2021 ACO #12

S T A T E O F M I C H I G A N
WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

MICHAEL R. SCHWEININGER,
PLAINTIFF,

V DOCKET #21-0006

ADVANCED TECHNOLOGY SOLUTIONS AND MANUFACTURING TECHNOLOGY MUTUAL INSURANCE COMPANY,
DEFENDANTS.

APPEAL FROM MAGISTRATE DELLA SANTINA.

JOHN P. CHARTERS FOR PLAINTIFF,
ROBERT A. KLUCZYNSKI FOR DEFENDANTS.

OPINION

ROYAL, CHAIRPERSON

This matter came before the Workers' Disability Compensation Appeals Commission ("WDCAC") on a claim for review filed by defendants Advanced Technology Solutions and Manufacturing Technology Mutual Insurance Company, from an opinion and order of Magistrate Phillip S. Della Santina mailed April 20, 2021. The magistrate's order quashed defendants' request for an independent medical evaluation of plaintiff Michael Schweininger to be conducted by a neuropsychologist.

Introduction

Plaintiff filed an application for mediation or hearing with the Workers' Disability Compensation Agency on December 11, 2019, alleging injuries to his head and neck causing headaches, dizziness, blurred vision, light-sensitivity, noise sensitivity, memory loss, personality change, and closed head injury. Defendant subsequently requested that plaintiff submit to an evaluation by Eduardo Montoya, a neuropsychologist. Plaintiff filed a motion to quash that examination, seeking a determination as to whether he could be required to attend. That motion contended that applicable law, more specifically MCL 418.385, provides only for "an examination by a physician or surgeon authorized to practice medicine under the laws of the state," a group plaintiff argued did not include neuropsychologists.

After a hearing on April 6, 2021, the magistrate granted plaintiff's motion and quashed the examination. Defendants appeal. We granted expedited review on June 18, 2021, and we now affirm the magistrate's order.

Standard of Review

Findings of fact made by the magistrate are conclusive upon us if supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3). We review the magistrate's conclusions of law *de novo*. *Abbey v Campbell, Wyant & Cannon Foundry (On Remand)*, 194 Mich App 341, 351; 486 NW2d 131 (1992). Matters of statutory construction constitute questions of law, subject to *de novo* review. *Maier v General Telephone Company of Michigan*, 247 Mich App 655, 659-660; 637 NW2d 263 (2001); *Shinholster v Annapolis Hospital*. 471 Mich 540, 548; 685 NW2d 275 (2004).

Analysis

The dispute in this matter revolves around the following language from MCL 418.385[1]:

> After the employee has given notice of injury and from time to time thereafter during the continuance of his or her disability, if so requested by the employer or the carrier, he or she shall submit himself or herself to an examination *by a physician or surgeon authorized to practice medicine under the laws of the state*, furnished and paid for by the employer or the carrier. (Emphasis added.)

In proceedings below, plaintiff argued that Dr. Montoya, a neuropsychologist, was not "a physician or surgeon authorized to practice medicine under the laws of the state." As a result, plaintiff contended that he was not subject to sanctions from Section 385, which penalize employees who refuse to attend or obstruct an examination within its parameters:

> If he or she refuses to submit himself or herself for the examination, or in any way obstructs the same, his or her right to compensation shall be suspended and his or her compensation during the period of suspension may be forfeited.

As a preliminary matter, defendant's brief conflates two separate issues – whether it can compel an examination with a neuropsychologist on pain of sanctions, and whether a neuropsychologist can be a permissible expert witness. These are two separate inquiries. An expert witness need not conduct an actual examination of the claimant to offer expert testimony. This appeal involves only the issue of whether defendant has a right to compel plaintiff's attendance at a neuropsychological examination.

[1] During the hearing below, defendant suggested that Section 385 applied only to cases being voluntarily paid, and not to matters in litigation. (Transcript at 6-7.) Defendant has not asserted that particular argument on appeal, although it does suggest that other discovery provisions might augment the language of Section 385, as discussed below.

When considering questions of statutory construction, we must discern and give effect to the Legislature's intent, a process which begins with an examination of the plain language of the provision under consideration. *Murphy v Michigan Bell Telephone Company*, 447 Mich 93, 98; 523 NW2d 310 (1994). "Where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000).

The language of Section 385 is clear and unambiguous. An employee may only be compelled to attend an examination with "a physician or surgeon authorized to practice medicine under the laws of the state…" These parameters are well established and defined in Michigan law.

The Public Health Code ("Code") defines a "physician" as "an individual who is licensed under this article to engage in the practice of medicine." MCL 333.17001(1)(e). By contrast, the Code further provides that "[t]he practice of psychology shall *not* include the practice of medicine such as prescribing drugs, performing surgery, or administering electro-convulsive therapy." MCL 333.18201(1)(b) (emphasis supplied). Therefore, by definition, a psychologist is not, and cannot be, "a physician or surgeon authorized to practice medicine under the laws of the state," as required by Section 385. The phrase chosen by the Legislature for Section 385 is clear and unambiguous, based upon equally clear and unambiguous definitional provisions.

Because the language crafted by the Legislature is unambiguous, we lack the authority to expand or modify it:

> There is no question that the [Worker's Disability Compensation Act] is a legislative creation which is in derogation of the common law. *Tews v C F Hanks Coal Co*, 267 Mich 466, 468; 255 NW 227 (1934); *Revard v Johns-Manville Sales Corp*, 111 Mich App 91, 95; 314 NW2d 533 (1981), lv den 417 Mich 854 (1983). "It is arbitrary and where it speaks nothing can be added nor changed by judicial pronouncement." *Tews, supra* at 468–469. It is the sole prerogative of the Legislature to alter or modify a provision of the WDCA, *Derwinski v Eureka Tire Co*, 407 Mich 469, 482, 286 NW2d 672 (1979). (*Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 363–364; 459 NW2d 279 (1990).)
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> As we have indicated with great frequency, our duty is to apply the language of the statute as enacted, without addition, subtraction, or modification. See, e.g., *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000); *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460

Mich 305, 311; 596 NW2d 591 (1999). (*Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101; 643 NW2d 553 (2002).)

As a result, we are constrained to conclude that Section 385 means just what it says – a claimant may only be compelled to submit to an evaluation by "a physician or surgeon authorized to practice medicine under the laws of the state…" See also *Lavin v City of Royal Oak*, 2020 Mich ACO #19. Dr. Montoya, a neuropsychologist, is *not* such an individual.

Defendants do not argue otherwise. At the hearing below, defendants indicated that they "want a neuropsychological evaluation" (Transcript at 7), and further stated that "[n]europsychological evaluations have been around a long time and *they've been done by non-doctors.*" (Transcript at 12; emphasis added.) In their appellate brief, defendants write that "[t]he proposed IME was a neuropsychological examination by Dr. Eduardo Montoya." (Defendant's brief at 1.)

Because Dr. Montoya is not a physician or surgeon, and he is not authorized to practice medicine under the laws of the state[2], we would need to add language to the statute to include neuropsychologists within the intendment of Section 385. This we cannot do. *Feld; Lesner*.

This conclusion is also supported by the maxim *expressio unius est exclusio alterius* – express mention in a statute of one thing implies the exclusion of other similar things. *Stowers v Wolodzko*, 386 Mich 119, 133; 191 NW2d 355 (1971). This maxim was applied to Section 385 in *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 362-363; 459 NW2d 279 (1990). In that case, the Court held that, where the statutory language provided for attendance at an examination by the claimant's physician but did *not* similarly provide for attendance by the claimant's lawyer, the Legislature should be held to have intended that only physicians attend. The same reasoning applies to this case, in that the Legislature provided for an examination by "a physician or surgeon authorized to practice medicine under the laws of the state." From this state of affairs, it may be inferred that the Legislature did not intend to include neuropsychologists, who are neither physicians or surgeons nor authorized to practice medicine under the laws of the state.

Defendant argues, however, that Section 385 has not been applied so restrictively in "common practice," and that neuropsychologists have frequently performed examinations on behalf of employers in the past. While that may be the case, tradition, and employees' acquiescence in other cases, may not trump the clear words of the statute.

The Court of Appeals applied this rule in *Fisher v Kalamazoo Regional Psychiatric Hospital*, 329 Mich App 555; 942 NW2d (2019). In that case, the Court considered a rule that

[2] Defendant's brief purports to distinguish the hand therapist in *Lavin* from the neuropsychologist in this case, noting that the Public Health Code ("Code") "excludes occupational therapy from the practice of medicine." (Defendant's brief at 7.) Of course, as noted above, the Code also excludes psychologists from the practice of medicine.

recoupment of overpaid benefits paid voluntarily was only permissible in cases of employee fraud – a rule that did not appear in the recoupment statute but which had been created by a prior commission opinion and then consistently applied as law in subsequent opinions. The Court held that the consistent application of this doctrine over time did not make it law, because we lack authority to create laws, a task which is reserved for the Legislature:

> Neither the act nor any promulgated rule entrusted the commission with crafting an employee-fraud requirement to a recoupment action. Whether the requirement might be sound public policy is neither for the commission nor this Court to decide, but instead is left solely to the Legislature. Const 1963, art 4, § 1; see also *People v Babcock*, 343 Mich 671, 679-680; 73 NW2d 521 (1955); *D'Agostini*, 322 Mich App at 560. (*Fisher*, 329 Mich App at 561.)

The Court's reference to "sound public policy" addresses another of defendants' arguments in this matter, that allowing neuropsychologists to perform examinations makes good public policy. However, "[i]t is *not* this Court's role to decide whether the Legislature acted wisely or unwisely in enacting this statute. We will not substitute our own social and economic beliefs for those of the Legislature, which is elected by the people to pass laws." *McAvoy v H B Sherman Company*, 401 Mich 419, 439; 258 NW2d 414 (1977)." These considerations are irrelevant in the face of clear and unambiguous statutory language:

> A court may not look to the statute's purpose or its public-policy objectives unless the statutory language is ambiguous or unclear. *People v Pinkney*, 501 Mich 259, 272; 912 NW2d 535 (2018). When a court looks to public policy without first analyzing the plain language, the court "'runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language.'" *Id.*, quoting *Perkovic v Zurich American Ins Co*, 500 Mich 44, 53;, 893 NW2d 322 (2017). (*People v Morrison*, 328 Mich App 647, 651; 939 NW2d 728 (2019).)

Section 385 clearly and unambiguously permits the sanctioning of a claimant who refuses to submit to or obstructs an examination solely by "a physician or surgeon authorized to practice medicine under the laws of the state…" Consequently, it does not provide a sanction for noncompliance with examinations by neuropsychologists who are neither physicians or surgeons nor authorized to practice medicine under the laws of the state. That defendants believe this is unfair, or that public policy would be better served if the latter were also included, must yield in light of the clear and unambiguous language excluding them.[3] "We must stick to the statute and

[3] If plaintiff were treating with or planning to present evidence from a neuropsychologist, a different situation *might* be presented. "[I]n satisfying its burden of production, the employer has a right to discovery under the reasoning of *Boggetta* [*v Burroughs Corporation*, 368 Mich 600; 118 NW2d 980 (1962),] if discovery is necessary for the employer to sustain its burden and present a meaningful defense." *Stokes v Chrysler LLC*, 481 Mich 266, 283–284; 750 NW2d 129 (2008). However, this case does not present such a situation, and we address it no further.

leave defendant to present the equity of its position to the legislature." *Geis v Packard Motor Car Co*, 214 Mich 646, 651; 183 NW 916 (1921). "The Legislature chose the words of the statute, and we are bound by them." *Perez v Keeler Brass Company*, 461 Mich 602, 606; 608 NW2d 45 (2000).

Defendant, however, suggests that if the Legislature had disagreed with the common practice of using neuropsychologists to perform Section 385 examinations, it has had decades to correct the law to stop it. This is a clear invocation of the doctrine of legislative acquiescence, inferring intent from legislative inaction. However, this doctrine is "highly disfavored" as a principle of statutory construction in Michigan. *Donajkowski v Alpena Power Company,* 460 Mich 243, 261; 596 NW2d 574 (1999); *Nawrocki v Macomb County Road Commission*, 463 Mich 143, 177, n33; 615 NW2d 702 (2000). As a result, we decline to utilize that doctrine in this matter. Furthermore, the Legislature has left unchanged for decades the clear and unambiguous language of Section 385, an indication it did not wish to change the statute. It may not be presumed that the Legislature is aware that a practice has arisen contrary to the statutory language, nor would that practice suffice to change what is already written into law.

Finally, defendants suggest that their right to a neuropsychological evaluation may arise pursuant to authorities other than Section 385. Defendants direct us to both federal and state court rules concerning discovery, which they state are "instructive" even while they acknowledge that these rules "are not binding authority on the Michigan Workers' Disability Compensation Agency and its Board of Magistrates." (Defendants' brief at 10-11.) In fact, both sets of court rules explicitly indicate that they are applicable only to *courts*, rather than to administrative proceedings. F R Civ P 1; MCR 1.103. These rules do not govern accordingly. *People v Curry*, unpublished opinion of the Court of Appeals dated June 11, 2015 (Docket No. 320363), slip op at 5, n4 ("The Federal Rules of Civil Procedure only apply to proceedings in the federal district courts."); *Brown v Beckwith Evans Company*, 192 Mich App 158, 166; 480 NW2d 311 (1991) ("The court rules do not apply to workers' compensation proceedings…"). Even if other rules were to be applied, in abandoning the strictures of Section 385, defendants also abandon the punitive provisions of that statute. It is not clear whether principles arising from other sources would permit sanctions for noncompliance.

Defendants also cites Appellate Administrative Rule 1301(2), R 792.11301(2), which states that, "In the absence of an applicable rule, at the discretion of the magistrate, the Michigan court rules may be considered in proceedings under the workers' disability compensation act." However, there *is* an applicable rule, or more properly there is an applicable statute – Section 385. Additionally, discretionary consideration of a court rule does not permit a magistrate to ignore a controlling statute. "The powers of its administrative commission, or board, cannot go beyond those expressly conferred or necessarily implied by the act creating it." *Carvalho v Cass Putnam Hotel Co*, 239 Mich 508, 512; 25 NW 21 (1927).

Conclusion

The language of Section 385 is clear and unambiguous. It compels a workers' compensation claimant to submit to an examination solely "by "a physician or surgeon authorized to practice medicine under the laws of the state…" A neuropsychiatrist is neither a physician or surgeon nor an individual authorized to practice medicine under the laws of the state. The magistrate therefore correctly quashed an examination of plaintiff by neuropsychologist Eduardo Montoya, and we affirm his order accordingly.

Commissioners McMillan and Ries concur.

Daryl Royal	Chairperson
Duncan A. McMillan	Commissioner
Granner S. Ries	Commissioner

STATE OF MICHIGAN
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IT IS ORDERED that the magistrate's interlocutory order quashing the proposed examination is AFFIRMED, and the file is returned to the magistrate for further proceedings.

In light of this order, plaintiff's motion to dismiss interlocutory claim for review or, alternatively, to peremptorily affirm is MOOT.

Daryl Royal Chairperson

Duncan A. McMillan Commissioner

Granner S. Ries Commissioner