

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

JUDY A. BRECHT,
PLAINTIFF,

V

DOCKET #01-0373

MACDONALD MOLDING, INCORPORATED,
SELF INSURED,
DEFENDANT.

ON REMAND FROM MAGISTRATE SLOSS.

FRANK L. PARTIPILO AND DARYL ROYAL FOR PLAINTIFF,
DENICE M. LEVASSEUR FOR DEFENDANT.

OPINION

WILL, COMMISSIONER

This matter was initially heard by Magistrate Sloss on August 14, 2001. On September 26, 2001 the magistrate granted plaintiff an open award. Defendant filed a timely claim for review with the Worker's Compensation Appellate Commission. On December 21, 2001, the defendant filed its brief on appeal arguing only that plaintiff's asthma is not work related. Plaintiff filed a reply brief.

On July 31, 2002 the Michigan Supreme Court decided *Sington v Chrysler Corp*, 467 Mich 144 (2002). No supplemental briefs were filed with the commission thereafter.

On September 4, 2002 a previous panel of this Commission issued its first decision in this case affirming the magistrate's finding of occupational asthma but remanding this matter to the magistrate for further factual findings based on *Sington, supra*, although the parties had never raised the issue of disability.¹

Regardless, the previous panel did remand this case for further action by the magistrate pursuant to *Sington*, saying:

We acknowledge and affirm the magistrate's determination that the chemical and fumes at defendant exacerbated plaintiff's asthma and bronchitis conditions causing permanent damage and deterioration to her underlying pathology. We are further persuaded based on Dr. Bruner's testimony that plaintiff cannot return to a work environment such as at defendant. However, on remand, the assigned magistrate shall determine whether plaintiff has established a disability pursuant to *Sington, supra*.

¹ Plaintiff has maintained his objection on these grounds since this Commission's first remand, thus, in our opinion, preserving it for possible appeal to a higher court.

Specifically, the magistrate shall determine whether there are regular jobs in the marketplace at the maximum level of wages within plaintiff's qualifications and training that she can perform. Additionally, the magistrate shall make a finding concerning plaintiff's qualifications and training. Since the current record proofs are deficient as to whether there are regular jobs in the marketplace within plaintiff's qualifications and training, the magistrate may reopen the record at his/her discretion. Upon mailing of the magistrate's supplemental decision, the parties shall have 30 days in which to file supplemental briefs at the Commission. We affirm all other aspects of the magistrate's decision not inconsistent with this remand.

On remand the magistrate held:

In order to establish a work-related disability, Plaintiff must demonstrate that she has a limitation of her maximum wage-earning capacity in work suitable to her 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 Corporation*, 403 Mich 206; 267 NW2d 923 (1978).

Sufficient evidence was presented at trial and in the deposition of Dr. Bruner for an adequate analysis of this matter under *Sington* without reopening the proofs, and I do so now.

Plaintiff has no education or training beyond a high school diploma (Tr, p 15), and has always worked in an industrial setting. (Tr, pp 16, 59). I therefore conclude and find as fact that Plaintiff has no qualifications and/or training other than that she performed for Defendant. She has basically always performed the same type of unskilled labor over her entire work history, and I find her wages for Defendant to be her maximum wage-earning capacity.

In my prior opinion, I adopted the opinions of Dr. Bruner. Dr. Bruner testified that because of Plaintiff's condition, she could not return to work in that type of environment. (Bruner, p 24). Accordingly, I find as fact that Plaintiff has a limitation of

her maximum wage-earning capacity, and is disabled as defined by the act, in that she is unable to return to any job for which she is trained and/or qualified.²

The parties filed supplemental briefs addressing the magistrate's December 18, 2002 decision. As a result the previous Commission again remanded this case to the magistrate. See 2003 ACO #28:

This case now returns to the Appellate Commission after remand. Both parties filed supplemental briefs. Plaintiff requests our affirmance. Defendant claims the magistrate failed to address the key issue in our remand order and requests we reverse the magistrate's supplemental decision. We re-remand to the Board of Magistrates.

We agree with defendant that the magistrate's supplemental decision fails to adequately address our instructions on remand. Defendant argues plaintiff failed to prove an inability to earn wages because of her asthma in non-industrial environments. The magistrate correctly noted that Dr. Bruner opined that plaintiff could not return to work in defendant's environment, however, Dr. Bruner never indicated plaintiff could not return to work elsewhere where fumes or asthma aggravating factors were not present. We note the following colloquy from Dr. Bruner's deposition:

Q. Would there ever be a time in the future where this individual could return to the type of work that she did at MacDonald Molding Textron?

A. No.

Q. What would be -- why is that?

A. Well, she can return to employment as long as she's not exposed to chemicals or fumes that could exacerbate the asthma.

We are persuaded, as defendant correctly points out, that plaintiff successfully performed inventory, clerical and inspection jobs with no education or training beyond a high school diploma. And, although plaintiff cannot perform these activities in defendant's environment, this is not to say that she cannot perform the same activities in a different environment outside the industrial setting.

The record proofs remain deficient as to whether there are regular jobs in the marketplace at plaintiff's maximum level of wages within her qualifications and training. As such, we are persuaded that the magistrate's conclusion that plaintiff is "disabled and is unable to return to any job for which she is trained and/or qualified" is without competent, material, and substantial evidence on the whole record. Therefore, we re-remand to the Board of Magistrates for a record supported supplemental decision. On

² Magistrate's December 18, 2002 decision, p. 2.

remand the magistrate is to determine whether there are regular jobs available in the marketplace at plaintiff's maximum level of wages within her qualifications and training. Should a party request of the magistrate that the record be re-opened for a complete *Sington* analysis, the magistrate must do so. Also, should either party wish to pursue any further appeal following the magistrate's supplemental decision after re-remand, the appealing party must file its brief with the Commission no more than 30 days after the mailed date of the magistrate's decision. The opposing party has 30 days to respond thereafter, should it choose to do so. We retain jurisdiction.³

On October 17, 2003 the second decision on remand was mailed. It reads, in part, as follows:

Samuel I. Goldstein, Ph.D. testified for Plaintiff that Plaintiff is not capable of earning any income from any form of employment. She is dependent on oxygen, and has severe exertional limitations that would preclude her from performing work at any level of exertion. Plaintiff has always performed unskilled work in the factory setting, and has no transferable skills. There is no work that she has performed in the past that she can return to. Similarly, Mr. James Fuller, providing expert testimony on behalf of Defendant, found that there were no available jobs within Plaintiff's qualifications and training that paid more than \$10 per hour.

Plaintiff objected to the admission of the depositions of Mr. Fuller and Dr. Gordon, which I initially sustained on relevance grounds. After reviewing the testimony of Dr. Fuller, I find that his testimony is indeed relevant, in that it supports a finding that there are no jobs available within Plaintiff's qualifications and training at her maximum wage-earning capacity. Accordingly, I have admitted the deposition of Mr. Fuller, and have relied upon his testimony. All other objections contained therein are overruled. The objection of Plaintiff to the admission of Dr. Gordon's deposition is sustained, and his testimony will not be admitted nor considered. His testimony relates to causation and extent of Plaintiff's disability, which is not an issue on this remand. All objections raised regarding the testimony of Dr. Goldstein are overruled.

Based upon the testimony presented at this hearing, I agree with Dr. Goldstein and find that Plaintiff's background and experience qualifies her to perform only unskilled work of medium physical demand in a factory setting. Essentially, the only work for which she was qualified and trained is that which she was performing for Defendant on her last day of work. Mr. Fuller opined that she could continue to perform work in a "clean environment" (Fuller Dep, p 24), but could only point to jobs for which Plaintiff has no experience or training. (Fuller Dep, pp 29-30). In any event, Mr. Fuller did not find any available jobs that paid the same or more than her wages for Defendant.

Accordingly, I find as fact that Plaintiff is disabled as defined by the act. The only job for which she was qualified and trained that would pay maximum wages is the

³ 2003 ACO #28, p 3-4.

position at Defendant that she is now unable to perform due to her injury. There are no regular jobs in the marketplace at plaintiff's maximum level of wages within her present qualifications and training.⁴

The parties have now filed additional supplemental briefs discussing the magistrates October 17, 2003 decision. Defendant seeks a reversal or a reduction of benefits based on what plaintiff is able to earn after the injury.

Plaintiff seeks an affirmance of the October 17, 2003 decision of the magistrate and again reminds the Commission that the defendant never raised the issue of disability prior to the September 4, 2002 decision of the Commission which introduced the *Sington* problem. Accordingly, the plaintiff argued that all of the *Sington* issues should not have been introduced into this case in the first place.

However, having introduced *Sington* into this case, sua sponte, the Commission must deal with it.

The defendant has told us in no uncertain terms that it wants us to deal with the plaintiff's residual earning capacity for work within her qualifications and training. In looking to our January 31, 2003 decision remanding this case we said, "on remand the magistrate is to determine whether there are regular jobs available in the marketplace at plaintiff's maximum level of wages within her qualifications and training." The order accompanying the opinion specifically said, "on remand, the magistrate is to determine whether there are regular jobs in the marketplace at plaintiff's maximum level of wages within her qualifications and training."

The magistrate answered this question holding that there were no such jobs. We affirm that finding believing it to be supported by competent, material and substantial evidence on the whole record.

Unfortunately, we did not tell the magistrate that in carrying out the *Sington* analysis the parties must address the requirements of Section 361 of the act. The claimant does this by proving either an inability to perform (or obtain because such jobs are not reasonably available) all the jobs within his or her qualifications and training that pay lesser wages establishing a prima facie wage loss. See *Riley v Bay Logistics*, 2004 ACO #27, pgs 6-8.

Plaintiff points out at page 10 of her April 5, 2004 brief:

What defendant effectively complains about is that the magistrate did not exceed the scope of the remand order, to determine not only whether plaintiff could earn reasonable maximum wages, but also whether she could earn any wages at all, and in what amount.

If this Commission wished more than merely proofs as to the availability of jobs within plaintiff's qualifications and training that would pay her maximum wages, it did not

⁴ Magistrate's October 17, 2003 decision, p 2-3.

so state. Plaintiff conformed her proofs to issue set forth in the remand order, and the magistrate similarly confined his opinion to that issue. If more is desired, it may be that a further remand is in order. Plaintiff may not be penalized for relying upon the precise language of this Commission's order.

The plaintiff is correct in offering the above argument. Indeed, this case has to be remanded again to allow the parties the opportunity to introduce proofs as to what the plaintiff is able to earn after the injury.

We remand this case to the magistrate for further action consistent with the above. We retain jurisdiction.

Commissioners Kent and Leslie concur.

Rodger G. Will

James J. Kent

Richard B. Leslie

Commissioners

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This case returns to the Appellate Commission from the Board of Magistrates. Magistrate Andrew G. Sloss's decision on re-remand was mailed October 17, 2003. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be re-remanded again to the Board of Magistrates. Therefore,

IT IS ORDERED that the magistrate's decision is re-remanded again to allow the parties the opportunity to introduce proofs as to the claimants residual wage earning capacity for work within her qualifications and training. We retain jurisdiction. The appellant shall file a transcript of any supplemental proceedings held by the Board of Magistrates, with the Commission within 60 days of the mailed date of the magistrate's supplemental opinion. The appellant shall file a supplemental brief with the Commission not more than 30 days after filing the transcript, or, if no transcript is required, 30 days from the date of the magistrate's supplemental opinion. Appellee shall file his reply brief not more than 30 days after receipt of Appellant's brief.

Rodger G. Will

James J. Kent

Richard B. Leslie

Commissioners