

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

LEONARD NESSEL,
PLAINTIFF,

V

DOCKET #03-0399

SCHENCK PEGASUS CORPORATION AND
MICHIGAN TOOLING ASSOCIATION,
DEFENDANTS.

APPEAL FROM MAGISTRATE COPE.

LAWRENCE J. SCHLOSS FOR PLAINTIFF,
GERALD M. MARCINKOSKI FOR DEFENDANTS.

OPINION

LESLIE, CHAIRPERSON

This matter comes before the Appellate Commission on defendants' interlocutory appeal from a decision of Magistrate Susan B. Cope mailed September 24, 2003 denying defendants' request to compel plaintiff to cooperate with discovery. After defendants filed their appeal, plaintiff filed a motion to dismiss on the ground defendants' appeal is vexatious because discovery is not permitted in worker's compensation cases. Consideration of plaintiff's motion necessitates our consideration of the merits of defendants' appeal. We deny plaintiff's motion to dismiss. We also reverse the magistrate's denial of discovery and remand for further proceedings. We do not retain jurisdiction.

Plaintiff filed his Application for Hearing on August 2, 2002 claiming continuing compensable disability as a result of a November 19, 1999 injury when he fell from a ladder fracturing his right foot. The application further alleges:

The employee returned to his favored work on light duty as limited by the physician following the payment of compensation payments and physical therapy from April 30, 2001 through May 1, 2001, being separated from the employer voluntarily on the last day worked, June 3, 2002, on an offer of a Release Agreement which was not executed by the employee. Said return to work aggravated the condition to his last day worked.

The pre-trial was held October 1, 2002. The first scheduled trial date was December 5, 2002. Hearing was rescheduled thereafter to dates of February 26, April 30, June 30, and then September 15, 2003. On August 19, 2003 defendants filed a Motion to Compel Cooperation with Pretrial Discovery together with a brief in support and notice of hearing for August 20, 2003. The motion stated:

1. In preparation for trial, defendants have requested that plaintiff meet with its vocational expert so that the expert can aid in determination of plaintiff's wage earning capacity.

2. Plaintiff has refused to meet with defendants' vocational expert.

3. This is *not* a question of vocational rehabilitation under MCL 418.319, but an inquiry into "disability" under MCL 418.301(4) and *Sington v Chrysler Corporation*, 467 Mich 144; 648 NW2d 624 (2002). See, *Burke v Welk*, 1997 ACO #468; 1997 Mich WCACO 1990, *Solis v Airborne Express*, 1998 ACO #727; 1998 Mich WCACO 3356, and *Solis* (post-remand opinion), *infra*.

4. In accordance with the argument set forth in the accompanying brief, defendants request the Magistrate to:

1. Order plaintiff to meet with defendants' vocational expert.

2. Order that plaintiff's failure to meet with the expert militates against plaintiff's claim of disability. See, *Solis v Airborne Express*, 2000 ACO #638; 2000 Mich WCACO 2490, 2494-2496.

3. If plaintiff does not meet with the expert, adjourn the trial after completion [of] plaintiff's testimony so as to afford defendants the opportunity to prepare its defense in light of the information disclosed for the first time by plaintiff at trial.

Plaintiff responded September 12, 2003:

1. That Pretrial discovery, as referenced by the Defendant, is not a sanctioned procedure by the Rules in the Department of Consumer and Industry Services Bureau of Workers' Unemployment Compensation.

2. That in keeping with the Rules, Plaintiff has declined to subject himself to non-sanctioned proceedings or requests that are not designed to potentiate the payment of Workers' Compensation benefits in accordance with the Workers' Disability Compensation Act.

3. That an "inquiry into disability" is not sanctioned by MCL 418.301(4).

4. That the request for an Order is not in accordance with the Workers' Disability Compensation Act and Defendant is possessed of all information on Plaintiff's experience, training and background from his pre-employment application and extensive work history as contained in his records prior to his sustaining an injury disabling him at work. Additionally, Plaintiff has informally provided information in response to

questions submitted by the Defendant regarding his qualification and training to perform work, as hereto attached.

The additional information “informally provided” was apparently forwarded to defense counsel the same date the answer was filed and was also attached to plaintiff’s answer to the motion. The information was presented in the form of informal answers to interrogatories:

Informal Responses to “Interrogatory Requests”

1. Please list all of the jobs that may fall within your qualifications and training.

Answer: None, other than the job he was performing at the time he was injured while working as an Electrical Department Leader at Schenck Pegasus.

2. Please list all the places where you have worked beginning with your most recent employer.

Answer: Schenck Pegasus;
Stanley Automatic Openers

3. Please list the jobs and job duties you performed at each of the employers listed in #2.

Answer: He assembled, tested and tore down electrical components and supervised the personnel on assembly and tear down. He ordered all special materials, components, transformers and heavy wiring for the job; trouble shot on occasion any electrical problems and performed maintenance duties.

4. Please indicate your education level. List the schools you have attended and the diplomas or degrees you received.

Answer: He graduated from Wilbur Wright High School and has a Certificate from R.E.T.S. Electronics.

5. Please identify the training you may have received at places besides the educational institutions listed in #4. The list should include any on-the-job training received at prior employers, and any classes which prepared you for jobs.

Answer: He has no[] additional training.

6. Please list any other qualifications besides those listed above. By way of example: a real estate license, computer training, etc.

Answer: Not applicable.

No hearing on the record was held regarding the motion. On September 15, 2003, the magistrate signed an order stating: "IT IS FURTHER ORDERED that: Defendant's motion to compel cooperation with discovery is denied." The order was mailed September 24, 2003 and defendants filed an interlocutory appeal October 6, 2003.

On October 8, 2003 plaintiff filed a Motion for Vexatious Claim or Proceedings/Disciplinary Action. Plaintiff states:

1. That Defendants filed a Claim for Review on October 3, 2003. That on the face of the matter asserted to have been appealed to the Appellate Commission is the statement that same was appealed from a dispositive Order of the Honorable Magistrate Susan B. Cope of the Pontiac Workers' Compensation Bureau (Annexed hereto as Exhibit 1, being the Decision of Magistrate Cope determining that the discovery Motion of the Defendants is denied.)

2. That the Plaintiff has inquired of the Defendants with regard to the proceedings taken and considers same to be vexatious and frivolous, causing the intended result of hindrance or delay without reasonable basis in that discovery is not permitted in accordance with the Workers' Disability Compensation Act of 1969 and Administrative Rules, as amended November, 1999, et seq.

3. That the document filed by the Defendants in the Plaintiff's cause grossly lacks the requirements of propriety and grossly disregards the requirement of a fair presentation of the issues.

WHEREFORE, your Plaintiff, LEONARD NESSEL, by and through his attorney, LAWRENCE J. SCHLOSS, requests that this Honorable Appellate Commission dismiss and hold for naught the claimed application of the Defendants and assess costs in accordance with MCL 418.861b, Vexatious Claim or Proceeding; Disciplinary Action.

Defendant responded October 23, 2003. Defendant stated:

1. Defendant is appealing the interlocutory order of Magistrate Cope, mailed September 24, 2003. In that order, the Magistrate holds defendant's "motion to compel cooperation with discovery is denied."

2. Plaintiff seeks sanctions for defendant's appeal on the basis that "discovery is not permitted" in workers' compensation and, therefore, defendant's appeal is vexatious, frivolous, and intended to "delay without reasonable basis" resolution of this case.

3. The basis of plaintiff's motion is without merit. Discovery *is* permitted in workers' compensation. *Boggetta v Burroughs Corp*, 368 Mich 600, 603-604;

118 NW2d 980 (1962); *Johnson v All Star Bar*, 2003 ACO #25; *O'Brien v Federal Screw Works*, 2002 ACO #53; *Martin v Ford Motor Co*, 1981 WCABO #155; *Parker v General Motors Corp*, 1997 WCABO #517.

4. The purpose of defendant's motion was to request plaintiff to meet with defendant's vocational expert to prepare for trial relating to plaintiff's wage earning capacity which is relevant for determining disability under MCL 418.301(4) and *Sington v Chrysler Corporation*, 467 Mich 144; 648 NW2d 624 (2002). The Commission in an order in another case has explicitly said these types of pretrial discovery issues:

. . . present[] significant questions regarding the necessity and scope of pre-trial discovery of a claimant's qualifications, training, and pre-injury wage earning capacity. Because *Sington v Chrysler Corp*, 467 Mich 144 (2002) places a claimant's qualifications, training, and pre-injury wage earning capacity at the forefront of a disability determination, we believe some manner of pre-trial discovery is essential to the orderly and expeditious disposition of claims. We further believe the bench and bar will benefit from a full exploration of the need and scope of such discovery. *Bailey v Simplified Employment Services*, 2003 Appellate Commission Docket #02-0560, mailed January 30, 2003.

5. Therefore, this appeal is not frivolous. The issue is "significant" not frivolous. And, discovery is permitted to some degree. Nor is the appeal being taken for purposes of delay. An interlocutory ruling on the point at issue here can save time rather than elongate the case. For example, in *Stanley v Waste Management*, 2002 ACO #285, the Magistrate legally erred by refusing defendants' request at the outset of trial to add employers. The case was tried without the joinder. No interlocutory appeal was taken. After the decision on the merits, the Commission decided joinder should have been undertaken. Therefore, the Commission had to remand the case with instructions the Magistrate join the employers and decide the case anew. If *Stanley's* joinder question had been rectified earlier via an interlocutory appeal, time would have been saved. *Stanley* was thus unnecessarily elongated for lack of an interlocutory appeal.

6. Insofar as plaintiff in his closing "WHEREFORE, . . ." clause also mentions dismissal of defendant's "application" [appeal], such request should be denied for the reasons cited above. Notably, in *Bailey* the Commission denied the motion to dismiss the defendants' appeal on a similar *Sington*/discovery issue.

WHEREFORE, defendant-appellant, Schenck Pegasus Corporation, a Self-Insured, respectfully requests the Worker's Compensation Appellate Commission deny "Plaintiff's Motion for Vexatious Claim or Proceedings/Disciplinary Action", and to the

extent plaintiff's motion could be understood as a request for dismissal of the appeal, that request should also be denied.

In deciding plaintiff's motion for sanctions for a vexatious appeal we must first determine whether it is appropriate to consider the defendants' appeal because it is interlocutory in nature. As we said in *Johnson v All Star Sports Bar*, 2003 ACO #25:

Because interlocutory appeals tend to delay final disposition of cases, the appellants in interlocutory appeal have the obligation to set forth reasons why review of the case after decision is inadequate to protect their rights in the event the magistrate committed error.

Under the facts defendants have asserted in this case, we find interlocutory review is warranted. (footnote omitted)

In this case, defendants' appeal merits consideration. First, the magistrate did not provide any reasons why the request for discovery was denied. Second, the material requested relates both to plaintiff's burden of proof under *Sington v Chrysler Corp*, 467 Mich 144 (2002) and defendants' obligation to produce evidence in the face of plaintiff's prima facie case. Resolving the discovery issue question prior to the taking of proofs will eliminate any potential for a second hearing or delays resulting if information is not disclosed until examination of the witnesses. Finally, because of the importance and novelty of such questions under *Sington* we proceed with consideration of the merits of defendants' appeal.

In *Kethman v Lear Seating Corp*, 2003 ACO #205 we discussed the relative burdens of proof and going forward under *Sington*. We said:

From our reading of *Sington*, in order to establish a prima facie case of disability and keeping in mind an economic focus rather than a medical impairment focus, the employee must demonstrate:

1. his work qualifications and training, and what jobs they translate to, and
2. that he has a work-related physical or mental impairment which does not permit him to perform jobs within his qualifications and training and that he has lost wages, and
3. that he is either unable to perform or cannot obtain employment at all those jobs within his qualifications and training that pay his maximum income, which are reasonably available

* * *

After putting in proofs which the fact finder accepts as sufficient to establish the three factors listed above, plaintiff has established a prima facie case, and the burden of going forward concerning these matters shifts to defendants. At this point defendants can bring forth proofs to show there were jobs reasonably available to plaintiff within

her qualifications and training which she remained physically able to perform and which paid either her maximum wage, or less for the purposes of a section 361 wage-loss determination. (footnotes omitted).

These legal requirements present both parties to a worker's compensation case with new and more complex burdens of proof and persuasion. The factfinder is also charged with a more complex task in evaluating the competing evidence. In *Scott v Tower Automotive, Inc*, 2003 ACO #161 Commissioner Wyszynski outlined the factfinder's obligations in order to fully analyze the required legal elements for compensable disability:

Under the *Sington* standard, the fact finder must determine what the claimant is qualified and trained to do; the nature and length of any post-injury employment along with the wages earned and the reason for termination if the employment is terminated; the claimant's post-injury efforts to obtain employment and the results of those efforts; and whether there was an actual job available in any area of work for which the claimant was qualified and trained.

Certainly, the worker's compensation arena has never had full discovery as provided for in the Michigan General Court Rules. However, as we wrote in *Johnson, supra*, discovery is permitted under the proper circumstances. *Boggetta v Burroughs*, 368 Mich 600 (1962), MCL 418.851 and MCL 418.853 empower magistrates to require disclosure of any relevant information to the issues under consideration. The elements of proof in *Sington* make it critical to develop plaintiff's qualifications and training, as well as the medical limitations and how those limitations affect plaintiff's ability to find work and earn wages.

Critical to this evaluation are detailed proofs and findings in the following areas:

- 1) The employee's full employment history, including wages earned at each job and the physical demands of the jobs and the skill sets required;
- 2) Other skills and training, including non-work activities, that show an ability to work and earn wages or why they do not as the case may be;
- 3) The employee's medical limitations, and how these limitations impact the ability to perform all the work within the employee's qualifications and training;
- 4) The employee's ability to work at other jobs, if any, and the availability of such work;
- 5) The history of subsequent employment or applications for employment after injury and the reasons why the employee is not working.

To the extent that an employee or the employer has control over this information, efficient administration of worker's compensation hearings dictates that it be exchanged prior to the hearing

rather than during the hearing. Waiting until the hearing, whether after direct or cross-examination of witnesses, would create undesirable bifurcation of proceedings and delays in final resolution.

We recognize that it would be possible to deny any pre-trial access to information required by *Sington*, and to continue worker's compensation as the last vestige of the common law trial by surprise. Such an approach would not advance the cause of making process and proceedings "as summary as reasonably may be" as required by MCL 418.853. Denying pre-trial access to this information would necessitate adjournment of proceedings after direct or cross-examination or in some cases after the lay proofs were initially completed, in order to provide the parties with the opportunity to evaluate the information and to prepare any defense or rebuttal based on the evidence of plaintiff's ability to perform work after injury.

We emphasize that access to information required by *Sington* does not flow exclusively from the employee to the employer. To the extent that defendants have or develop information showing or tending to show the employee's qualifications and training as well as availability of jobs, that information should be subject to discovery by the employee in order to prevent delay in the event those proofs are presented at trial. If the employer adduces evidence that certain jobs are available, the employee will want the opportunity to investigate these jobs to determine whether he or she is qualified and able to perform them, and to apply for these jobs in order to test their availability if that course is appropriate. To be sure, an employee need not do any of these things in response to an employer's proofs, but to do so is to imperil the claim. As a result, disclosure of such information prior to presentation of proofs may be required under the appropriate circumstances.

While pre-trial access to information is critical, the extent of discovery and the precise form which disclosure may take, is commended to the broad discretion of worker's compensation magistrates. However, it is error for a magistrate confronted with requests for information pursuant to *Sington* to categorically deny requests for information on the ground such information is not subject to pre-trial production. The need for particular information must be assessed on a case-by-case basis.¹ In this case, the hearing on defendants' motion was not on the record. In addition, the magistrate gave no reasons for her denial. As a result, on its face the decision to deny defendants access to information is erroneous.

Based on the above analysis, we deny plaintiff's motion for dismissal. The magistrate's decision denying discovery is reversed on the authority of *Sington v Chrysler Corp*, 467 Mich 144 (2002), *Johnson v All Star Sports Bar*, 2003 ACO #25 and MCL 418.851 and 853. The matter is remanded for an evidentiary hearing on the record regarding the question of compelling discovery. Defendants will present reasons justifying the nature and extent of discovery requested. Plaintiff may present any countervailing considerations for the magistrate's evaluation. Based on this hearing, the magistrate will grant or deny the requested discovery and provide written reasons explaining the decision. We do not retain jurisdiction.

¹ Without endorsing the propriety of defendants' request in this case, we observe that under the proper circumstances evaluation by a vocational expert may be appropriate in order to fully explore the legal elements required by *Sington* as the Commission has explicated them.

Commissioners Kent and Martell concur.

Richard B. Leslie

Chairperson

James J. Kent

Marie E. Martell

Commissioners

