

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

ANTHONY CLISH,
PLAINTIFF,

V

DOCKET # 02-0227

PEERLESS INDUSTRIES,
A DIVISION OF MASCO TECH,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE BRENNAN.

PETER J. VERROS FOR PLAINTIFF,
SAM AYYASH FOR DEFENDANT.

OPINION

LESLIE, COMMISSIONER

This case returns to the Commission after remand to Magistrate Mary C. Brennan for further proceedings and a supplemental opinion pursuant to *Sington v Chrysler Corp*, 467 Mich 144 (2002). In our original opinion, we affirmed the magistrate's findings of work-related personal injury in November of 1999, and that work after that time did not aggravate plaintiff's condition. However, because the matter was tried prior to the issuance of *Sington* remand was required. We ordered as follows:

On remand, the magistrate will determine plaintiff's qualifications and training, and whether he has lost his maximum wage earning capacity as a result of his work-related injuries. To the extent further proofs are required to make these determinations, the magistrate will permit such proofs should the parties desire to present them.

Pursuant to this order, further proceedings were conducted June 11, 2003, consisting of additional testimony from plaintiff and testimony from a new defense witness, Charles Miller. Supplemental testimony from plaintiff's treating doctor, Michael Fitzsimmons, taken by deposition March 18, 2003 was also introduced into evidence.

On remand, after considering the proofs adduced, the magistrate issued a supplemental opinion entitled "Findings on Remand" mailed July 30, 2003. She found plaintiff entitled to an open award of benefits. With respect to plaintiff's qualifications and training, she wrote:

At the instant hearing, plaintiff testified that he completed only the ninth grade in school and has limited ability to read and write. He estimated that his reading and math skills were at fourth grade level. Outside of his limited high school and work at

defendant, he has not undergone any other formal training, nor does he have any certifications, or licenses. His prior jobs include working as a laborer, a stockman, and assembling bicycles in a hardware store. All of these jobs required considerable lifting which plaintiff stated he is no longer able to perform, and all paid significantly less than the wages he earned at defendant. At Masco, plaintiff operated the chucker and screw machines, which jobs he was taught by another operator. In order to operate these machines, plaintiff needed to read a blue print and use a micrometer.¹

She summarized the remaining lay and medical testimony as follows:

In November 1999, plaintiff sought medical treatment from Dr. Fitzsimmons for complaints regarding bilateral arm pain. Dr. Fitzsimmons diagnosed recurrent bilateral epicondylitis and recommended that plaintiff reduce his hours to 40 per week and wear splints. (Opinion, 3) Plaintiff did reduce his work hours and consequently suffered a reduction in his earnings, but he was able to perform the chucker job without any other modification until his lay off in June 2000. Since leave defendant, plaintiff has not actively looked for work, nor has defendant offered him any other employment or rehabilitation. Plaintiff testified that his left arm continues to be very painful and he continues to treat with Dr. Fitzsimmons.

Dr. Fitzsimmons testified that he saw plaintiff in December 2002 and that his upper extremity complaints were “chronic and ongoing” since 2000. He recommended that plaintiff undergo surgery on his left arm. He also recommended that his earlier restrictions remain in effect. These included limiting his work to 40 hours per week, no heavy lifting, repetitive gripping or grasping or repetitive use of the upper extremities.

Charles Miller is a certified disability management specialist and vocational rehabilitation case manager for ASU/Recovery Unlimited. He performs vocational assessments and assists people with disabilities return to work. He did not meet with plaintiff but utilized a June 2000 report from Dr. McCauley regarding a right shoulder strain, and reviewed plaintiff’s qualifications and training as contained in his job application. He then prepared a transferable skill analysis and labor market survey for plaintiff. Mr. Miller testified that he utilized Mr. Clish’s work history, education, skills and medical limitations to identify eight job titles, as defined by the Department of Labor Dictionary of Occupational Titles, that he felt plaintiff would be able to perform. Utilizing these job titles, Mr. Miller conducted a labor market survey and identified ten actual employers with job openings. It is significant to note that each of these actual jobs pays wages significantly less than Mr. Clish earned at defendant, and that in his report, Mr. Miller acknowledged that the wages reflected in the transferable skill analysis were skewed due to the high number of union jobs in the metropolitan area and that, “I would expect a more reasonable wage for these jobs that the non-union would be in the \$7 to \$9 range”. (Defendant’s Ex #1.) Mr. Miller testified that although he contacted each of these prospective employers to inquire as to job availability and

¹ Magistrate's opinion at 1.

requirements, he did not specifically inquire as to whether the employers would hire or accommodate an employee with restrictions. He also admitted that he was not aware of plaintiff's problems with his left arm or his restrictions regarding that arm. On the other hand, plaintiff testified that he had contacted each of the employers identified in the labor market survey and they advised him that they were either not hiring or would not hire an individual with physical restrictions. He did specifically advise each of the employers that he had restrictions.²

She found plaintiff had proven loss of maximum wage earning capacity based on the following analysis:

Pursuant to the instructions of the Appellate Commissions, and based upon the evidence presented at the hearing, I find that plaintiff's qualifications and training are limited to unskilled physical labor such as stock boy and laborer, and machine operator. He lacks any other training, and has no other skills, licenses or certifications. I further find that plaintiff's highest level of earnings within his qualifications and training was reached at the time of his injury November, 1999. Plaintiff testified that his physical limitations would prohibit him from returning to any of his prior jobs and defendants [sic] have not produced any proofs to the contrary. Moreover, even if plaintiff were able to physically perform these jobs, they paid significantly less than his wages at the time of his injury. Defendants [sic] have presented evidence that there are jobs available within plaintiff's limited qualifications and training. Plaintiff has presented convincing evidence that the prospective employers would not hire him due to his restrictions, thereby casting doubt on the availability of the jobs identified by defendants. Moreover, the actual jobs identified by Mr. Miller all paid significantly less than the wages plaintiff earned at defendant. Accordingly, even assuming per arguendo that these jobs are available and within plaintiff's qualifications and training, they do not equal plaintiff's highest demonstrated pre-injury ability to earn wages, and do not negate a finding of disability. *Sington v Chrysler Corp*, (On Remand) 2003 ACO # 92, 10.

Defendant argues that since plaintiff was able to perform his regular job at his regular hourly rate of pay through his last of work, limited only by his inability to work overtime which in turn was based upon his subjective complaints, plaintiff has not established disability under *Sington*. I find this argument to be without merit. In my initial opinion I found that plaintiff had sustained an injury to his bilateral upper extremities that limited his ability to work more than eight hours per day. I based the finding on the testimony of plaintiff and the testimony of Dr. Fitzsimmons. This finding was considered and affirmed by the Appellate Commission and defendant's attempt to attack the basis of this finding, within the narrow confines of this remand, exceeds the parameters of this hearing. More important, however, is defendant's repeated attempt to confuse plaintiff's ability to perform the physical requirement of the chucker job with his inability to earn the same wages in the job after his injury as before. A key factor in the determination of disability is whether the injury has caused a reduction in the plaintiff's

² *Id.* at 1-2.

ability to earn wages at his highest demonstrated pre-injury level. “If, on the other hand, plaintiff’s work at the time of his injury represented his highest demonstrated ability to earn, then we must determine whether his injury caused any diminution of his ability to earn at the same level.” *Sington* (On Remand) 2003 ACO #92, 10. I found, and continue to find that due to his arm injuries, plaintiff was unable to perform overtime work and thus sustained a loss in his maximum wage earning capacity. It should also be noted that this diminution in earnings was not insignificant, as demonstrated by the wage stipulation for the time of injury versus the last day work. Accordingly, even if plaintiff was physically able to perform the requirements of the job, his injury rendered him unable to perform it in the same manner as he had prior to his injury and caused a “diminution” in his ability to earn wages at his pre-injury level. Therefore, I find that plaintiff has established a work-related disability under the definition set forth in *Sington*, supra.³

Defendant finds three grounds for reversal in the magistrate’s decision. First, it states plaintiff worked a regular job until the plant closed, a fact which precludes an award of benefits. Second, it argues plaintiff’s overtime restrictions were prophylactic only, that plaintiff chose not to work overtime, and plaintiff’s testimony regarding the unavailability of jobs after his last day of work was not believable. Third, defendant contends “the Plaintiff has not demonstrated that any physical limitations affect his ability to earn wages in which he is qualified and trained...”⁴ Plaintiff responds:

Defense counsel argues, that it is the willingness to work at the overtime level rather than an inability or lack of capacity, that seems to be the major problem. This statement flies in the face of two magistrate opinions regarding the credibility of the plaintiff, several work related surgeries during almost thirty years of employment with the defendant in which the plaintiff always returned; the fact that surgery for the left arm was required, and that no work is available that meets plaintiff’s qualifications and training.⁵

We agree with plaintiff that under the facts as found by the magistrate, *Sington* does not mandate reversal.

First, the magistrate previously found plaintiff’s work-related upper extremity problems prevented him from working overtime. The lack of overtime represented a real reduction in plaintiff’s earnings. Thus, the fact plaintiff continued to perform his usual and customary work does not preclude a finding of loss of maximum wage earning capacity.⁶ As in *McKinney*, the magistrate in this case found a direct link between plaintiff’s work-related injury and his reduced wages. Certainly, there was evidence

³ *Id.* at 2-3.

⁴ Defendant’s brief at 9.

⁵ Plaintiff’s brief at 4.

⁶ *McKinney v Ford Motor Company*, 2003 ACO #270.

to the contrary, however, the magistrate accepted plaintiff's testimony as credible and accepted the treating medical as persuasive. There was no legal or factual error on this point.

Likewise, defendant's second argument is misplaced. The magistrate rejected defendant's argument that plaintiff did not work overtime as a matter of personal choice. As noted, she found that the lack of overtime was directly due to plaintiff's injury, supported by testimony from plaintiff as well as his treating doctor establishing that plaintiff could not reasonably perform more than 40 hours of work.⁷

Defendant also argues plaintiff's testimony that certain employers would not hire employees with restrictions is not believable. The magistrate expressly found plaintiff to be credible. This finding is entitled to deference because the magistrate had the opportunity to observe the witnesses, and defendant has not shown the magistrate seriously misapprehended the evidence or overlooked significant evidence.⁸

Defendant's final argument was partially resolved against it in the original appeal. To the extent defendant contends plaintiff has no medical impairment, or that the medical impairment is not related to his work, these questions were resolved against defendant in the original appeal. Defendant does also argue that plaintiff could perform the jobs which its vocational expert identified, and, as a result, plaintiff did not meet his burden of proof regarding disability under *Sington*. Unfortunately for defendant, the magistrate also resolved these factual questions in plaintiff's favor.

Defendant finally argues plaintiff's testimony and the supporting medical regarding plaintiff's limitations is not persuasive. As discussed under argument two, we defer to the magistrate's evaluation of the witnesses before her. Thus, despite defendant's assertion plaintiff's testimony regarding his ability to perform the jobs and the availability of such jobs is not believable, we must defer to the magistrate's assessment.

There was no legal or factual error in the magistrate's award. We affirm her decision as supplemented.

Commissioner Reamon and Kent concur.

Richard B. Leslie

William G. Reamon, Jr.

James J. Kent

Commissioners

⁷ March 18, 2003 deposition of Dr. Fitzsimmons at 9-10; June 11, 2003 trial transcript at 27, 29-30.

⁸ See, e.g., *Wilde v Ann Arbor Public Schools*, 1997 ACO #96.

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

ANTHONY CLISH,
PLAINTIFF,

V

DOCKET # 02-0227

PEERLESS INDUSTRIES,
A DIVISION OF MASCO TECH,
SELF INSURED,
DEFENDANT.

This case returns to the Commission after remand to Magistrate Mary C. Brennan for further proceedings and a supplemental opinion pursuant to *Sington v Chrysler Corp*, 467 Mich 144 (2002). The Commission has considered the record and counsel's briefs, and believes that the magistrate's supplemental decision should be affirmed. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed as supplemented.

Richard B. Leslie

William G. Reamon

James J. Kent

Commissioners