen reads more convincingly than does that of Ms. Tubergen. We are troubled by Ms. Tubergen's failure to alert the employer to intelligence about a second non-occupational event until nearly two years after it happened. As per *Isaac*, on this record we affirm the magistrate's choice of plaintiff's persuasive testimony on this question.

More problematic is the magistrate's analysis under *Rakestraw/Fahr*, *supra*. The magistrate is persuaded by Dr. Easton that a pathologic change represented by "inflammation" leading to surgery satisfies plaintiff's burden of proof under this line of cases to demonstrate personal injury. Defendant correctly points to prior determinations by this Commission or its predecessor that neither inflammation nor the availability and offer of surgery as a medical remediation for symptoms are markers of personal injury sufficient to satisfy *Rakestraw/Fahr*. The former Workers' Compensation Appellate Commission (WCAC) has so held with respect to the offer of surgical remediation. *Wendy K. Rahn v United Parcel Service, Inc.*, 2011 ACO #86 at 13 (citing *Dewaele v William Beaumont Hospital*, 2009 ACO #5 at 5). The current Commission (MCAC) has likewise found testimony that identified the pathologic change as "inflammation" was insufficient to satisfy *Rakestraw/Fahr*. *Slovan v HCR-Manor Care, Inc.*, 2011 ACO #134 at 4. While not suggesting that proof of inflammation must in all cases fail to satisfy the *Rakestraw/Fahr* requirements, as in *Slovan*, we find here that it does in the context of Dr. Easton's overall testimony as part of our examination of the record as a whole. Here, Dr. Easton does not testify that he objectively identified the presence of inflamed anatomic bodies or structures. He believed nerve roots had become inflamed by virtue of plaintiff reporting the onset of symptoms. This may be well reasoned medical analysis, but under the *Rakestraw/Fahr* rubric appears simply as the legally inadequate inference of pathologic change in the face of reported symptom onset. Furthermore, the probative value of the doctor's opinion as to inflammation, under *Rakestraw/Fahr* is undercut by his admission elsewhere as follows:

> *Q*. And is it also your opinion that there was new - - there was no new objectively verifiable pathology or change in the underlying condition that occurred as a result of the fall, but it was the fall that made the nerve roots symptomatic; is that true?
>
> *A*. That's true. [Dr. Easton's deposition at 27.]

The magistrate chose to rely for his finding of evidence of a personal injury upon Dr. Easton. That reliance upon the treating surgeon initially appears reasonable upon the record as a whole and we at first glance might again defer per *Isaac*. However, when examining his comments with respect to inflammation in the context of his entire testimony we cannot find that they meet the requirements of *Rakestraw/Fahr*.

Were we to find that we could affirm the magistrate's *Rakestraw* analysis of the personal injury question, we would still reverse the personal injury finding as plaintiff has failed to present proofs sufficient to satisfy MCL 418.301(2). No physician has been asked, nor does one volunteer via his testimony that the described fall in the parking lot contributed to plaintiff's condition in a significant manner. This is the standard for workers' compensation proof of injury in the face of a pre-existing aging process. The medical evidence is unanimous that plaintiff suffered from degenerative arthritis that was rendered symptomatic on or about December 16, 2008, when plaintiff reports that she fell. Dr. Easton explained that plaintiff suffered from pre-existing degenerative disc disease, the development of which is generally associated with age and genetics. Although Dr. Mayer's report was given less weight by the magistrate, it revealed that he also felt plaintiff's pathology was primarily degenerative in nature. Dr. Mankoff agreed and acknowledged that age, and to some degree genetics, are factors in the degenerative process. Finally, Dr. Lawley stated that plaintiff's degenerative arthritis predated December 2008 and could result from aging and genetics. Viewing this record in its entirety then, we are persuaded by defendant's argument that the competent, material, and substantial evidence on the whole record pointed to a pathologic process due, at least in part, to aging. Yet no physician testified to a significant contribution to that process by the fall in December 2008. Nor were sufficient proofs presented to engage in the weighing of occupational versus non-occupational factors by any of the doctors who testified. Significantly, the doctors were not presented with plaintiff's history of horseback riding or were told that she never fell or sustained injury while riding. Plaintiff at trial admitted to falling from horses at times over the years, even while denying injury in those falls. Thus, were the proofs as to personal injury sufficient under *Rakestraw/Fahr*, they fail nonetheless under MCL 418.301(2), as illuminated by *Farrington, supra* and *Martin, supra*.

Plaintiff has urged upon us a different standard of review than the one we have employed. She has cited to *Kostamo v Marquette Iron Mining Company*, 405 Mich 105 (1979) and argued that we must affirm the magistrate if we find ANY support in the record for the magistrate's findings of fact. Plaintiff misreads *Kostamo* and mistakes our scope of review. Language to the effect cited by plaintiff in *Kostamo* refers to the Supreme Court's standard of review as to findings made by the former Workers' Compensation Appeal Board (WCAB), which itself was possessed of de novo review powers. As noted above, and as utilized by us in review of the magistrate's findings of fact, we proceed in light of MCL 418.861a(3), to determine whether the magistrate's findings are supported by competent, material, and substantial evidence on the whole record. We review questions of law de novo. Mindful of MCL 418.861a(11), we review only those findings of fact and conclusions of law preserved and specifically presented for our review. Proceeding in this light, we find that the magistrate's

finding of a December 16, 2008, personal injury arising out of and in the course of plaintiff's employment must be reversed.

Chair Wheatley and Commissioner Goolsby concur.

George H. Wyatt III	Commissioner
Jack F. Wheatley	Chair
Garry Goolsby	Commissioner

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HEATHER R. JENSEN,
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This cause came before the Appellate Commission on a claim for review filed by plaintiff and a cross-appeal by defendants from Magistrate Timothy M. McAree's order, mailed September 14, 2011. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be reversed. Therefore,

IT IS ORDERED that the magistrate's order is reversed.

George H. Wyatt III Commissioner

Jack F. Wheatley Chair

Garry Goolsby Commissioner