

STATE OF MICHIGAN
IN THE SUPREME COURT

WAYLON E. GEE,

Plaintiff-Appellee,

vs

ARTHUR B. MYR INDUSTRIES, INC.,

Defendant-Appellant.

Supreme Court:
133762

Court of Appeals:
269351

Lower Court: WCAC
Docket No: 03-0402

133762
Suppl

PLAINTIFF'S SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTIONS PRESENTED

I

WAS THE WCAC'S APRIL 19, 2002 OPINION AND ORDER DENYING PLAINTIFF'S CLAIM FOR ATTENDANT CARE SERVICES UNDER MCL 418.315(1) A FINAL DECISION ONLY AS TO ATTENDANT CARE RENDERED BEFORE THE ORIGINAL HEARING DATE?

Plaintiff-Appellee answers "YES."

II

WHILE PLAINTIFF'S SECOND CLAIM FOR ATTENDANT CARE SERVICES DID NOT EXPRESSLY ALLEGE A CHANGE OF CONDITION, IS THAT NOT FATAL TO HIS CLAIM?

Plaintiff-Appellee answers "YES."

III

DOES THE WCAC'S APRIL 12, 2005 OPINION AWARDED ATTENDANT CARE SERVICES APPEAR NOT TO HAVE BEEN BASED UPON A CHANGE IN PLAINTIFF'S CONDITION?

Plaintiff-Appellee answers "YES."

IV

DID THE WCAC'S APRIL 12, 2005 OPINION AND ORDER THAT AWARDED ATTENDANT CARE SERVICES BASED UPON BOTH PLAINTIFF'S APPLICATION AND THE APPLICATIONS FILED BY THE ATTENDANT CARE PROVIDERS?

Plaintiff-Appellee answers "YES."

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STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Plaintiff Waylon Gee adopts the answer to defendant's application for leave to appeal he previously filed with this Court. Since the filing of that answer, this Honorable Court issued an order on September 14, 2007, directing its clerk to schedule oral argument on whether to grant the application or take other peremptory action. The Court further directed the parties to file supplemental briefs, providing as follows:

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 services 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 in the plaintiff's condition; and (4) whether the WCAC's April 12, 2005 opinion and order awarded attendant care services based on the plaintiff's application or on the applications filed by the attendant care providers.

Plaintiff now files this supplemental brief to address the issues noted in the Court's order.

ARGUMENT I

THE WCAC'S APRIL 19, 2002 OPINION AND ORDER DENYING PLAINTIFF'S CLAIM FOR ATTENDANT CARE SERVICES UNDER MCL 418.315(1) WAS NOT A FINAL DECISION ONLY AS TO ATTENDANT CARE RENDERED BEFORE THE ORIGINAL HEARING DATE.

In *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 640; 433 NW2d 787 (1988), this Court held that res judicata was not an “inflexible doctrine,” and that “its applicability depends in part upon the legal context in which a determination is made.” In that regard, the Court wrote in *Pike v City of Wyoming*, 431 Mich 589, 595; 433 NW2d 768 (1988), that “...workers’ compensation determinations, which generally involve claims for continuing benefits, are different by their very nature from judgments rendered in tort and most other civil actions.” As a result, the Court held that the fact that benefits were payable over a period of years, during which the level or type of payments required could be affected by changes in the underlying law or facts, “may render a prior determination obsolete or erroneous for future purposes.” *Id.*, at 599.

This type of reasoning has led to a distinction between various types of determinations in workers’ compensation matters. A finding as to a claimant’s underlying *entitlement* to workers’ compensation has been held to be subject to res judicata, while a decision as to the *amount* of benefits payable has been excluded from the reach of that doctrine. In *Quinton v General Motors Corp*, 453 Mich 63, 91, n 50; 551 NW2d 677 (1996), the Court explained as follows:

Although a worker's compensation award is never final, and the amount of the award is not entitled to conclusive res judicata effect, a tribunal's decision with respect to its finding of an underlying disability or work-relatedness is ordinarily

considered final and is to be accorded deference absent a showing of a change of circumstances.

Such a distinction is particularly appropriate with respect to an employer's liability for medical expenses. Following a finding of compensability, an injured employee may need a new type of treatment, such as a previously unanticipated surgery or a different medication. Obviously, *res judicata* would not bar this new treatment. Consequently, medical awards typically grant benefits "until further order of the Bureau." This language implies that the award is never final as to those expenses, but is always subject to subsequent modification.

As a result, the WCAC's order of April 19, 2002 was not, and could not have been, final as to the type or amount of medical care, including attendant care expenses. At best, it could have precluded further consideration of attendant care expenses through the date of the original hearing, the date upon which *res judicata* attaches. *Askew v Ann Arbor Public Schools*, 431 Mich 714; 433 NW2d 800 (1988).

ARGUMENT II

WHILE PLAINTIFF'S SECOND CLAIM FOR ATTENDANT CARE SERVICES DID NOT EXPRESSLY ALLEGE A CHANGE OF CONDITION, THAT IS NOT FATAL TO HIS CLAIM.

Plaintiff acknowledges that his second claim for attendant care services did not expressly allege a change in his condition since the earlier proceedings. However, he further submits that this is not fatal to his claim.

This Honorable Court has held that "the niceties of common-law pleadings are not required" in workers' compensation proceedings, as long as the defendant is not harmed by imprecisions in the pleadings. *Pardeick v Iron City Engineering Co*, 220 Mich 653, 657;

190 NW 719 (1922). See, also, *Wing v Aten*, 316 Mich 365, 370; 25 NW2d 561 (1947); *Kaiucki v American Car & Foundry Co*, 200 Mich 604; 166 NW 1011 (1918). Clearly, there was no prejudice here, where defendant clearly knew that a change in condition is a defense to res judicata.

Consequently, the fact that plaintiff did not specifically plead a change in condition does not preclude a finding that he has proven one. In any event, this was not the sole basis for the opinion below granting plaintiff attendant care benefits.

ARGUMENT III

THE WCAC'S APRIL 12, 2005 OPINION AWARDING ATTENDANT CARE SERVICES DOES NOT APPEAR TO HAVE BEEN BASED UPON A CHANGE IN PLAINTIFF'S CONDI- TION.

Plaintiff cannot honestly contend that the WCAC's April 12, 2005 opinion was in any way based upon a finding that he had proven a change in his condition since the earlier opinion. Instead, the WCAC seems to have found both that there had previously been an error of omission, and also that res judicata would not apply to the application filed by plaintiff's care providers since they were not parties to the original action.

The Court of Appeals, however, did offer this as an alternative basis for its opinion. This is entirely appropriate, and should be considered to have preserved the issue if it becomes critical. If this Court believes that the Court of Appeals should not have considered this issue in the first instance, it should remand the case to the WCAC for further proceedings.

ARGUMENT IV

THE WCAC'S APRIL 12, 2005 OPINION AND ORDER AWARDED ATTENDANT CARE SERVICES BASED UPON BOTH PLAINTIFF'S APPLICATION AND THE APPLICATIONS FILED BY THE ATTENDANT CARE PROVIDERS, AND GAVE APPROPRIATE REASONS WHY EACH WOULD BE AN INDEPENDENT BASIS FOR SUCH AN AWARD.

This Court has asked which application or applications formed the basis for the WCAC's award of attendant care services. The correct answer is "both," in that the WCAC provided reasons why the award was appropriate based upon each application independently.

If the WCAC was not awarding payment for attendant care based upon plaintiff's application, there would have been no reason for it to rely upon *Barnowsky v General Motors Corp*, unpublished opinion of the Court of Appeals rel'd December 21, 2001 (Docket No. 231169), lv gtd ___ Mich ___; 654 NW2d 329 (2002), lv dismissed ___ Mich ___; 666 NW2d 667 (2003).¹ *Barnowsky* deals with the issue of whether the magistrate or WCAC possesses the power to correct a prior oversight, when a claimant files a new application after the adjudication of an earlier one. Obviously, this reasoning would not apply to the providers' applications.

Correspondingly, the WCAC would have had no cause to rely upon *Ivezaj v Federal Mogul Corp*, 197 Mich App 462; 495 NW2d 800 (1993), had it not been awarding attendant care on the applications filed by the caregivers. *Ivezaj* dealt with the question of whether a family caregiver's request for payment would be barred, if the injured employee had

¹A copy of *Barnowsky* is attached, for the Court's convenience.

earlier filed an application but failed to prosecute a claim for attendant care. Again, it is clear that this case would have been irrelevant, if the award was not also based upon the providers' applications.

In other words, the WCAC offered a reason to award attendant care based upon the plaintiff's application, and another reason to award care based upon the providers' applications. Each reason would serve as an independent basis for the granting of attendant care services in this case.

Defendant's supplemental brief reiterates its belated (and, plaintiff submits, waived) objection to any litigation based upon the providers' applications, which had not yet been formally served by the Bureau at the time of the original hearing. Plaintiff directs this Court to the response in his previously-filed application for leave to appeal, and will only briefly address this issue further here.

In that regard, defendant's argument truly elevates form over substance. Where the providers' applications covered the precise same subject area and required exactly the same proofs as did plaintiff's, what was the harm in combining them and litigating all of them at once? As previously noted, it is ironic that a party attempting to invoke a doctrine designed to promote judicial economy would insist upon a procedure that would have precisely the opposite effect. Why should there be two separate hearings, when each would cover the exact same ground?

In point of fact, the Bureau did eventually serve the applications filed by providers Nancy and Lucille Gee, so that a hearing would ultimately have been held on those applications even if they had not been litigated as part of the instant proceedings. That

being so, it makes absolutely no sense to find that the parties would be required to litigate again the very same subject matter already litigated, using the same evidence to do so.

As a further note, the dismissal order defendant refers to “on information and belief” was actually entered *after* the entry of the magistrate’s order granting attendant care in this case. That dismissal order was mailed on April 9, 2004, and was premised upon the fact that the subject matter had already been litigated nearly a year earlier.² In other words, defendant has the time line confused, and the dismissal did not occur before relief was granted on the applications at all. It was designed instead to prevent the duplicative hearings defendant apparently now belatedly suggests should have taken place. Defendant should not be allowed to lull plaintiff into action, only to object after the time for an appeal had long expired.

If this Court holds that hearings should not have been held on the providers’ applications until they were formally served by the Bureau, it should remand this matter for a hearing on said applications, so that Nancy and Lucille Gee can get their day in court. However, plaintiff submits that, where defendant had full notice of those applications, knew they were being litigated as well as was plaintiff’s application, and utterly failed to object to this procedure through several successive rounds of litigation on appeal, the Court should find that the prior litigation on the providers’ application was appropriate.

Leave to appeal should be denied accordingly.

²A copy of the dismissal order is attached.

RELIEF

WHEREFORE Plaintiff-Appellee WAYLON E. GEE respectfully renews his request that this Honorable Supreme Court deny defendant's application for leave to appeal, and further grant him any other relief to which he may be entitled.

Respectfully submitted,



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