STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE WORKERS
COMPENSATION APPELLATE COMMISSION

WAYLON E GEE,

Plaintiff-Appellee,

SC: 133762
COA: 269351
WCAC: 03-00402

V

ARTHUR B. MYR INDUSTRIES, INC.,

Defendant-Appellant.
____________________________________/

133762
Suppl

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF
IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

AFFIDAVIT OF MAILING

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STATEMENT OF SUPPLEMENTAL QUESTIONS INVOLVED

I

WHETHER THE WCAC'S APRIL 19, 2002 OPINION AND ORDER DENYING PLAINTIFF'S CLAIM FOR ATTENDANT CARE UNDER MCL 418.315(1) WAS A FINAL DECISION.

Defendant-Appellant asserts that the answer is "Yes".
Plaintiff-Appellee asserts that the answer is "No".

II

WHETHER PLAINTIFF'S SECOND CLAIM FOR ATTENDANT CARE SERVICES ALLEGED A CHANGE IN CONDITION AS A JUSTIFICATION FOR AN AWARD OF ATTENDANT CARE SERVICES

Defendant-Appellant asserts that the answer is "No".
Plaintiff-Appellee asserts that the answer is "Yes".

III

WHETHER THE WCAC'S APRIL 12, 2005 OPINION AND ORDER AWARDING ATTENDANT CARE SERVICES WAS BASED ON A CHANGE OF CONDITION.

Defendant-Appellant asserts that the answer is "No".
Plaintiff-Appellee asserts that the answer is "Yes".

IV

WHETHER THE WCAC'S APRIL 12, 2005 OPINION AND ORDER AWARDING ATTENDANT CARE SERVICES [WAS] BASED ON THE PLAINTIFF'S APPLICATION OR ON THE APPLICATIONS FILED BY THE ATTENDANT CARE PROVIDERS.

Defendant-Appellant asserts that the WCAC's opinion and order were not based on either application for Hearing.
Plaintiff-Appellee's answer is unknown.

Supplemental Statement of Proceedings

Defendant-Appellant filed an application for leave to appeal with this August Tribunal on or about April 26, 2007. Plaintiff-Appellee filed an answer to that application on or about July 15, 2007. Thereafter, on September 14, 2007, this Learned Body issued a one page order directing the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. Specifically this Honorable Court provided:

> On order of the Court, the application for leave to appeal the March 15, 2007 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the WCAC's April 19, 2002 opinion and order denying plaintiff's claim for attendant care under MCL 418.315(1) was a final decision; (2) whether plaintiff's second claim for attendant care services alleged a change in condition as a justification for an award of attendant care services; (3) whether the WCAC's April 12, 2005 opinion and order awarding attendant care services was based on a change of condition; and (4) whether the WCAC's April 12, 2005 opinion and order awarding attendant care services [was] based on the plaintiff's application or on the applications filed by the attendant care providers. The parties should not submit mere restatements of their application papers

This supplemental brief is submitted in response to this August Tribunal's order.

ARGUMENT I

THE WCAC'S APRIL 19, 2002 OPINION AND ORDER DENYING PLAINTIFF'S CLAIM FOR ATTENDANT CARE UNDER MCL 418.315(1) WAS A FINAL DECISION.

The WCAC concluded its April 19, 2002, opinion writing, "We affirm the magistrate's decision with the weekly benefit rate modification." In accord with this comment, the WCAC's order provided, "IT IS ORDERED that the decision of the magistrate is affirmed with modification. We modify the weekly benefit rate from $338.90 to $332.46 as of September 27, 2000." Nowhere within the WCAC's opinion or order is there any indication that it retained jurisdiction. In the absence of retaining jurisdiction, it is clear that the administrative tribunal intended for its order to become binding upon the parties if not appealed or if affirmed by final order of the Court.

The WCAC knows full well how to prevent its orders from becoming final. See *Leonard v Wayne State University*, 2003 ACO # 4; 17 MIWCLR 8 (2003); *Braun v Secure Pak/aka Same Day Delivery, Inc.*, 2003 ACO # 180; 17 MIWCLR 192 (2003); *Adkins v Delphi Automotive Systems, Inc.*, 2003 ACO # 188; 17 MIWCLR 200 (2003) and *Campbell v Ford Motor Co.*, 2003 ACO # 220; 17 MIWCLR 234 (2003), wherein WCAC retained jurisdiction to keep its opinions and orders from becoming final.

It is axiomatic that a Court or in this case an administrative tribunal speaks through its orders. Whatever the administrative tribunal puts in its opinions and orders is binding on the parties when the order becomes final. In this instance, the WCAC opined on April 19, 2002, that the magistrate acted properly in refusing to award attendant care benefits predicated upon insufficient proofs. It then entered an order affirming the

decision of the magistrate. That order became final and as intended by the WCAC, it is now binding on the plaintiff.

The plaintiff alleged in his application for hearing and has argued throughout the second round of litigation that the magistrate erred when he failed to include a ruling on his request for attendant care benefits. (April 19, 2002 slip sheet at p 1 and affidavit in support of application for hearing dated May 22, 2002. A copy of that affidavit is attached). After quoting MCL 418.315(1); MSA 17.237 (315)(1), the Section of the Workers' Disability Compensation Act that provides for attendant care, WCAC noted that, "While the magistrate did not directly rule on the plaintiff's request for attendant care benefits, he addressed the issue indirectly at the close of proofs." [April 19, 2002 slip sheet at p 2]. Following this statement, the WCAC quoted a colloquy occurring at the close of proofs wherein the magistrate had stated that there was no evidence presented as to the appropriate rate for the attendant care benefits (April 19, 2002 slip sheet at p 3).

The WCAC then entered the following finding:

> We find no error in the magistrate's procedure. Section 315 requires plaintiff to prove the reasonableness of any medical expense. Reasonableness includes an evaluation of the dollar amount involved. As the magistrate noted, plaintiff provided no proof of the cost. Without that proof, the magistrate properly excluded attendant care benefits [April 19, 2002 Slip sheet at p 4].

To make it absolutely certain that plaintiff's claim for attendant care would be denied once its order became final, the WCAC wrote:

> Recognizing his failure in proving the reasonableness of the attendant care, plaintiff requests a remand that allows him to enter the necessary proofs. Such a remand would improperly advantage plaintiff and disadvantage defendant. We cannot ignore the legal consequence of plaintiff resting

> on his proofs at the conclusion of all hearings [April 19, 2002 slip sheet at p 4].

If the WCAC had wanted to leave the door open for plaintiff to receive attendant care benefits, then it would not have slammed it shut by denying his request to reopen the record. Clearly, the WCAC intended its order denying attendant care to become final. Thereafter, this Learned Body caused that order to become final when issued its order dated May 22, 2003 denying his application for leave to appeal. In light of that denial, the WCAC's order became final and pursuant to the law of this case, the WCAC was legally obligated to honor its prior decision, even if it concluded that the magistrate erred the first time around for omitting an award of attendant care benefits.

ARGUMENT II

PLAINTIFF'S SECOND CLAIM FOR ATTENDANT CARE SERVICES DID NOT ALLEGE A CHANGE IN CONDITION AS A JUSTIFICATION FOR AN AWARD OF ATTENDANT CARE SERVICES.

Item 25 of the May 22, 2002, application for hearing instructed the plaintiff in pertinent part to, "Specify the relief sought." In response, plaintiff wrote, "See attached addendum and affidavit." A copy of the May 22, 2002 application and its attachments is affixed hereto. The attachment provided, "Claimant during the course of employment suffered severe injury to spine and lower limbs rendering him totally and permanently disabled. Claimant is in need of 56 hours of attendant care in accordance with section 418.315."

The affidavit attached to the May 22, 2002 application likewise failed to mention a change of condition. Instead, it focused on the magistrate having "overlooked" the request for attendant care benefits at the close of the initial hearing and his counsel's

prompt request for a correction of that oversight. Therefore, the May 22, 2002 application for hearing did nothing more than to regurgitate the request for attendant care benefits that was made at the close of the of the proofs as quoted in the WCAC's April 19, 2002 decision (See the April 19, 2002 slip sheet at pp 2-4). It did not mention or for that matter allege a change of condition.

The form application for hearing that was completed by the plaintiff dated May 22, 2002, offered him a second chance to allege a change of condition. In this regard, item 28 asked, "Does this application involve a disputed claim for medical benefits." When completing the application for hearing, plaintiff check the box marked, "No."

As noted by the WCAC in its April 19, 2002, opinion, Section 315 of the Workers' Disability Compensation Act "addresses the payment of medical expenses including attendant care" (April 19, 2002, slip sheet at pp 1-2). In this sense it could be argued that by checking the "No" box, Plaintiff wasn't even claiming attendant care benefits, albeit he did specifically ask for 56 hours of such benefits in his application for hearing

While it certainly can be argued that medical benefits and attendant care are separate benefits payable under the Act and as such, plaintiff's failure to affirmatively request medical benefits in his May 22, 2002, application is not fatal to his claim, it cannot be argued that the request for attendant care implied the concomitant allegation of a change of condition necessary to evade the doctrine of Res Judicata. Stated simply, plaintiff did not allege a change of condition and as such he should have been precluded from re-litigating the same question that was previously resolved against his interest via a final order.

ARGUMENT III

THE WCAC'S APRIL 12, 2005 OPINION AND ORDER AWARDING ATTENDANT CARE SERVICES WAS NOT BASED ON A CHANGE OF CONDITION.

Since the plaintiff relied on the medical evidence that was admitted into the record during the prior proceeding as the foundation for his expert's testimony the second time around, there obviously was no medical evidence showing the occurrence of a distinguishable medical condition since the prior adjudication. Consequently, the WCAC could not have found a change of condition based on the medial proofs.

While plaintiff most likely will argue that the WCAC implicitly found a change of condition predicated upon his testimony that his condition had gotten worse, such a finding would be contrary to this August Tribunal's pronouncement in *Rakestraw v General Dynamics*, 469 Mich 220, 666 NW2d 199 (2003). It would have also been in opposite to the record herein, which, as shown in the Defendant-Appellant's application for leave to appeal dated April 26, 2007, actually established an improvement in Plaintiff's condition, albeit a nominal improvement. Finally, if the WCAC's decision awarding attendant care benefits was based on a change of condition, then logic would dictate that the administrative tribunal would have said so, or at the very least, intimated as much in its opinion.

Scour the April 12, 2005 opinions authored by the three WCAC panel members as this Honorable Court may, it will not find a single reference to a change of condition. It will, however, find that Chairperson Reamon's decision expressly turned on his belief

that magistrate had acted properly in correcting an error of omission. In this regard, Chairperson Reamon wrote:

> We believe this matter falls within the scenario covered by the *Barnowsky* case. That case involved a situation wherein the magistrate's opinion failed to include language ordering defendant to pay for plaintiff's psychological treatment even though the magistrate found plaintiff's mental disability compensable. The present case is similar in that regard. The magistrate, by finding *Barnowsky* instructive, implicitly concurs with plaintiff's position that the magistrate committed an error of omission in the first proceeding in not specifically including attendant care benefits as part and parcel of his first opinion. We like wise read *Barnowsky* as instructive ... [April 12, 2005 slip sheet at p 8. See *Barnowsky v General Motors Corp.,* (docket # 231169), Lv granted 467 Mich 899 (2002)] Lv dism 469 Mich 856 (2003)].

This ruling was in complete accord with the plaintiff's theory of the case; namely, the magistrate had erred in not providing for nursing care benefits the first time around and he was entitled to a correction of that error.

Forgetting for the moment that this second bite at the apple thrown to the plaintiff by the WCAC completely ignored the prior decision of its predecessor panel which specifically denied attendant care benefits, a decision that was allowed to become final when this Learned Body denied plaintiff's application for leave to appeal, the essence of Chairperson Reamon's decision is that the magistrate erred the first time around and we are permitting him to correct that error during this round of litigation. As such, his opinion was premised entirely upon the initial record and could not, as a matter of law or logic, have turned on anything in the second record. That being the case it was impossible to have been based on a change of condition.

Commissioner Glaser's decision was predicated exclusively upon which party carried the burden of proof. Commission Kent wrote solely to indicate that he disagreed with Commissioner Glaser's premise. Since neither of their opinions even mentioned a change of condition, they were obviously not based on an alleged change of condition.

While there is no indication whatsoever that the WCAC took a change of condition into consideration when affirming the award of attendant care benefits, there is an expressed indication that the award was premised upon the short coming in the magistrate's initial decision. By definition, that error and its correction the second time around was based on the initial record, not a change in condition established in the second record. That being the case, the WCAC award of attendant care could not have been based upon a change of condition as a matter of both law and logic.

ARGUMENT IV

THE WCAC'S APRIL 12, 2005 OPINION AND ORDER AWARDING ATTENDANT CARE SERVICES [WAS] NOT BASED ON THE PLAINTIFF'S APPLICATION OR ON THE APPLICATIONS FILED BY THE ATTENDANT CARE PROVIDERS.

As a matter of course, the WCAC's award of attendant care was not based on any application for hearing filed subsequent the April 19, 2002, opinion and order of its predecessor. The WCAC's April 12, 2005 decision turned on the original record and the perceived error of the magistrate in failing to provide for attendant care in his initial decision. By implication, that record and decision was premised upon the initial application for hearing, not the May 22, 2002 application for hearing filed by the plaintiff or the July 18, 2003 applications for hearing filed on the eve of the hearing by the alleged attendant care givers.

The decision could not have turned on the plaintiff's application for hearing because he neglected to allege and/or prove the necessary change of condition required as a matter of law to evade the prior final order of the WCAC denying attendant care. As previously noted the applications for hearing filed by the alleged attendant care givers had not even been served by the Bureau as of the date of hearing and as such were a legal nullity.

Rule 4. (1) [R408.34] of the Administrative Rules accompanying the Workers' Disability Compensation Act provides:

> In cases of dispute coming under the jurisdiction of the bureau, any party may petition the bureau for relief. The complaining party shall file his or her petition (form 104A, 104B, or 104C) with the bureau at its Lansing office. *The bureau shall then serve the adverse party with a copy of the petition* and, at the same time, notify the parties of the time and place of the initial hearing. *The adverse party shall file his or her answer to the petition with the bureau within 15 days after service* and serve a copy of the answer on the complaining party [Emphasis added. A copy of Rule 4 (1) is attached].

See also Rule 6 (a) [R408.36], which states:

> Rule 6. Service of all petitions, papers, notices, and orders shall be in accordance with the following:
>
> (a) *Service* of all original petitions for hearing under R 408.34 (1) *shall be by the bureau* on each named party to the case at the time service is made [Emphasis added. A copy of Rule 6 (a) is also attached].

As noted at page 4 of the transcript of proceedings, the form B petitions were filed by the alleged care givers on July 18, 2003. These petitions were not served on the Defendant until November 18, 2003 (See the Acknowledgement & Notice of Hearing dated November 18, 2003, which was served by the bureau. A copy of that Notice and

copies of the July 18, 2003 applications of the alleged care givers are attached). This service occurred long after the July 29, 2003 and July 31, 2003 hearings and more than two months after the mailing of the magistrate's decision awarding attendant care. Even if these applications had been properly served so as to capture jurisdiction over the defendant, the period for filing an answer had not yet run by the time of trial. Therefore, the petitions had no legal efficacy.

Further, those applications for hearing were upon information and belief dismissed by the magistrate. See item No. 2 in the WCAC's certification of record. If the alleged care giver's applications were dismissed by the magistrate, then he obviously did not rely upon them when rendering his decision and as such, the WCAC could not have relied upon them either when affirming that decision.

CONCLUSION

In its April 12, 2005 decision, the WCAC resurrected the magistrate's July 9, 2001 decision and corrected what it perceived to be an oversight on his part in falling to award attendant care benefits. When doing so, the WCAC completely ignored the final April 19, 2002 decision of its predecessor panel which denied attendant care benefits.

Nowhere in the record is there any indication that the WCAC required plaintiff to show a change of condition to evade the prior denial of attendant care benefits. Nor was a record created that would support such a finding. Consequently, plaintiff failed to plead or establish a change of condition. Instead, the plaintiff proceeded on the theory of a prior omission. The WCAC bought that theory and granted plaintiff the benefits that had been specifically denied by way of a final order.

Our system of jurisprudence provides for due process of law. To insure that claimants receive due process, they are given every opportunity to plead and present their claims. They are not, however, given the opportunity to repeatedly retry issues that were resolved by final order.

Workers' Compensation claimants are bound by prior adjudications unless they demonstrate a change of condition sufficient to justify a determination of whether their current condition would permit an award of the benefits that were previously denied. See *White v Mich Consolidated Gas Co.,* 352 Mich 201; 89 NW2d 439 (1958) and *Hlady v Wolverine Bolt Co.,* 393 Mich 368, 375-6; 224 NW2d 856 (1975). In the absence of a change of condition, they may not receive what was once denied, simply because a new panel of the WCAC did not like its predecessor's ruling.

The WCAC recognized that plaintiff had not established entitlement to attendant care during the initial proceedings before the bureau. Therefore, it denied his request to re-open the record, noting that it could not ignore the legal consequence of plaintiff resting on his proofs at the close of trial (April 19, 2002 slip sheet at p 2). The second time this matter appeared before the WCAC, the successor panel completely ignored its predecessor's final decision and provided plaintiff the relief that was denied to him during his initial appeal.

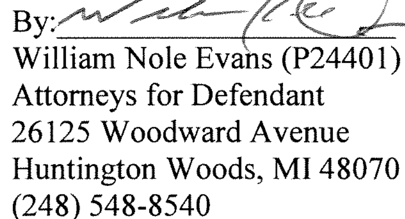
Stare decisis, the law of the case and judicial economy demand that the April 12, 2005 decision of the WCAC be summarily vacated and that the April 19, 2002, opinion and order of the WCAC be given full force and effect. As such, this August Tribunal should take peremptory action and vacate the April 12, 2005, opinion and order of the WCAC and reinstate the April 19, 2002, opinion and order denying attendant care

benefits until such time as plaintiff alleges and proves a change of condition subsequent to the initial adjudication sufficient to justify an award of the benefits that were previously denied by a final order of the bureau.

In the alternative, this Honorable Court should grant leave to appeal to provide the bench and bar with appropriate guidance on the questions presented herein, as well as the questions stated in the Defendant's application for leave to appeal dated April 26, 2007. By granting the application, this August Tribunal can determine the reach of *Barnowsky* and *Ivezaj v Federal Mogul Corp.,* 197 Mich App 462; 495 NW2d 800 (1992), two cases of questionable value and clear misapplications by the WCAC herein. It can also issue a decision that sets forth what is meant by a final decision of the bureau, thus permitting an orderly administration of the provisions of the Workers' Disability Compensation Act of 1969, as amended.

Respectfully submitted,

EVANSPLETKOVIC, P.C.



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