

STATE OF MICHIGAN
COURT OF APPEALS

LISA M. SZABO, Widow of EDWARD M.
SZABO, Deceased,

UNPUBLISHED
October 30, 1998

Plaintiff-Appellant,

v

No. 198624
WCAC
LC No. 93-000376

FORD MOTOR COMPANY and
ROUGE STEEL,

Defendants-Appellees.

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order of the Worker's Compensation Appellate Commission, which reversed a magistrate's decision awarding worker's compensation death benefits. We affirm in part and remand in part.

Plaintiff's decedent worked for defendant as an electrician for approximately twenty years. He was hospitalized for liver problems. Approximately one month later, he applied for worker's compensation benefits, alleging that his liver problems arose from chemical exposure at work. Approximately ten months later, the decedent died and plaintiff, his widow, thereafter pursued the worker's compensation claim.

The magistrate granted plaintiff's claim for death benefits. The magistrate concluded that, while there may have been a non-occupational cause for the liver problems, the evidence established that the chemical exposure also played a role in causing or contributing to the liver problems. On appeal, the WCAC applied the "proximate cause standard" of MCL 418.375(2); MSA 17.237(375)(2), and concluded that there was not the requisite competent, material and substantial evidence on the whole record. The application of § 375 by the WCAC is critical because the WCAC acknowledged in its opinion that if the magistrate was correct in applying the lesser standard of causation, there may have been sufficient evidence to support the magistrate's findings.

This brings us to the critical issue raised by plaintiff on appeal: did the WCAC err in applying the proximate cause standard under § 375 when neither party had argued that the magistrate had incorrectly applied the lesser standard? We conclude that the WCAC acted properly. Plaintiff argues that MCL 418.861a(11); MSA 17.237(861a)(11) precluded the WCAC from raising the issue sua sponte. We disagree.

While § 861a(11) does limit the WCAC's authority to reviewing those issues the parties specifically request to be reviewed, we do not read that limitation as preventing the WCAC from applying the correct legal standard. The WCAC's predecessor, the Workers' Compensation Appeal Board, possessed the authority to consider issues not properly raised by the parties. See *Nelson v General Motors Corp*, 122 Mich App 499; 332 NW2d 514 (1983). Clearly, § 861a(11) is designed to prevent the WCAC from exercising such broad powers. However, we do not believe that § 861a(11) is intended to compel the absurd result of requiring the WCAC to apply the incorrect legal standard merely because the parties did not question whether the standard applied by the magistrate was correct. It is nonsensical to suggest that the WCAC should be required to determine if the magistrate reached the "correct" decision under the wrong standard, which may well be the "wrong" decision under the correct standard. Rather, the beginning point of any appellate analysis is: what standard is to be applied.

Having concluded that the WCAC was authorized to determine what the correct standard was, even if the issue was not raised by the parties, the next question is whether the WCAC correctly determined that the proximate cause standard in § 375(2) is applicable to the case at bar. We agree with the WCAC that it is. The Supreme Court in *Hagerman v Gencorp Automotive*, 457 Mich 720, 725; 579 NW2d 347 (1998), noted that § 375(2) applies when "death is not immediate." The Court also later distinguished away an immediate death case, noting that non-immediate death cases require jumping the hurdle of proximate cause under § 375(2). *Hagerman*, *supra* at 739.

Plaintiff argues that there is a distinction between cases where the decedent had been receiving benefits before death and those where the decedent had not. We see no basis for such a distinction. Rather, it is the passage of time which is relevant. That is, the proximate cause standard is employed in non-immediate death cases to ensure that there is a connection between the work-related injury and the death. In this regard, we note that the time which elapsed between injury and death in the case at bar is approximately three times as long as was the case in *Hagerman*. We fail to see why plaintiff should be held to a lesser standard than was the case in *Hagerman* merely because benefits had not yet been paid in the case at bar.

Having concluded that the WCAC correctly determined that the proximate cause standard of § 375(2) is applicable to this case, the final question to be addressed is whether the WCAC erred in concluding that the evidence did not support plaintiff's position when the correct standard is applied. We believe that the WCAC erred to the extent that it made that determination itself rather than remanding the case to the magistrate for reconsideration under the correct standard. The parties were not afforded the opportunity to brief or argue the issue under the correct standard, nor did the magistrate have the opportunity to assess the evidence under the correct standard. The WCAC should have remanded the matter to the magistrate, who then could have considered the parties' arguments and

made a determination under the correct standard. See *Layman v Newkirk Electric Associates, Inc*, 458 Mich 494, 509; 581 NW2d 244 (1998).¹

Affirmed in part and remanded to the magistrate in part for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Jane E. Markey

/s/ David H. Sawyer

/s/ William C. Whitbeck

¹ The Michigan Supreme Court opinion in *Hagerman, supra*, was issued after the WCAC opinion in this case. To the extent that there may be any conflict between the legal principles articulated in *Hagerman* and the instant WCAC decision, the magistrate on remand should apply *Hagerman*.