2015 ACO # 5

STATE OF MICHIGAN
MICHIGAN COMPENSATION APPELLATE COMMISSION

JASON R. SALENBIEN,
PLAINTIFF,

ALLSTATE INSURANCE COMPANY,
INTERVENING PLAINTIFF,

V DOCKET #14-0026

ARROW UNIFORM RENTAL LIMITED PARTNERSHIP,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE TJAPKES.

C. MATTHEW YOKOM FOR PLAINTIFF,
DANIEL S. SAYLOR FOR INTERVENING PLAINTIFF,
JAMES J. HELMINSKI FOR DEFENDANT

OPINION

WHEATLEY, COMMISSIONER

This matter comes before the Commission on appeals filed by defendant and intervening plaintiff of an order issued by Magistrate Robert J. Tjapkes, mailed February 24, 2014, in which he found that plaintiff had successfully established an injury date of July 26, 2006, and that the injury occurred in the course of and arose out of his employment. The magistrate's order also established an average weekly wage, discontinued fringe benefits, provided for weekly benefits at various rates for two closed periods of time, and an open award of $386.88.

The magistrate found defendant responsible for medical expenses pursuant to § 315 and reimbursement to intervening plaintiff as outlined in his opinion. His opinion and order also provided for ongoing payment of reasonable and necessary medical expenses subject to cost containment.

After a thorough review of the record in this case, as well as the briefs filed by the parties, the Commission reverses the underlying opinion of the magistrate, namely that the alleged injury arose out of and in the course of plaintiff's employment.

HISTORY OF THE CASE

On page two of Magistrate Tjapkes' opinion under "Statement of Claim," the magistrate gives a reasonably accurate history of the case. The Commission adopts this statement of history as part of our opinion. MCL 418.861(a)(10).

In summary, intervening plaintiff Allstate Insurance Company filed an application for mediation or hearing seeking recovery for first party no-fault insurance benefits paid to plaintiff following a motor vehicle accident occurring July 26, 2006, allegedly arising out of and in the course of employment. Plaintiff also filed his own application for mediation or hearing seeking the same benefits and any additional benefits to which he might be entitled.

The case was tried in late 2007 and in 2008, but only on the issue of whether alleged injuries arose out of and in the course of plaintiff's employment. The original magistrate found that they did not, noting that there was insufficient evidence to determine whether plaintiff was on his way to the office, on his way home, or going to some other non-work location. The Workers' Compensation Appellate Commission, the forerunner of the Michigan Compensation Appellate Commission (MCAC), upheld the decision of that magistrate.

The Michigan Court of Appeals reversed, concluding that the credible and essentially uncontested evidence was that plaintiff was on his way back to his office from a sales call at the time of the motor vehicle accident (MVA). The matter was remanded to the MCAC and in turn was remanded to the Board of Magistrates. Essentially the remand from the MCAC to the Board of Magistrates was that while the Court of Appeals had concluded from all the evidence that plaintiff was on his way back to his office at the time of the injury to do further work, the Board of Magistrates remained possessed of discretion to decide with or without further evidence whether or not the injury sustained in the MVA by the plaintiff arose out of and in the course of the employment. The Court had determined that plaintiff was, based on the record, on his way back to the office. However, the ultimate issue was not determined either by the Court of Appeals or the remand from the MCAC. Magistrate Tjapkes concluded that the Court of Appeals had decided two issues; that plaintiff's injury arose both in the course of and out of plaintiff's employment.

The defendant has appealed from Magistrate Tjapkes' opinion and makes the following two legal arguments:

> I. The Magistrate's finding on remand that Plaintiff's accident arose out of and in the course of employment is based on legal error and is not supported by competent, material, and substantial evidence.
>
> II. Plaintiff and Intervening Plaintiff are not entitled to attorney fees on any ordered reimbursement. [Defendant's brief at 2.]

Since this Commission reverses the magistrate's finding that the injury arose out of and in the course of the employment, the Commission need not and will not address defendant's second reason for appeal.

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.

DISCUSSION

The Commission reverses the magistrate's opinion. Defendant's argument that Magistrate Tjapkes' opinion is deficient in support of plaintiff's injury occurring in the course of and "arising out of" his employment as required by § 301 is persuasive.

In the current case defendant makes a credible and persuasive argument that the Court of Appeal's remand left open the question of whether or not plaintiff's injuries met both standards of § 315. That is, that the injury must be in the course of and arise out of plaintiff's employment. The Court of Appeal's opinion decided that, based on the evidence in the record, the plaintiff was returning to his office at the time of the injury after a sales call.

As noted, we are convinced that after a review of the case law argued by defendant and the plaintiff that the magistrate should have made findings consistent with the decision of the original magistrate who applied the *Stark v L. E. Myers Company*, 58 Mich App 439 (1973) and *Forgach v*

George Koch & Sons Company, 167 Mich App 50 (1988) to the facts of this matter and found that plaintiff's injury did not arise "out of" and "in the course of" his employment.

It is noted that defendant correctly argues that neither the Commission nor the Court of Appeals ever disturbed the original magistrate's determination that the four elements of *Stark* and *Forgach* were not met.

In this case, former Magistrate Goolsby, who tried the initial hearing before the Board of Magistrates, addressed the factors and essentially found all four against the interests of the plaintiff. Neither the Commission (WCAC or MCAC) nor the Court of Appeals has overruled former Magistrate Goolsby's findings as to these elements of plaintiff's burden of proof. Therefore, this element of his opinion lends factual and legal support for the Commission's reversal of Magistrate Tjapkes' decision.

The cases argued by defendant in support of are persuasive that the elements of § 315 that an injury must occur "in the course of" and "arising out of" are two distinct elements of § 315 that must be established individually before a finding can be made of compensability.

Defendant's argument, as buttressed by cited case law interpreting statutory provisions that "in the course of" and "arising out of" is a two-pronged requirement is convincing. The Commission agrees that the plaintiff's proofs do not meet the second prong of the "arising out of" requirement as found by former Magistrate Goolsby. We also disagree with intervening plaintiff's argument that the requirements of *Stark*, as further elaborated on in *Forgach*, are not applicable to the current matter because that case and others only applied to going to a work location, a factual situation different from the current situation, where the plaintiff was returning from a meeting with the client and, as the court decided, returning to his workplace. The Commission believes this is an argument without substance. We agree with defendant that restricting the findings of *Stark* and *Forgach* to this limited scenario of going to work makes no sense and is inconsistent with good case law interpretation and with the public interest.

Stark and *Forgach*, along with other cases cited by both the defendant and plaintiff, clearly require some type of nexus between the alleged injury and the plaintiff's work. Again, *Stark* as elaborated by *Forgach* lays out the four requirements to determine how this nexus is to be determined based on the factual analysis.

The Commission also agrees with defendant's argument that Magistrate Tjapkes' opinion would create two separate required showings under § 301. His opinion could well be interpreted as stating that injuries are compensable if they occur during company business with no nexus to plaintiff's work. As noted in defendant's brief, *Ledbetter v Michigan Carton Company*, 74 Mich App 330 (1977) explicitly rejected this proposition. Plaintiff's intended destination during work travel may well be determitive of whether the injury is in the course of employment, but is merely relevant to address the nexus between work and injuries. The magistrate is still required to decide the second prong of § 301, that is the "arising out of" requirement.

Adopting the magistrate's decision in this matter would establish different requirements for those employees traveling to work and those traveling from work or to work with the intention to work. We do not believe that the statute provides for this interpretation, nor that the case law by either defendant or the plaintiff supports such a result, nor do we identify any public interest which is promoted by such an interpretation.

Former Magistrate Goolsby, in his original decision, applied the four elements of *Forgach* and *Stark* and ruled against plaintiff by finding that the alleged injury did not arise out of and in the course of plaintiff's employment.

Defendant also argues extensively that the doctrine of "integral part of the job" is not applicable in this case. We agree, but it is not necessary to address this doctrine since it is clear that the requirements of *Stark* and *Forgach* apply.

We also note with approval the defendant's argument that it is still the plaintiff's burden to prove that he suffered a compensable injury under the provisions of the workers' compensation statute, *Aquilina v General Motors Corporation*, 403 Mich 206 (1978). MCL 418.851. The Court of Appeals held that there is no evidence suggesting a non-work-related intent in plaintiff's travel after he left the sales meeting. The lack of evidence suggesting the plaintiff had non-work content does not serve as affirmative evidence of work intent or purpose. To proffer such evidence remained the responsibility of the plaintiff. In the Commission's opinion, plaintiff did not carry this burden.

In summary, an injury is not compensable just because it occurs while traveling on company business. This may establish that it occurred in the course of employment but is not dispositive of the issue of "arising out of." The case law, including *Stark* and *Forgach*, requires that four factors be considered in determining "arising out of" and in this respect Magistrate Tjapkes' opinion is not supported by competent, material, and substantial evidence. Neither the Court of Appeals decisions, nor the decisions by the WCAC or the MCAC, invalidated that part of former Magistrate Goolsby's original decision, finding that the four elements of *Stark* and *Forgach* were not met. We continue to affirm that portion of former Magistrate Goolsby's opinion that plaintiff did not preponderate in proving that the injuries he sustained on July 26, 2006 "arose out of" his employment with the defendant-employer. For these reasons, the Commission finds that Magistrate Tjapkes' decision, mailed February 24, 2014, must be reversed.

Therefore based on a review of the record, the arguments of intervening plaintiff and defendant, we reverse the opinion of Magistrate Tjapkes and find that the alleged injury did not arise out of plaintiff's employment. We do not reach other issues presented by the defendant-employers appeal.

Commissioner Owczarski concurs.

Jack F. Wheatley Commissioner

Lester A. Owczarski Commissioner

S T A T E O F M I C H I G A N
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WYATT, CHAIR, CONCURRING

I concur in the analysis and the result reached by my colleagues.

As we noted in our remand order at 2011 ACO #132 at 3, the Court of Appeal's only factual finding in this matter was that plaintiff Salenbien met his burden of proving that, at the time and place of his personal injury, he was traveling back to his employer's office. The Court, in its decision, recited circumstantial evidence which might support a finding that Salenbien was returning to do additional work for his employer. But the Court appears to have stopped short of finding that Salenbien had met his burden of proof in this regard.

I find without merit any argument that the Court of Appeal's factual finding in this matter decided the question of whether Salenbien's injury arose "out of and in the course of" his employment with Arrow. As pointed out by the lead opinion, this is necessarily a two element burden of proof as to compensability of a personal injury under MCL 418.301(1). *Thomason v Contour Fabricators, Inc*, 469 Mich 960 (2003); *Ruthruff v Tower Holding Corporation (On Reconsideration)*, 261 Mich App 613, 617, 618 (2004); *Hill v Faircloth Manufacturing Company*, 245 Mich App 710, 717 (2001); *McClain v Chrysler Corporation*, 138 Mich App 723, 731 (1984). The burden of proving both elements of compensability rests with the claimant. MCL 418.851.

If one concedes that the Court of Appeals fact finding settled the question of whether Salenbien's injury arose "in the course of" his employment with Arrow, it remains claimant's burden to establish that it also arose "out of" said employment. In assessing this question, former Magistrate Goolsby analyzed the proofs under the rubric of a four factor test from *Forgach v George Koch & Sons Company*, 167 Mich App 50, 57-58 (1988) [quoting from *Stark v L. E. Myers Company*, 58 Mich App 439, 443 (1973)]. The dissent in the former WCAC's opinion at 2009 ACO #66 at 2-4 recited the test and the magistrate's analysis thereunder:

The only issue before me at this time by agreement of the parties is whether the July 26 motor vehicle accident arose out of and in the course of employment. The general rule is that a worker injured on the way to or from work is not covered under the act. In *Simkins v GMC,* 453 Mich 703 (1996), the Supreme Court stated coverage begins when the employee is on the employer's premises. In *Forgach v George Koch & Sons,* 167 Mich App 50 (1988), quoting *Stark v LE Myers Co,* 58 Mich App 439 (197[3]) at 443, the Court of Appeals determined there is a four-point test to determine whether an incident falls outside the general rule regarding compensability:

> "1. Whether employer paid for or furnished employee transportation…
>
> 2. Whether the injury occurred during or between working hours…
>
> 3. Whether the employer derived a special benefit from the employee's activities at the time of the injury…
>
> 4. Whether the employment subjected the employee to excessive exposure to risks."

In a worker's compensation case, the burden is on the Plaintiff to prove his case by a preponderance of the evidence. *Aquilina v General Motors,* 403 Mich 206 (1978).

In this case, Defendant provided a standard transportation allowance of $450.00 per month. Plaintiff was required to pay for his insurance, fuel, tires, repairs, and etc. Though Plaintiff was required to submit monthly mileage reports, the allowance was not based on total miles traveled. The monthly report was for tax purposes only.

It is not clear from the record whether the injury occurred during or between working hours. This issue is the crux of this case. Testimony established that Plaintiff would sometimes return to the office after his last call of the day, but Plaintiff doesn't remember what he was doing on the date of the accident. Plaintiff did testify it was his routine, habit and practice to return to the office after visiting a potentially large client, but, again he could not state what he was doing on the date of the accident. Testimony from Plaintiff and others also show that there were other methods at Plaintiff's disposal to acquire the information he may have been seeking about the smock. According to Plaintiff's Exhibit #1, the accident occurred at 3:44 p.m. so it is quite possible Plaintiff would not have – assuming he was returning to the office – been back in time to prepare the papers in time for the truck to take them to Taylor on the 26th.

This fact finder is also perplexed about the testimony from two of Plaintiff's witnesses stating Plaintiff informed them he was going to the Spring Arbor area.

> Spring Arbor is located between Jackson and Homer. The accident happened just west of Spring Arbor. Though Plaintiff denied knowing anyone in Spring Arbor and did not recall any accounts there, I am mindful that he returned both of those calls before the accident – one by voice mail to a friend and the other by personally speaking with his cousin. In my view, that fact increases the reliability of their testimony.
>
> Mr. Herron testified Defendant would have benefited if Plaintiff had successfully acquired the account with Hayes-Lemmertz, but there was no showing that Defendant derived a special benefit at the time of Plaintiff's injury.
>
> There was no evidence offered which suggested Plaintiff was subjected to excessive exposure of risk. In fact, Plaintiff set his own schedule so he could have avoided any increased risks which might have existed. Clearly, however, based upon the testimony presented, the employer did not place Plaintiff at an increased risk; no more than any other motorists traveling M-60.
>
> This fact finder doesn't know whether Plaintiff received a smock from Tracy Petersen or not on the date of the incident, but given the fact that Plaintiff doesn't know what happened to his calendar which was in his vehicle when the accident occurred, I feel it is equally true that if there was a smock, it was not retrieved from the vehicle. Thus, I believe Mr. Eagle's testimony that Defendant's Exhibit C was in the branch office before the date of the accident.
>
> This is one of those unfortunate situations wherein Plaintiff has suffered injury to many body parts as the result of the motor vehicle accident, but given the totality of the evidence presented, I find he has failed to sustain his burden to show the accident arose out of and in the course of his employment. Plaintiff is really the only person who knows everything that happened on the day in question, but because of his memory loss, all are left to speculate where he was headed after leaving Hayes-Lemmertz. Accordingly, Plaintiff has failed to sustain his burden. [Magistrate's opinion, pp 8-10.]

The dissenting commissioner did not challenge Magistrate Goolsby's recitation or employment of the *Forgach* factors, but would have reversed the magistrate because he deemed the travel engaged in by Salenbien at the time of his injury was an integral part of the claimant's job, inasmuch as the job foretook of visiting multiple customers daily.

The majority at 2011 ACO #132 likewise took no issue with former Magistrate Goolsby's application of *Forgach* to the fact pattern before him and endorsed the dissent's recitation of the applicable law, while embracing its application to the record by the magistrate. In turn, the Court of Appeals found that the WCAC majority had applied the correct legal standard. It was otherwise silent with respect to *Forgach.* It did conclude that plaintiff proved he was traveling to the office when injured and reversed and remanded on that narrow point. It did, however, reject as persuasive an argument for a finding of arising "out of" premised upon *Naski v Contempo Kitchens, Incorporated,* 2007 ACO #78 at 3 and *Martin v Mutual of Detroit Insurance Company*, 2004 ACO #74 at 7. This was the very argument which the dissent at the

former WCAC found as persuasive that plaintiff had carried his burden of proving that his claim was compensable. 2011 ACO #132 at 5. The Court of Appeals conspicuously did not declare that it had resolved the ultimate questions of arising "out of" and "in the course of" employment. From this we cannot conclude that the *Forgach* template has been rejected by the Court of Appeals as inapplicable to this case. Nor has it overturned any but one of the findings of former Magistrate Goolsby reached in applying the factors. The opinion on remand of Magistrate Tjapkes provides no occasion to otherwise re-assess former Magistrate Goolsby's findings with respect to the factors. Premised as it is on the misunderstanding that the Court of Appeals had decided the issues of "arising out of" and "in the course of" in favor of claimant Salenbien, (Magistrate Tjapkes' opinion at 15) Magistrate Tjapkes focused his analysis instead on proof and quantification of disability resulting from the found personal injury. This presents the choice to again remand for the magistrate to re-assess the previous *Forgach* analysis in light of the Court of Appeals lone factual finding, or to make that assessment at the MCAC level of review. The record is not too incomplete so as to warrant remand under MCL 418.861(a)(12). The current magistrate having misunderstood what was the threshold issue before him, I look to whether the MCAC can properly decide that issue. The Court of Appeals has instructed in this matter that the questions of whether claimant Salenbien's injury arose out of and in the course of his employment are either a question of law or a mixed question of law and fact. Court of Appeals opinion at 3. The Court has upon review reversed one factual finding which the MCAC's predecessor upheld of former Magistrate Goolsby, and left undisturbed the balance of his findings. It appears that it has thus settled the factual issues and what remains are legal issues. The MCAC's scope of review of legal issues is limited only by MCL 418.861a(11), inapplicable here as the issue has been raised by this appeal. Thus unfettered from resolving the legal question at this level, then, I join my colleagues in concluding that the sole factual finding by the Court of Appeals insufficiently impacts the efficacy of former Magistrate Goolsby's *Forgach* analysis to warrant its reversal. I therefore join in reversing the decision of Magistrate Tjapkes. Plaintiff failed to preponderate in showing that his injuries arose out of his employment.

George H. Wyatt III Chair

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This cause came before the Appellate Commission on claims for review filed by defendant and intervening plaintiff from Magistrate Robert J. Tjapkes' order, mailed February 24, 2014, granting an open award of benefits. 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.

Jack F. Wheatley Commissioner

George H. Wyatt III Chair

Lester A. Owczarski Commissioner