

STATE OF MICHIGAN  
WORKER'S COMPENSATION APPELLATE COMMISSION

GARY A. HENRY,  
PLAINTIFF,

V

DOCKET #03-0334

CITY OF MIDLAND,  
SELF INSURED;  
J. E. JOHNSON CONTRACTING, INC. AND  
CITIZENS INSURANCE COMPANY OF OHIO,  
DEFENDANTS.

APPEAL FROM MAGISTRATE SLOSS.

EDWARD J. GALLAGHER, II FOR PLAINTIFF,  
BRUCE L. DALRYMPLE FOR DEFENDANT CITY OF MIDLAND,  
JUDITH F. VARGA FOR DEFENDANTS J. E. JOHNSON CONTRACTING, INC. AND  
CITIZENS INSURANCE COMPANY OF OHIO.

OPINION

LESLIE, COMMISSIONER

Defendant City of Midland appeals the decision of Magistrate Andrew G. Sloss mailed July 31, 2003 granting plaintiff an open award of benefits for right foot disability. Defendant claims the magistrate erred in his application of *Sington v Chrysler Corp*, 467 Mich 144 (2002), and failed to apply the one year back rule. Plaintiff denies error in the magistrate's application of *Sington*. Defendants-Appellees, J. E. Johnson Contracting and Citizens Insurance Co. of America ask only that the magistrate's finding of no date of injury during plaintiff's employment at Johnson Contracting be affirmed. We affirm in part and remand in part for a supplemental opinion.

In granting plaintiff an open award of benefits, the magistrate wrote:

Plaintiff alleges an injury date of December 24, 1992. In order to establish a work-related disability, Plaintiff must demonstrate that he has a limitation of his maximum wage earning capacity in work suitable to h[is] qualifications and training. MCL 418.301(4); MSA 17.237(301)(4); *Sington v Chrysler Corp*, 467 Mich 144, 154; 648 NW2d 624 (2002). An inability to return to the same or similar work is not enough to establish disability; the claimant is not disabled if the physical limitation does not affect the ability to earn maximum wages in work in which the claimant is qualified and trained. *Id.*, p 156, citing *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201; 536 NW2d 542 (1995). In determining the claimant's maximum wage earning capacity, the factors that the magistrate is to consider include: (1) the particular work that the employee is both trained and qualified to perform; (2) whether there continues

to be a substantial job market for such work; and (3) the wages typically earned for such employment in comparison to the employee's wages on the date of injury. *Id.*, p 157. Plaintiff carries the burden of proof by the preponderance of the evidence standard. *Aquilina v General Motors Corp.*, 403 Mich 206; 267 NW2d 923 (1978).

Based upon my review of the evidence and testimony presented in this matter, I conclude and find as fact that Plaintiff has established by a preponderance of the evidence that he sustained a work-related personal injury on December 24, 1992. It was essentially undisputed that Plaintiff worked all day performing overhead work on a ladder on that date, and that he experienced pain in his right forefoot and curling of his right toes at the end of the day. Although some of the medical histories indicated that the date was December 12, 1992, the basic facts were unchallenged.

Plaintiff's treating physician, Dr. Biddinger, indicated that this condition was likely caused by the employment activities on December 24, 1992, and that his subsequent work aggravated the symptomatology. Dr. Buszek suggested that the December 24, 1992 work on the ladder aggravated the symptomatology of a pre-existing condition. However, given the lack of history of any prior problems, I adopt the opinion of Dr. Biddinger, and find that Plaintiff has neuritis of the right forefoot that was caused by his work activities on December 24, 1992.

Both of the medical experts testifying in this matter concluded that Plaintiff's condition requires restrictions that would preclude him from performing all of his prior work duties as an Operator Mechanic. Defendant Midland introduced the testimony of a vocational expert purporting to show many available jobs within Plaintiff's qualifications and training. However, it was evident that Mr. Rossi utilized a resume belonging to someone other than Plaintiff. Therefore, Mr. Rossi did not have accurate information regarding Plaintiff's qualifications and training, and his testimony is irrelevant and inadmissible.

Accordingly, Plaintiff's work for Defendant as an Operator Mechanic for Defendant Midland was the highest paying job for which Plaintiff is qualified and trained. He cannot perform this work any longer due to his physical limitations due to the work-related injury. No admissible evidence was presented that there is any work available within Plaintiff's capability at or exceeding the wages he earned on the date of injury. I therefore find as fact that Plaintiff is disabled as defined by the act.<sup>1</sup>

Defendant contends this analysis is improper because the medical testimony does not support the magistrate's conclusion plaintiff is disabled from all of the functions which he performed as an operator/mechanic, noting plaintiff's several years of subsequent employment performing lighter, but regular work in the same classification. In addition, defendant asserts the magistrate erred because he did not consider plaintiff's ability to return to work at all the jobs he is trained and qualified to do, including purchasing agent, inside or outside sales representative, and self-employment doing sales of small engine parts and bench repair of small engines. Defendant notes plaintiff:

---

<sup>1</sup> Magistrate's opinion at 5-6.

was not in a position to testify as to what work in that capacity existed in the marketplace because of his remarkable inactivity in making any effort to secure employment from any other entity than the City of Midland.<sup>2</sup>

Defendant contends plaintiff testified that he did not feel it was his obligation to seek work with any entity other than the City, and acknowledged at trial he had not tried to find work in the three years after his job with Johnson Contracting. Defendant states it is plaintiff's burden to establish the absence of all jobs paying the maximum wage earning capacity. As a result, defendant asserts the magistrate put the burden of proof on defendant rather than plaintiff. Defendant also claims the magistrate did not follow the requirements of *Sington* regarding a determination of wage loss based on wages the employee is able to earn after injury, asserting plaintiff's behavior after injury demonstrates avoidance of work.

Plaintiff responds:

The magistrate found that the Plaintiff's restrictions would preclude his work as an operator/mechanic at the Waste Water Treatment Plant based on the expert's agreement that the Plaintiff needs the following extensive restrictions: no extensive walking, no walking on uneven surfaces, no use of stairs or ladders, avoid forceful pushing on the foot such as driving. As found by the magistrate, these restrictions rendered the Plaintiff physically incapable of performing the duties for which [sic] his past employment for which he was qualified and trained. The testimony also established that no work paying his maximum wage was available to him and that there are no jobs that pay less available to him. This meets the required analysis under *Sington v Chrysler Corp*, 467 Mich 144 (2002).<sup>3</sup>

Plaintiff adds that the requirements of MCL 418.847(2) do not require the magistrate to "make specific references to each and every nuance of the law and evidence he is applying, so long as his opinion, when reviewed as a whole and in context is sufficient to allow us to understand what legal standard he is applying to which facts."<sup>4</sup> Although we agree with the general principle stated, we do not agree with plaintiff that the magistrate sufficiently reviewed the evidence in his opinion in order for us to evaluate all of the arguments on appeal.

Nor do we agree with defendant's premise that the magistrate found plaintiff was unable to perform *all* his duties as an operator/mechanic. Based on plaintiff's testimony and that of the persuasive medical testimony, he concluded plaintiff could not perform "this work any longer due to his physical limitations due to the work-related injury."<sup>5</sup> We understand this comment to mean plaintiff could not fully perform the work of operator/mechanic, not that he was unable to perform every aspect of this job. Defendant correctly points out that after the injury, plaintiff performed many of his duties as an operator/mechanic. There did come a time when plaintiff's job again required all the physical work of

---

<sup>2</sup> Defendant's brief at 14.

<sup>3</sup> Plaintiff's brief at 12.

<sup>4</sup> *Id.* at 13.

<sup>5</sup> Magistrate's opinion at 6.

his pre-injury position as an operator/mechanic.<sup>6</sup> At this point, he testified he was unable to continue in this position. Defendant then provided a lesser paying job. This is not the end of the inquiry, however.

In *Sington*, the Supreme Court held that inability to perform one job within one's qualifications and training does not establish disability within the meaning of MCL 418.301(4). The court also held that the performance of restricted or accommodating work after injury does not automatically establish compensable disability. However, the Commission has held in several recent cases that the employer's removal of an accommodating job means that the work involved is not reasonably available to the employee, absent some proof from the employer that such work is generally available.<sup>7</sup> In this case, the change in job duties, again requiring full physical activity means that the accommodating work was, in fact, taken away from the employee. As a result, the equal paying, accommodating work in the classification of operator/mechanic does not establish maximum wage earning capacity. At this point the burden lies with defendant to produce evidence showing that there are jobs in the general marketplace the same or similar to plaintiff's accommodated work as an operator/mechanic.<sup>8</sup> Defendant offered no such proof.

Clearly, any jobs plaintiff performed which pay less than his wages at the time of injury do not establish maximum wage earning capacity. As a result, we find no error in the magistrate's analysis of the lesser paying jobs after injury when determining loss of maximum wage earning capacity under §301(4) and *Sington*. As a result, plaintiff has proven a compensable disability based on loss of maximum reasonable wage earning capacity.

However, an employee bears the burden of proving he experiences a wage loss due to the injury.<sup>9</sup> The existence of jobs in the marketplace reasonably available to plaintiff within his qualifications and training and within his capacity to perform, may represent wages which the employee is able to earn after injury. This is particularly true where the employee testifies there are specific jobs reasonably available to the employee which he can perform, but makes no effort to obtain them. The magistrate did not provide any summary or analysis of plaintiff's somewhat conflicting testimony concerning his efforts to search for or obtain work both before and after he last worked at Johnson Contracting.

An employee's efforts in seeking employment may be an important inquiry under *Sington*. As we recently stated in *Fuller v Wal Mart Stores, Inc (1542)*, 2004 ACO #115:

Where the employee has a large universe of qualifications and training coupled with relatively limited impairment, the failure to look for work could well be fatal to plaintiff's claim, because plaintiff failed to show either loss of maximum wage earning capacity, or wage loss due to injury. Where, as here, the plaintiff's universe of jobs is essentially limited to physical labor or highly accommodating work, the failure to look for work is far less significant.

---

<sup>6</sup> Trial transcript at 17.

<sup>7</sup> See, e.g., *Crenshaw v CLCD Flint (General Motors Corp)*, 2004 ACO #36.

<sup>8</sup> See, e.g., *Kethman v Lear Seating Corp*, 2003 ACO #205; *Crenshaw, supra*.

<sup>9</sup> *Sington* at 160. See, also, *McKinney v Ford Motor Company*, 2003 ACO #270; *Voss v Amsted Industries, Inc*, 2004 ACO #35; *Brecht v MacDonald Molding, Inc*, 2004 ACO #85.

In the case before us, plaintiff has significant restrictions, however, he testified he was capable of performing the same or similar work to that which he performed at Johnson Contracting.<sup>10</sup> Plaintiff also testified he could work as a salesman as long as it only involved driving and talking to people.<sup>11</sup> There were, however, many jobs within plaintiff's qualifications and training that he felt he could not physically perform.<sup>12</sup> These included most of the activities in his self-employment small engine repair business.<sup>13</sup>

The magistrate acknowledged, but rejected, the testimony of vocational rehabilitation expert, Robert Rossi. Mr. Rossi provided information regarding several jobs which he stated were available, and within plaintiff's abilities. The magistrate did not consider this evidence, because the witness relied on deeply flawed resume information. Plaintiff's testimony on rebuttal fully supports the magistrate's conclusion regarding this testimony.

The magistrate did not discuss or resolve any of the conflicts or ambiguities in plaintiff's own testimony, however. Plaintiff's description of his efforts at obtaining employment was not a model of clarity. On direct examination plaintiff did not provide any testimony on this question. On examination by defense counsel plaintiff stated that after work at Johnson Contracting, he did not look for work. Indeed, at one point he agreed with defense counsel's characterization that since leaving that employer, he had been "sitting home not doing anything."<sup>14</sup> Plaintiff did not clearly explain why he had not sought work.<sup>15</sup> At one point the implication was raised that plaintiff would not return to work except for defendant. Although plaintiff agreed he felt he was entitled to return to work at defendant, he denied that he told the vocational rehabilitation caseworker that he would not look for work anywhere else.<sup>16</sup>

In order to evaluate the competing arguments on appeal regarding the extent of plaintiff's continuing compensable disability, as well as defendant's argument regarding avoiding work and new wage earning capacity after injury, we need the magistrate's analysis of plaintiff's remaining physical abilities, the work plaintiff remains qualified and trained to do, the availability of such work, as well as the impact of plaintiff's effort or lack of effort to find work.<sup>17</sup> We remand for a supplemental opinion summarizing the testimony, analyzing the case considering these factors, and determining the extent of plaintiff's disability, i.e. does plaintiff have the ability to earn wages within the meaning of *Sington* and MCL 418.361(1).

---

<sup>10</sup> Trial transcript at 38, 68, 72.

<sup>11</sup> *Id.* at 73.

<sup>12</sup> *Id.* at 71-76.

<sup>13</sup> *Id.* at 73-74.

<sup>14</sup> *Id.* at 29-30.

<sup>15</sup> *Id.* at 30.

<sup>16</sup> *Id.* at 57.

<sup>17</sup> In doing so the magistrate should make specific findings in line with the Supreme Court's remand order in *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201 (1995).

Defendant next contends the magistrate erred in failing to consider whether plaintiff's performance of post-injury employment represents a new wage earning capacity under MCL 418.301(5)(d).

That provision reads:

(d) If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job through no fault of the employee, the employee shall receive compensation under this act pursuant to the following:

(i) If after exhaustion of unemployment benefit eligibility of an employee, a worker's compensation magistrate or hearing referee, as applicable, determines for any employee covered under this subdivision, that the employments since the time of injury have not established a new wage earning capacity, the employee shall receive compensation based upon his or her wage at the original date of injury. There is a presumption of wage earning capacity established for employments totaling 250 weeks or more.

(ii) The employee must still be disabled as determined pursuant to subsection (4). If the employee is still disabled, he or she shall be entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of termination of the employment of the employee, and the wages paid at the time of the injury.

(iii) If the employee becomes reemployed and the employee is still disabled, he or she shall then receive wage loss benefits as provided in subdivision (b).

Noting that the sum total of plaintiff's employments after injury continued for more than 250 weeks, defendant argues the magistrate erred by failing to apply the presumption of wage earning capacity found in §301(5)(d)(i). Defendant argues there is no testimony that plaintiff's post-injury work was not regular work with the ordinary conditions of permanency. As a result, it was error for the magistrate not to find a new wage earning capacity.

Plaintiff disputes the application of this provision, arguing:

The statute provides that the 100-week period begins to run only upon the occurrence of three conditions; 1) the employee must have a disability pursuant to Section 301(4); 2) the employee must lose his job per Section 301(5)(d) and; 3) the employee's unemployment eligibility must have expired per Section 301(5)(d)(i).

Plaintiff then contends he was not disabled until he was transferred to the library job in April of 1997 and was paid a lesser wage. Plaintiff also argues continued employment with the City and his ineligibility for unemployment benefits means no weeks of post-injury employment may be counted until his last day of work at defendant.

We agree with the defendant that it was incumbent on the magistrate to provide his analysis of all the work performed after the injury and whether the presumption applies and whether, if work was of sufficient duration, this work created a post-injury wage earning capacity. Further, we do not agree

with plaintiff's position that the weeks of post-injury employment are not counted until the three listed conditions are met. Rather, these statutory conditions are separate requirements for the employee to meet in order to be entitled to benefits under §301(5). Compensable disability under §301(4) must be established as a fundamental qualification for entitlement to compensation benefits, and for the classification of post-injury employment as reasonable employment.<sup>18</sup>

Nor is loss of employment after injury is a trigger to begin counting weeks of post-injury employment. Loss of employment triggers the need to determine the question of post-injury wage earning capacity, not the beginning time for counting the number of applicable weeks worked.<sup>19</sup>

Finally, the phrase "after exhaustion of unemployment digibility of an employee" as used in subsection (i) is not an onset date for counting the number of weeks worked after injury. Rather, this phrase is a limitation on the employee's eligibility for worker's compensation benefits. It is not by any stretch of the plain meaning of the section the beginning time for counting the weeks of post-injury employment.<sup>20</sup>

All of plaintiff's post-injury jobs should have been evaluated under §301(5)(d) to determine whether they represented a new wage earning capacity.<sup>21</sup> To the extent that any accommodating work after injury represents capacity to earn in the real world market, it may establish a new wage earning capacity after injury.<sup>22</sup> We remand the case to the magistrate for an evaluation of plaintiff's wage earning capacity after injury taking into account the performance of all work paying lesser wages after injury. The magistrate will first determine the number of weeks plaintiff performed such work. He will then make an evaluation of plaintiff's wage earning capacity in accordance with the Commission decisions in *Wilson v Walt Industries, Inc*, 2001 ACO #133 and *Ray Williams v Sparton Enterprises*, 1999 ACO #669.<sup>23</sup>

We affirm the magistrate's finding of compensable disability. We remand for a supplemental opinion regarding the extent of plaintiff's disability and whether plaintiff's post injury jobs created a new wage earning capacity. We retain jurisdiction.

---

<sup>18</sup> See, e.g., *Koenig v Miesel Sysco Food Service Co*, 2001 ACO #89.

<sup>19</sup> The Commission has held that the question of new wage earning capacity does not arise until the loss of employment. See, *Ponder v Hicks Plastics Co, Inc*, 2000 ACO #6 and *Dompier v Copper Country Intermediate School District*, 2000 ACO #430. This is a fundamentally different question from when weeks of post-injury reasonable employment might begin for purposes of establishing the length of post-injury reasonable employment. The Commission has held that new injuries in reasonable employment require restarting the counting of weeks. *Thomas v Mills Products, Inc*, 2000 ACO #242. Fundamentally, the question is one of how many weeks post-injury the employee has worked in reasonable employment.

<sup>20</sup> *Koenig, supra*.

<sup>21</sup> *O'Brien v Muskegon Area Intermediate School District*, 2000 ACO #448.

<sup>22</sup> *Ray Williams v Sparton Enterprises*, 1999 ACO #669; *Britz v Reef Gear Mfg, Inc*, 2000 ACO #44.

<sup>23</sup> Although these cases were decided under the then governing definition of disability from *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997), the Commission recently held that the wage earning capacity concepts embodied in these decisions remain unchanged by the change wrought in *Sington. Sohn v U.S. Air*, 2004 ACO #63.

Chairperson Reamon and Commissioner Will concur.

Richard B. Leslie Commissioner

William G. Reamon, Jr. Chairperson

Rodger G. Will Commissioner

STATE OF MICHIGAN  
WORKER'S COMPENSATION APPELLATE COMMISSION

GARY A. HENRY,  
PLAINTIFF,

V

DOCKET #03-0334

CITY OF MIDLAND,  
SELF INSURED;  
J. E. JOHNSON CONTRACTING, INC. AND  
CITIZENS INSURANCE COMPANY OF OHIO,  
DEFENDANTS.

This cause came before the Appellate Commission on Defendant City of Midland's appeal from Magistrate Andrew G. Sloss' decision, mailed July 31, 2003, granting plaintiff an open award of benefits for right foot disability. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed in part and remanded in part. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed in part and remanded in part for a supplemental decision in accordance with the attached opinion. The parties may submit supplemental briefs within 30 days from the mailed date of the magistrate's supplemental decision. We retain jurisdiction.

Richard B. Leslie Commissioner

William G. Reamon, Jr. Chairperson

Rodger G. Will Commissioner