

STATE OF MICHIGAN
IN THE COURT OF APPEALS
ON APPEAL FROM THE WORKER'S COMPENSATION APPELLATE COMMISSION

SHARON REINICHE,

Plaintiff-Appellee,

v

WAL-MART STORES, INC. and NATIONAL
UNION FIRE INSURANCE COMPANY,

Defendants-Appellants.

C.A. NO:

L.C. NO: WCAC 000090

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DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

COPY OF WORKERS' COMPENSATION APPELLATE COMMISSION'S
AND MAGISTRATE'S DECISIONS

PROOF OF SERVICE

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STATEMENT OF BASIS OF JURISDICTION

Defendants submit that the Court has jurisdiction to entertain this application for leave to appeal pursuant to MCL 418.861a(14); MSA 17.237(861a)(14) [§861a(14)]. Defendants are applying for leave to appeal the order, mailed February 9, 2001 of the Worker's Compensation Appellate Commission. In that order, the Commission affirmed in part and reversed in part the Magistrate's decision, a decision which had denied plaintiff benefits. The Commission has remanded the case for completion of the record, but the Commission has not retained jurisdiction.

The Commission's order is "final" for §861a(14) purposes in the following sense. First, the Commission has definitively and finally ruled that plaintiff's injury arises out of and in the course of her employment. Second, the Commission has, as will be explained in the accompanying brief, ruled on a point never addressed by the Magistrate and therefore foreclosed by any remand resolution of that point, namely: whether the social or recreational provision of the Worker's Disability Compensation Act applies to defeat plaintiff's claim for benefits. MCL 418.301(3); MSA 17.237(301)(3). Third, the Commission says at one point that it is "remand[ing] the case for the granting of a general disability award", which is a ruling that appears to finally settle that question (Commission's majority opinion, p 1).

The fact that the Commission has not retained jurisdiction, defendants submit, means that this particular order of the Commission is final for MCL 418.861a(14); MSA 17.237(861a)(14) purposes. Since there are no delayed applications in workers' compensation proceedings, defendants must appeal the Commission's order now. Compare, *Wszola v Robert Carter Corp*, 187 Mich App 372; 468 NW2d 57 (1991).

ISSUES

I.

HAS THE WORKER'S COMPENSATION APPELLATE COMMISSION MISAPPREHENDED ITS ADMINISTRATIVE ROLE AND USURPED THE MAGISTRATE'S FACTFINDING? FURTHERMORE, HAS THE COMMISSION BEEN INCONSISTENT POST-MUDEL BY SAYING IN SOME CASES THAT IT WILL NOT REWEIGH THE EVIDENCE AND DOING JUST THAT IN THIS CASE?

Defendants-Appellants, Wal-Mart Stores, Inc. and National Union Fire Insurance Company, assert the answer is "YES"

II.

IS THE COMMISSION'S DIRECTIVE ON REMAND INCONSISTENT?

Defendants-Appellants, Wal-Mart Stores, Inc. and National Union Fire Insurance Company, assert the answer is "YES"

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WAL-MART STORES, INC. and NATIONAL
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Defendants-Appellants.

DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

Defendants-Appellants, Wal-Mart Stores, Inc. and National Union Fire Insurance Company, by and through their attorneys, Lacey & Jones, request that the Court grant this application, stating as follows:

1. Defendants are appealing the order and opinion of the Worker's Compensation Appellate Commission, mailed February 9, 2001. In that order, the Commission affirmed in part and reversed in part the Magistrate's decision denying benefits. The Commission remanded the case but did not retain jurisdiction.
2. Defendants request that the Court grant this application or grant defendants such other relief as the Court deems proper.
3. The Worker's Compensation Appellate Commission has misapprehended its administrative appellate role. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709-710; 614 NW2d 607 (2000). The Commission here says that it accepts the factfinding by the Magistrate, accepts the Magistrate's statement of the applicable rule of law, but the Commission

reverses by giving greater weight than the Magistrate to a particular factor under the law. This is an invasion of the factfinding province of the Magistrate. *Mudel, supra*. The Commission has also been inconsistent post-*Mudel* on whether it will reweigh evidence. In *Ruthart v Sam's Club (Wal-Mart)*, 2000 ACO #635, the Commission said in a post-*Mudel* decision that, "Every member of this Commission has at one time or another indicated in opinions that we will not on appeal 'weigh' evidence contradictory to a magistrate's decision and then reverse on a theory of 'the great weight of the evidence'." *Ruthart, slip op* at p 4 n 1 (attached). By contrast, the Commission here says that the Magistrate should have "given greater weight" to a fact (Commission's opinion, p 4). The Commission here reverses because that fact "tilts this case in favor of plaintiff's claim of work-relationship." (*Id.*, p 5).

4. The Commission's remand (without retention of jurisdiction) is also inconsistent. The Commission originally says it reverses "in plaintiff's favor on this issue and remand[s] the case *for the granting of a general disability award* in accordance with Section 301(4) of the Act." (Commission's opinion, p 1; emphasis is defendants'). This suggests that an award must be entered. Yet, the concluding paragraph of the Commission's opinion says that the case is "remanded to the magistrate for a full explanation of his conclusion that plaintiff demonstrated general disability". (Commission's opinion, p 7). This concluding directive requires exploration of "any other evidence on the existing record relevant to plaintiff's entitlement to benefits". (*Id.*). Defendants submit that if the Magistrate has not fully explained or explored the question of whether plaintiff has demonstrated a general disability, then there should be no remand "for the granting of a general disability award". (Commission's opinion, p 1).

5. In support of this application, defendants offer the following.

STATEMENT OF FACTS

(Numbers in parentheses refer to the pages of the transcript of the trial proceedings. Numbers preceded by "H" refer to the pages of the deposition of Dr. Holda. Numbers preceded by "A" refer to the pages of the deposition of Dr. Anderson).

Plaintiff, who was 52 years of age at the time of trial (72), began working for defendant-employer [hereinafter defendant] on January 25, 1996 (73). She worked as a cashier, as a "sales associate," and as a "courtesy desk associate." (73-74). An "associate" of defendant means that the person is an employee (77).

The circumstances surrounding plaintiff's injury were as follows. The Lion's Club from plaintiff's small central Upper Peninsula town (named Rock) approached defendant in January 1998 regarding participation in a Labor Day parade in September (24; 75; 89). The assistant manager said that she would ask the associates of their interest, and that was done (25-26). The associates voted that they wanted to participate (25-26; 41).

Later that year in the spring or summer of 1998, the Lion's Club followed up with a form inquiring as to the type of participation (26). That question was discussed and the associates decided that they would create a float (26-27).

Defendant then asked for volunteers and some employees, including plaintiff, agreed to participate (27-28). Plaintiff had been unaware of the initial meeting where participation in the parade had been discussed, but learned about it from a customer in the summer of 1998 (96).

There was no management involvement in the creation of the float (28; 98). There was perhaps one meeting at the store where management was not present or only minimally involved (98-99). There was no company pressure for employees to become involved (41).

Defendant did not take control or express any direction into what float the participants created, except to say that the float should not be “x-rated” (100; 134).

The float was constructed in an employee’s driveway (68-69). Participants were not paid (68-69). The participants decided to use, amongst other things, smiley faces on the float that resembled Wal-Mart’s smiley face logo (135). Plaintiff also testified that she wore a Wal-Mart shirt, that the theme of the float was “we are family,” and that defendant would pay up to a \$150.00 limit for decorations such as balloons (32; 99). Plaintiff provided her “mule”-type tractor that pulled plaintiff’s trailer upon which the float had been constructed (128-130).

After the parade was completed, plaintiff, along with the help of her husband, connected the trailer to their van and then drove the mule upon the trailer (*Id.*). After that was done, plaintiff walked on the trailer to the mule to get a can of pop that had been left on the mule when she slipped and fell (105). Plaintiff injured her left knee (74).

Plaintiff underwent surgery on the knee in October 1998 (107). Plaintiff had also suffered from a preexisting congenital hip problem that had required surgery, including an artificial hip (116). When asked whether she felt this was a workers’ compensation claim so as to file for workers’ compensation benefits, plaintiff declined saying she was receiving benefits from her automobile insurance company, benefits she was still collecting through the time of trial (60-61; 142). Plaintiff also receives social security disability benefits (143).

Plaintiff returned to a favored job for defendant, until a new policy precluded providing her with a favored job for a non-work-related injury (64-65). Plaintiff’s last day of actual work was March 25, 1999, but she does not claim a new date of injury on that date (5-10).

Plaintiff filed her application for mediation or hearing on April 12, 1999 (Magistrate’s opinion, p 1). Trial was held before Magistrate Hedstrom. The lay witnesses

consisted of plaintiff, Torey Prati (the assistant store manager at the time in question), and Cynthia Devera Perron (defendant's personnel manager).

In an order and opinion, mailed February 23, 2000, the Magistrate denied plaintiff benefits on the basis that the injury sustained did not arise out of and in the course of her employment.

Plaintiff appealed to the Worker's Compensation Appellate Commission. The Commission reversed the Magistrate's finding that plaintiff's injury did not arise out of and in the course of employment. The Commission also said that the case was remanded "for the granting of a general disability award" and did not retain jurisdiction. This brief follows in support of defendants' position that the Commission has erred.

ARGUMENT I

THE WORKER'S COMPENSATION APPELLATE COMMISSION HAS MISAPPREHENDED ITS ADMINISTRATIVE ROLE AND USURPED THE MAGISTRATE'S FACTFINDING. FURTHERMORE, THE COMMISSION HAS BEEN INCONSISTENT POST-MUDEL BY SAYING IN SOME CASES THAT IT WILL NOT REWEIGH THE EVIDENCE AND DOING JUST THAT IN THIS CASE.

The Court's **standard of review** is to determine whether the Worker's Compensation Appellate Commission has misapprehended its administrative appellate role. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709-710; 614 NW2d 607 (2000). Defendants submit that the Commission has misapprehended its administrative appellate role. It has usurped the Magistrate's factfinding. The Commission has also been inconsistent subsequent to *Mudel* in frequently saying that it will not reweigh the evidence and doing the opposite here. The Court should therefore reverse and reinstate the Magistrate's order.

The Supreme Court in *Mudel* restored the Commission's ability to make factual findings, but also insisted that in so doing the Commission not misapprehend its administrative appellate role. *Mudel, supra* at 709-710. That is, the Commission cannot set aside a Magistrate's factfinding where that factfinding is supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3); MSA 17.237(861a)(3).

Here, the Commission says that, "We fully accept the magistrate's understanding of the underlying facts in this case." (Commission's opinion, p 4). The Commission also does not disagree with the Magistrate's application of relevant case law to determine the question whether plaintiff's injury was one "arising out of and in the course of employment." MCL

418.301(1); MSA 17.237(301)(1). What the Commission majority does disagree with is: the weight given by the Magistrate to factors under the applicable rule of law. The Commission believes that the Magistrate should have “given greater weight” to one factor (Commission’s opinion, p 4). The Commission recognizes that legally no one factor is “absolute” or “dispositive in the determination of work-relationship.” (Commission’s opinion, p 5, 6, respectively). But, the Commission says that unlike what the Magistrate found, “other factual variables might tilt the determination in the other direction.” (Commission’s opinion, p 6).

Defendants submit that this is a usurpation of the factfinding function of the Magistrate. Where the Commission agrees with the underlying facts of the Magistrate and where the Commission does not say that the Magistrate has applied an incorrect legal standard, then the Commission is reversing solely on the weight of the evidence. The weight to be assigned any particular “factual variables” so as to “tilt” the case one way or the other is the very essence of factfinding. See generally, *Thornton v Luria-Dumes Co-Venture*, 347 Mich 160, 162; 79 NW2d 457 (1956). That factfinding is entrusted to the Magistrate. To reverse although you agree with everything about the Magistrate’s decision except the weight to be given factual variables is to misapprehended the administrative appellate role and insert oneself into the shoes of the Magistrate. *Mudel* recognizes wide ranging powers of the Commission, but those powers do not extend to reweighing different factual variables where the Magistrate’s resolution of that weighing process has support in the record.

The Commission has been inconsistent post-*Mudel* on this question of reweighing of evidence. In *Ruthart v Sam’s Club (Wal-Mart)*, 2000 ACO #635 (attached), the Commission emphatically said:

Every member of this Commission has at one time

or another indicated in opinions that we will not on appeal “weigh” evidence contradictory to a magistrate’s decision and then reverse on a theory of “the great weight of the evidence”. *Ruthart, supra*, slip op at p 4 n 1.

Yet, the Commission here says that the Magistrate’s error is not “giv[ing] greater legal weight” to one factual variable (Commission’s opinion, p 4). The Commission weighs that factor more heavily and, in the Commission’s view, that “tilts this case in favor of” plaintiff (Commission’s opinion, p 5).

Defendants submit that the Commission either can or cannot reweigh the evidence post-*Mudel*. Whatever the answer to that question is the answer is *not*: the Commission can weigh the evidence in certain cases and refuse to weigh the evidence in others.

Also, the Magistrate had not reached a particular issue and the Commission has decided it for the first time on appeal. That too is error, particularly given that the Commission is remanding the case on other points and could just as easily remand on this issue. That would provide the Magistrate the opportunity to rule in the first instance on an issue he had no need to reach.

To explain, the Magistrate had determined that plaintiff’s injury was not one “arising out of and in the course of employment” under MCL 418.301(1); MSA 17.237(301)(1). A claimant must first demonstrate that the injury is one “arising out of and in the course of employment” under § 301(1) before one proceeds to consider whether such work injury is nevertheless non-compensable because it was “incurred in the pursuit of an activity the major purpose of which is social or recreational” under MCL 418.301(3); MSA 17.237(301)(3). *Angel v Jahm, Inc. and Wausau Underwriters Insurance Co*, 232 Mich App 340; 591 NW2d 64 (1998); compare also, *Eversman v Concrete Cutting & Breaking*, 463 Mich 86; 614 NW2d 862 (2000);

and, *Lesh v Mostly Mopars*, 1991 ACO #176. The Commission resolved the §301(3) question in the first instance on appeal saying that “we are unpersuaded that plaintiff’s activity fits within this provision.” (Commission’s opinion, p 7). Since the Commission was remanding, the Magistrate should have been given the opportunity on remand to address this question in the first instance. Alternatively, the Commission should have resolved the issue on remand – the general disability §301(4) issue – on appeal as well. That §301(4) issue is the subject of the next argument. Defendants note here only this: we have here the Commission majority deciding one issue in the first instance on appeal [the §301(3) issue] and remanding, rather than deciding, the general disability §301(4) issue. The Commission should resolve neither or both. The Court should address the Commission’s inconsistency and resolve it.

ARGUMENT II

THE COMMISSION'S DIRECTIVE ON REMAND IS INCONSISTENT.

The Court's **standard of review** is to determine whether the Commission has erred as a matter of law. MCL 418.861a(14); MSA 17.237(861a)(14). Here, the Commission has erred as a matter of law by, on the one hand, "remand[ing] the case for the granting of a general disability award" and, on the other hand, concluding that a remand is necessary because the Magistrate's initial decision with respect to a general disability award requires a fuller explanation, "further discussion", and further "explor[ation]." (Commission's opinion, p 7). This remand directive is inconsistent and should be resolved by the Court now.

In the opening paragraph of its opinion, the Commission majority says in pertinent part, "we reverse in plaintiff's favor on this issue and remand the case for the granting of a general disability award in accordance with Section 301(4) of the Act." (Commission's opinion, p 1). This directive suggests that the Magistrate on remand must grant a general disability award. By contrast, the Commission's majority concludes its opinion saying that:

This matter is remanded to the magistrate for a full explanation of his conclusion that plaintiff demonstrated general disability, including further discussion of his preference for the testimony of Dr. Anderson, and the magistrate should explore any other evidence on the existing record relevant to plaintiff's entitlement to benefits under Section 301(4). The magistrate must also issue an order, consistent with this Section 301(4) analysis, regarding plaintiff's entitlement to weekly benefits. (Commission's opinion, p 7).

If the Magistrate must more fully discuss, explain, and explore the general disability issue as indicated in the latter quote, then the direction to grant an award in the former

quote is improper. Further exploration of the issue might lead the Magistrate to find no general disability, but that appears foreclosed by the Commission.

RELIEF

WHEREFORE, defendants-appellants, Wal-Mart Stores, Inc. and National Union Fire Insurance Company, respectfully request that the Court of Appeals grant this application for leave to appeal or grant defendants-appellants such other relief as the Court deems proper.

Respectfully submitted,

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