

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

KENNETH SIEGEL, SR. (DECEASED),
SANDRA SIEGEL, SURVIVING SPOUSE,
J. TIMOTHY ESPER, PERSONAL REPRESENTATIVE,
PLAINTIFF,

V

DOCKET #05-0090

EDWARD C. LEVY,
d/b/a MILFORD SAND AND GRAVEL COMPANY,
SELF INSURED,
SILICOSIS DUST DISEASE AND LOGGING INDUSTRY
COMPENSATION FUND,
DEFENDANTS.

ON RETURN FROM REMAND TO MAGISTRATE PAIGE.

DARYL C. ROYAL FOR PLAINTIFF,
DAVID H. WILLIAMS FOR DEFENDANT EDWARD C. LEVY,
d/b/a MILFORD SAND AND GRAVEL COMPANY,
DENNIS J. RATERINK FOR DEFENDANT SILICOSIS DUST DISEASE
AND LOGGING INDUSTRY COMPENSATION FUND.

OPINION

GRIT, COMMISSIONER

This case returns to us after remand to the magistrate. We now address all the issues raised in the initial appeal, as well as the remand.

On remand the magistrate found the plaintiff's work exposures were "the proximate cause" of his death under MCL 418.375(2), as that term was clarified by the Supreme Court in *Paige v City of Sterling Heights*, 476 Mich 495 (2006). We affirm that finding as it is supported by competent, material and substantial evidence on the whole record. We also affirm the magistrate on the additional issues raised in the defendant Edward C. Levy's appeal and on the issue raised by the Fund.

This appeal presents both legal and factual challenges to the magistrate's decision. We review alleged legal errors and factual errors under different standards of review. We review issues of law de novo. On factual issues, we perform a qualitative and quantitative review of the evidence and affirm a magistrate's findings when they are supported by competent, material and substantial evidence on the whole record. [MCL 418.861a(3) and (13); *Mudel v Great Atlantic & Pacific Tea Company*, 462 Mich 691 (2000).]

Factual Summary

Mr. Siegel worked for the defendant from 1966 until July of 1990, when he went off work for a hernia repair. While off work for the hernia, he was diagnosed with pulmonary problems. He never returned to work. He was diagnosed with lung cancer in January of 2002, 18 months after he last worked. He died five months later in June of 2002.

Mr. Siegel worked as plant operator at the defendant's gravel pit. The operation to process gravel and sand involved multiple "plants" or operations. We are primarily concerned with the first two. The sand and gravel was pulled from underground mines. When it came out of the earth, the sand and gravel was wet. It was conveyed to the first operation, the wash plant, where it was sprayed down while the sand, small stones and larger rocks were sorted by machinery. The plant operators spent part of their workday inside a small building and monitored the operation. At other times, the plant operator was outside, climbing catwalks and conveyors, helping other operators and monitoring the equipment.

The second step started by conveying the larger rocks to the crusher plant. The crusher plant was located about 150 feet from the wash plant. The rocks were crushed into smaller stones, gravel and dust. All the witnesses agreed this aspect of the process was the dustiest. While the larger stones might have been wet on the outside from the trip through the wash plant, crushing the stones produced a large amount of dust.

The defendant presented testimony that Mr. Siegel primarily worked as a wash plant operator and only occasionally helped out in the crush plant. The medical records and histories indicate the decedent worked as a crush plant operator earlier in his employment, then worked as a wash plant operator.

The plaintiff alleged exposure to dust and respiratory irritants caused silicosis, lung cancer and Mr. Siegel's eventual death. There was conflicting testimony at trial regarding the amount of silica dust Mr. Siegel was exposed to at work. There was general agreement that the plaintiff rarely, if ever, wore a face mask or respiratory equipment. He did generally wear goggles.

Mr. Cecil Powell, a previous president and business agent for the union, testified the gravel pit atmosphere was dusty. When he visited and parked at the gravel pit, dust would accumulate on his car. [Trial transcript 1, pp 16-20, 23, 28.] In addition to the dust produced by

the processing plants, gravel trains--double bottom tandem trucks carrying product--stirred up dust in the air. [*Id.*, p 23.]

Mr. Michael Smolak last worked with Mr. Siegel in 1986. They worked as wash or sand plant operators on different shifts. Mr. Smolak testified the sand plant operator would start up the crusher if it was not running, walk around the crush plant and grease it, and pull big rocks out if they were stuck. He testified the crusher plant is dry and that dust flies “all over” the area. [Trial transcript 2, pp 15-17.] If it was not windy, most of dust stayed in the area of the crusher plant. [*Id.*, pp 19, 32.] Mr. Smolak testified that 50% of the time, he had hardly any dust on his person at the end of his shift. The other 50% of the time, he would have dust in his hair, shirt, pants and on his face.

Mrs. Siegel testified her husband always came home dirty. He was covered in dust and looked like a snowman. Although he wore a hard hat at work, his hair was full of sand. Dust would accumulate on his ear hairs. His clothes and his car were always dusty. [*Id.*, pp 117-119.] Over the years, she estimated she visited his place of work approximately 10 times. Each time the roads were dry and dusty. She described the atmosphere as, “nothing but dust.” [*Id.*, p 123.]

The plaintiff’s smoking history was also disputed at trial. Mrs. Siegel testified her husband started smoking in his late teens, quit in the late 1960s or early 1970s for a couple years, then quit again in 1985. [*Id.*, pp 104-106.] The most he ever smoked was a pack a day. [*Id.*, p 105.] Mrs. Siegel started smoking at age 17. At one point she smoked as much as three packs a day. Shortly after her husband quit smoking, Mrs. Siegel stopped smoking around him. She estimated in the years after her husband quit smoking, she smoked in front of him 20-30 times. [*Id.*, pp 107-111.]

The defendant presented several witnesses who contradicted the plaintiff’s evidence on the amount of dust Mr. Siegel was exposed to and his smoking history. Mr. Scott Carson, the defendant’s general manager, testified the plaintiff was always a wash plant operator, not a crush plant operator. While the crush plant was dusty, approximately 6,000 gallons of water a minute were pumped through the wash plant. [*Id.*, pp 163, 165.] He did acknowledge there was dust in all the plant areas, not just around the crusher. [*Id.*, p 186.]

Mr. Carson met Mr. Siegel in 1991 and saw him yearly at meetings. He testified he saw Mr. Siegel smoking through the year 2000. [*Id.*, pp 172, 199.]

Mr. Joseph Stachurski worked with the plaintiff starting in November of 1983. He was the plaintiff’s supervisor for two months. [*Id.*, p 213.] Mr. Stachurski maintained that water was running constantly in the wash plant and that it was not a dusty area. [*Id.*, p 215.] He acknowledged Mr. Siegel helped at the crush plant occasionally. [Trial transcript 3, p 20.]

Mr. Stachurski worked with Mr. Siegel again from 1985 to 1989. During that time he saw Mr. Siegel daily. From 1993 to 1995, he worked as the plant manager at the same facility as

Mr. Siegel. During that time, he saw Mr. Siegel on a daily basis. Mr. Siegel continued to smoke cigarettes during that time period. He was not aware if the plaintiff smoked daily. [Trial transcript 2, pp 227-228; trial transcript 3, pp 11-12.]

Mr. Michael Taylor took over as plant manager for Mr. Stachurski in 1995. He worked at the facility until April of 1997. During that time, Mr. Siegel worked as a wash plant operator. Mr. Taylor testified the wash plant was not dusty. In contrast, he described the wash plant as “misty” from the 6,000 gallons of water that were pumped through the plant each minute. The area was wet and sloppy. The workers, including Mr. Siegel, were supplied with raincoats and rubber rain boots. [Trial transcript 3, pp 34, 37-38.] Occasionally, Mr. Siegel would work somewhere other than the wash plant. [*Id.*, p 44.]

Mr. Taylor observed Mr. Siegel smoking from 1995 to 1997. [*Id.*, pp 39, 42.] He had no doubt the plaintiff remained a smoker until 1997.

Ms. Linda Wyatt, the defendant’s human resources director, met Mr. Siegel in the early 1990s. She recalls seeing him approximately 6 times over the years. She testified she recalls seeing him smoke with other employees during a contract negotiation in 1991. [*Id.*, pp 56-58, 91.]

Mr. Siegel suffered from increasing respiratory problems well before his last day of work. He was diagnosed with COPD or emphysema. In January of 2002, part of Mr. Siegel’s upper left lung was resected and analyzed. He was diagnosed with advanced lung cancer and silicosis. He died five months later from complications related to the cancer treatments.

The magistrate granted an open award of benefits. Because the *Paige* decision was issued after the magistrate’s decision, it was necessary to remand this case for application of the *Paige* case. [*Siegel v Edward C. Levy*, 2006 ACO #228.]

On remand, the magistrate was persuaded Mr. Siegel’s work exposures caused silicosis and lung cancer, leading to his death.

I.

The plaintiff’s theory is that exposure to silica dust at work caused Mr. Siegel’s silicosis and lung cancer. The plaintiff’s expert pointed out that the particular type of lung cancer Mr. Siegel had was not normally associated with cigarette smoking. The plaintiff’s expert accepted pathological evidence that confirmed the diagnosis of silicosis. The defendant’s expert linked Mr. Siegel’s lung cancer to his smoking history. The defendant tries to maintain that the plaintiff did not have silicosis, but its own expert agrees the plaintiff had early silicosis.

In her first decision, the magistrate found the testimony of Dr. Rosenman, an internal medicine and occupational and environmental medical specialist, persuasive. Dr. Rosenman has

a unique relationship with the State. The State contracts through Michigan State University for an evaluation and determination of work-relationship in certain pulmonary cases. As such, all the reported cases of silicosis in Michigan cross Dr. Rosenman's desk for analysis and his opinion on causation. The magistrate also found the testimony of Dr. Michael, the cytopathologist at the University of Michigan who reviewed the slides of Mr. Siegel's lung tissue, persuasive.

The magistrate provided the following analysis of why she found the testimony of Drs. Rosenman and Michael compelling:

Dr. Rosenman's credentials were very impressive and his testimony was very persuasive. The doctor had been contracted by the State of Michigan to investigate the silicosis and determine how the plaintiff might have been exposed. The method by which the doctor was brought into the case removes him as a treating physician and gave credence to his opinion. The State of Michigan was confident that Dr. Rosenman was capable of reviewing the medical documentation and determining if plaintiff was exposed to silica and if so was the exposure occupational, whether he suffered from silicosis and in this case was the plaintiff's death caused by the silicosis.

It was Dr. Rosenman's opinion that the pathology reports of plaintiff's lung tissue showed plaintiff had fibrosis that was typically seen with silicosis nodules. The doctor was very clear when he stated: "I would conclude within a reasonable degree of medical certainty that his exposure to silica at Milford Sand and Gravel was a significant cause of his lung cancer and subsequent death." All indicators pointed to occupational exposure to silica. Further the doctor testified that the type of work plaintiff performed at Milford Sand and Gravel was a known occupation that was at risk for silica exposure and for the disease associated with silica exposure and was a significant contributing factor in the development of plaintiff's lung cancer.

The doctor's testimony was summed up as follows: "Yes, within a reasonable degree of medical certainty the changes, the scarring in his lungs, the fibrosis, he had exposure to a well-know cause of lung cancer. He had the pathological findings consistent with that exposure, he had chest radiographs consistent with that exposure, and, yes, that was the cause of his exposure. I would say that cigarettes had something to do with that, and that was also a contributor to his death".

Dr. Rosenman's testimony was supported by the testimony of Dr. C. Michael, a cytopathologist, who testified that by examining the cells of an individual she could formulate a diagnosis. Dr. Michael's testimony was given extra credence due to the fact that she worked at the University of Michigan Hospital and was aware of their procedural practices and the format of their pathology reports. The doctor was able to review the actual slides taken from the plaintiff as well as the pathology reports from the January 18, 2002, surgery.

After reviewing the pathology slides, not just a report, the doctor concluded that plaintiff's exposure to silica/dust while in the course of his occupation was a substantial contributing factor in his silicosis. In her opinion, silica was seen as the clinical cause of death. Dr. Michael's testimony was very persuasive as was Dr. Rosenman's.

The fact that plaintiff's death certificate did not specifically list silicosis, as a cause of death is not dispositive of the effects of silica exposure. Dr. Rosenman pointed out that of the six hundred patient's death certificates he has reviewed who have had silicosis, none of them had a specific reference to silicosis noted on the certificate. [Magistrate's opinion, pp 21-22.]

The magistrate expressed doubt Mrs. Siegel had a full understanding of her husband's smoking history. The magistrate accepted testimony from the defendant's witnesses that Mr. Siegel continued to smoke while at work, even after his wife thought he quit in 1985.

A great deal of judicial time was spent trying to establish and/or deny that plaintiff was a smoker up to the time of his death. Co-workers were brought in to testify that plaintiff smoked up to his last day of work. Plaintiff's wife adamantly denied that plaintiff smoked, claiming he had quit in 1985. Unfortunately, plaintiff's wife had not entered even the basic level of the grieving process. Portions of her testimony were not credible due to the fact that she was a poor historian, changed her testimony on several occasions, and had an altered view of her husband's situation. Sandra's smoking habits included up to a three pack a day habit, that involved hiding her smoking from her husband for twenty years, climbing into the attic with a ladder, up two levels to an unheated space, using a fan to disperse the smoke. If she were going to these levels to keep the fact that she smoked from her husband, then it would be reasonable to accept the testimony of the co-workers that plaintiff smoked while working, hiding his addiction to nicotine from his wife. [*Id.*, p 22.]

In the initial decision, the magistrate also found that Mr. Siegel's smoking history was irrelevant. While the magistrate found smoking cigarettes, "did not help [Mr. Siegel's] overall prognosis and may have accelerated the effects of the silicosis and/or hindered his physical ability to cope with the disease," the magistrate found smoking cigarettes was not the "sole" cause of Mr. Siegel's death and "neither was the silicosis." However, she found silicosis was "the proximate cause" of the plaintiff's death. [*Id.*, p 23.]

We remanded the case because the magistrate's analysis was not consistent with the new legal standard set forth in *Paige*. In *Paige*, the Michigan Supreme Court overruled the previous decision in *Hagerman v Gencorp Automotive*, 457 Mich 720 (1998) and held in order to establish "the proximate cause" under MCL 418.375(2), a claimant had to establish the work event or work exposure was the, "the one most immediate, efficient, and direct cause of the injury or damage." [*Paige, supra* at 499.]

After remand, the plaintiff retook Dr. Rosenman's deposition, emphasizing the change in the causation standard under *Paige*. On remand, Dr. Rosenman testified even if the plaintiff continued to smoke after 1985, that his 35 year exposure to silica dust caused his silicosis. He also opined the type of lung cancer the plaintiff was diagnosed with is not typically associated with cigarette smoking. Silica itself is a carcinogen. The magistrate again found Dr. Rosenman's and Dr. Michael's testimony persuasive.

Dr. Rosenman was firm in his conviction that the silica exposure was the proximate cause of plaintiff's death. It was Dr. Rosenman's testimony that was found to be the most persuasive both during the original trial and in preparation for the remand.

The other expert witness proffered by plaintiff during the original trial was Dr. Clair W. Michael, M.D. This witness specialized in cytopathology, which is the study of cells. She reviewed certain medical records and pathologic tissue slides obtained as a result of plaintiff's lung lobectomy in January 2002. Her observations of the slides included evidence of fibrosis surrounded by dust cells and tiny needle nodules. These materials allowed her to reach a conclusion that plaintiff had adrenal carcinoma with background nodular silicosis. The doctor indicated that it was her opinion that decedent's exposure to silica and dust was a substantial contributing factor in the development of the lung disease. [Magistrate's opinion on remand, pp 4-5.]

II.

The defendant appeals the magistrate's findings on remand. The crux of the defendant's argument now, and in the original appeal, is that the magistrate relied on expert witnesses who had an inaccurate understanding of the decedent's occupational and non-occupational exposures. We disagree.

The defendant's "legal" arguments are little more than disagreements with the lay and expert witnesses the magistrate found credible. The defendant argues the magistrate had inadequate proofs to establish Mr. Siegel's exposure to dust was as severe as the plaintiff's experts believed. The defendant points to its lay witnesses, who contradicted the testimony of Mrs. Siegel and the plaintiff's witnesses. The defendant urges a review of the evidence that favors its witnesses. We note the magistrate had the testimony of several competent witnesses, including Mrs. Siegel and two of her husband's co-workers, who all claimed the dust exposure was significant. Finally, the magistrate had the diagnosis of silicosis from two well-qualified expert witnesses.

The defendant also points out Mr. Siegel continued to smoke after 1985. We agree the magistrate found Mr. Siegel smoked after 1985 while at work. When Dr. Rosenman's deposition was retaken for the remand, he was provided an accurate history that the plaintiff continued to smoke after 1985. Despite that, Dr. Rosenman felt the silica exposure at work was the proximate cause of the plaintiff's silicosis and lung cancer.

- A. I would continue to conclude that silica is the significant factor in this case and the proximate cause of his death, and I would base that on the histologic type of lung cancer he had, the amount he smoked, which my understanding was still--no one has suggested it was more than a pack a day and possibly less in these later years, and so I continue to conclude that silica remains the proximate cause.

* * *

- A. I would conclude, within a reasonable degree of medical certainty, that Mr. Siegel's thirty-five years of exposure to silica, documented by the increased measures of silica in his lungs, documented by the evidence of silicosis, scarring in his lungs from that silica, based on the histologic type of lung cancer he had, being a type that is the least associated with cigarettes, that Mr. Siegel's proximate cause of his lung cancer and death was his silica exposure that occurred over those thirty-five plus years. [Dr. Rosenman's deposition, pp 17, 20-21.]

We believe Dr. Rosenman's testimony, combined with Dr. Michael's testimony and the lay testimony the magistrate found persuasive, is competent, material and substantial evidence on the whole record to support the magistrate's conclusion that the work exposures were the, "one most immediate, efficient, and direct cause" of the plaintiff's silicosis and lung cancer.

III.

The defendant argues the plaintiff's "fatal lung condition" was an ordinary disease of life, and therefore not compensable under MCL 418.401(2). Section 401(2) provides an injury suffered as the result of an, "ordinary disease of life to which the public is generally exposed outside of employment is not compensable."

The defendant's argument completely ignores the magistrate's fact finding. The defendant once again points to its lay and expert witnesses to conclude Mr. Siegel died of smoking related lung cancer. In order to win this point, the defendant would have to convince us to completely ignore the magistrate's findings on the relative credibility of the witnesses. We decline to do so. The magistrate made reasoned choices and accepted the testimony of competent witnesses. In the case of the expert testimony, the magistrate chose to rely on well-qualified physicians and found the decedent's lung cancer was not caused by smoking.

The defendant argues the plaintiff had COPD (chronic obstructive pulmonary disease) or emphysema, which has been characterized as an ordinary disease of life. However, no one testified the plaintiff died of emphysema or smoking related COPD. The plaintiff did have fibrotic lung disease, caused by what the magistrate found was work related silicosis, which is not, by any stretch, an ordinary disease of life under § 401(2).

IV.

The defendant argues the magistrate erred by failing to apportion liability under MCL 418.431. Once again, this legal argument completely ignores the magistrate's factual findings. The defendant argues Mr. Siegel died of "lung pathology, only a portion thereof was in any way causally connected with the employment . . ." [Defendant's brief on appeal, p 34.] In other words, the defendant argues that because the plaintiff arguably had a degree of smoking related emphysema, the magistrate was compelled to apportion liability. Once again, the expert witnesses relied on by the magistrate did not link Mr. Siegel's death, even tangentially, to COPD or emphysema. Mr. Siegel might have had any number of non-occupational disorders when he died. However, unless they contributed to his death, and his emphysema did not, then the presence of those conditions is irrelevant under § 431.

V.

The defendant alleges the magistrate erred by failing to apply the one and two year back rules. Mr. Siegel left his employment in the summer of 2000 for a hernia repair. The defendant voluntarily paid benefits for the hernia claim, but denied the later claim for a pulmonary injury.

The one year back rule, MCL 418.833(1) provides as follows:

(1) If payment of compensation is made, other than medical expenses, and an application for further compensation is later filed with the bureau, no compensation shall be ordered for any period which is more than 1 year prior to the date of filing of such application.

The one year back rule does not apply if the benefits sought are of a different category of benefits. For instance, if a claimant seeks total and permanent disability benefits after receiving specific loss benefits, the claim is not limited by the one year back rule. [*Piwowski v Detroit Sulphite Pulp & Paper Company*, 412 Mich 716 (1982).]

Likewise, if the further claim for benefit involves a separate date of injury, the one year back rule does not apply. [*Marckiewicz v Tecumseh Production Company*, 1989 ACO #49, *Gauthier v Munson Health Care*, 2005 ACO #1.]

In this case, the disability benefits sought for the pulmonary condition and the disability benefits paid for the hernia *might* have involved the same date of injury, as represented by the defendant in its brief, or they *might* have involved two separate dates of injury. The references in the record to the previous benefits paid for the hernia injury do not establish the date of the hernia injury. We know approximately when the defendant paid benefits for the hernia injury, but we do not know the hernia injury date. [Trial transcript 1, p 80; trial transcript 3, p 98.]

The defendant failed in establishing that the hernia claim had the same date of injury as the pulmonary claim. As such, we believe the one year back rule does not apply under *Marckiewicz*.

In addition, the disability benefits voluntarily paid were for a different injury (hernia) than the benefits awarded by the magistrate (pulmonary) for disability and death.

The parties both agree the two year back rule; MCL 418.381(2) would apply. We note both parties agree benefits were voluntarily paid for the hernia injury into the applicable two year period, making the application of the rule moot.

VI.

The defendant argues the magistrate erroneously failed to allow coordination of the pension benefits Mr. Siegel received during his lifetime and erroneously failed to subtract the disability benefits granted during Mr. Siegel's lifetime from the maximum potential death benefits. The plaintiff does not address these issues in her brief. We agree with the defendant on both points. The pension benefits the decedent received during his life are to be coordinated under MCL 418.354(1). We modify the magistrate's order to reflect that coordination.

In addition, the defendant is entitled to a reduction in the maximum payable death benefits under MCL 418.375(2), to reflect the amount of indemnity benefits paid prior to Mr. Siegel's death. However, any benefits which are reduced by coordination are not subtracted from the total remaining maximum death benefit. The defendant may reduce its overall liability for death benefits to the widow by the total sum of what it pays in indemnity benefits after coordination. The remaining maximum death benefits are then paid equally over the remaining weeks in the 500 week limit. [*Paige, supra.*] We modify the order to reflect this ruling.

VII.

The last issue is the liability of the Silicosis and Dust Disease Fund. The statute, MCL 418.531, requires the Fund to reimburse the employer for weekly benefits paid (beyond a statutory threshold) for "compensation for disability or death from silicosis or other dust disease[s]."

Except in the case of certain enumerated dust diseases, (including silicosis) it is the defendant's burden to establish the claimant's underlying condition poses an economic threat to the industry as a whole, in order to be entitled to reimbursement from the Fund. In this case, the defendant did not submit proofs that its industry was threatened by either silicosis or lung cancer.

The magistrate found the Fund was liable to reimburse the employer. She provided the following analysis on this issue:

In *Alston v Chrysler Corp.*, 464 Mich 865, 630 NW2d 619 (2001), the Supreme Court found that the defendant employer need no[t] show a threat to the automobile industry from asbestos in order to receive reimbursement from the fund when the dust disease is pneumoconiosis. It appears now that if the disease is silicosis, or pneumoconiosis, that the Fund is liable and will make reimbursement without a showing of a threat to the industry. Medical testimony has established that plaintiff has silicosis, as well as COPD, emphysema, lung cancer. I therefore find that defendant; Edward C. Levy Company is entitled to reimbursement from the Silicosis, Dust Disease and Logging fund, under MCL 418.531. [Magistrate's February 10, 2005 opinion, p 27.]

We agree with the outcome reached by the magistrate. For disability or death involving certain enumerated dust diseases, including silicosis, the employer does not need to show there is a threat to the industry in order to be entitled to reimbursement. [*Alston v Chrysler Corporation*, 464 Mich 865 (2001), *Felcoskie v Lakey Foundry Corporation*, 382 Mich 438 (1969) and *Stottlemeyer v General Motors Corporation*, 399 Mich 605 (1977).]

The Fund argues that even if the employer did not have to prove silicosis was a threat to its industry, because Mr. Siegel died of lung cancer, the employer was obligated to show cancer posed a threat to its industry.

We do not agree with the Fund's position. First, because the plaintiff was disabled as a result of his silicosis before his death, the provisions of MCL 418.531(1) are triggered.

Second, under *Paige*, the magistrate relied on the testimony of Dr. Rosenman to find exposure to silica (which caused silicosis, which in turn caused lung cancer) was the "sole proximate cause, i.e., the one most immediate, efficient, and direct cause of the injury or damage." Because silicosis is a covered dust disease under the Silicosis and Dust Disease provisions of the statute and because the silicosis caused the lung cancer, the employer was not obligated to submit additional proofs regarding a threat to its industry from lung cancer.

Conclusion

We affirm the magistrate's causation findings on remand as they are supported by competent, material and substantial evidence on the whole record.

We find the one year back rule does not limit the plaintiff's recovery.

We affirm the finding that the Silicosis and Dust Disease Fund must reimburse the employer under the statute, MCL 418.531.

We modify the order to reflect the pension benefits the decedent received during his life are to be coordinated under MCL 418.354(1). We also modify the order to reflect a reduction in the maximum payable death benefits under MCL 418.375(2), to include indemnity benefits paid

for periods prior to Mr. Siegel's death. However, any benefits which are reduced by coordination are not subtracted from the total remaining maximum death benefit. The defendant may reduce its overall liability for death benefits to the widow by the total sum of what it pays in indemnity benefits after coordination. The remaining total amount is then paid equally over the remaining weeks in the 500 week limit.

Chairperson Gasparovich and Commissioner Will concur.

Donna J. Grit	Commissioner
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Martha M. Gasparovich	Chairperson
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Rodger G. Will	Commissioner
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STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

KENNETH SIEGEL, SR. (DECEASED),
SANDRA SIEGEL, SURVIVING SPOUSE,
J. TIMOTHY ESPER, PERSONAL REPRESENTATIVE,
PLAINTIFF,

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DOCKET #05-0090

EDWARD C. LEVY,
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SELF INSURED,
SILICOSIS DUST DISEASE & LOGGING INDUSTRY
COMPENSATION FUND,
DEFENDANTS.

This matter returns to the Appellate Commission after remand, appealed by defendant Edward C. Levy, d/b/a Milford Sand and Gravel Company, Self Insured, and by defendant Silicosis, Dust Disease & Logging Industry Compensation Fund, from Magistrate Melody Paige's decision, mailed February 10, 2005, granting plaintiff an open award of benefits. The Commission, by 2006 ACO #228, remanded this matter to the magistrate for a supplemental opinion. Magistrate Paige issued an opinion on remand, mailed March 7, 2008. The Commission has considered the record and counsel's briefs, and believes that the magistrate's opinion and order should be affirmed in part and modified in part. Therefore,

IT IS ORDERED that the magistrate's opinion and order is affirmed in part and modified in part, according to the attached opinion.

Donna J. Grit	Commissioner
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Martha M. Gasparovich	Chairperson
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Rodger G. Will	Commissioner
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