

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

MARY ANN DOW,
PLAINTIFF,

V

DOCKET #03-0098

GENERAL MOTORS CORPORATION,
SELF INSURED,
DEFENDANT.

ON RETURN FROM REMAND TO MAGISTRATE PAIGE.

EDWARD J. GALLAGHER, II FOR PLAINTIFF,
BRUCE L. DALRYMPLE & SCOTT C. STRATTARD FOR DEFENDANT.

OPINION

GLASER, COMMISSIONER

This case comes to us after remand pursuant to our order, 2004 ACO # 157. We retained jurisdiction, and the parties have submitted supplemental briefs, pursuant to our invitation.

We had remanded this case for further findings pursuant to *Robertson v DaimlerChrysler Corp*, 465 Mich 732 (2002):

We remand for the magistrate to complete the analysis for determining whether a personal injury occurred. In doing so an objective standard should be used to determine whether plaintiff's perceptions of the actual events were founded or unfounded. Considering all of the circumstances, would a reasonable person have perceived the events the way plaintiff did. If so, then a subjective standard is applied to the plaintiff's reaction.

After taking the additional steps under *Robertson*, if the magistrate finds that a personal injury did arise out of and in the course of plaintiff's employment, then the magistrate should apply the "significant manner" analysis.¹

In responding to our remand order, the magistrate stated in relevant part:

. . . There was no evidence to suggest that plaintiff was not telling the truth. A reasonable person could perceive that going against the wishes of a boss in the scope of employment, could cause apprehension and the fear of reprisal. I do not believe that

¹ 2004 ACO #157.

plaintiff's perception of the events that occurred were delusional or the imagination of an impaired mind. Objectively there was evidence to support that plaintiff's perceptions of the actual events were founded in fact and reality, a normal and otherwise mentally sound person would have reason to worry about the consequences of taking action against their union and/or its representatives. There was nothing in the treating medical to suggest that plaintiff's thinking was impaired.²

Defendant had initially argued that the magistrate applied the wrong legal standard, having relied on *Gardner v VanBuren Public Schools*, 445 Mich 23 (1994). After remand it argues that the magistrate has still not performed the proper analysis. Defendant states:

The Magistrate's discussion in the Opinion on Remand simply makes no clear finding of what Plaintiff's perception of actual events of employment was as opposed to her fears and concerns based on those perceptions. That such a finding of the nature of events is required is established [sic] by footnote 9 of *Robertson v Chrysler, supra*, above which indicates that a correct perception of an innocuous event may be sufficient under some circumstances to establish compensability but that the well-founded perception of such an event must then be evaluated in connection with whether it contributed to the injury in a "significant manner". . . .³

Plaintiff, in response, correctly points out that this Commission had previously affirmed the magistrate's finding that actual events of employment took place. She further argues that at the second step, the *Robertson* analysis does not require the fact finder to determine whether plaintiff's perception of the work events is accurate, but rather, to determine if plaintiff's perception is objectively reasonable. We agree.

The magistrate, pursuant to our order, did perform an analysis and explained her rationale for finding that plaintiff's perception was not unfounded, on an objective (i.e. reasonable), basis. Although defendant argues that the magistrate relied on unsubstantiated allegations that at least two other employees had similar types of issues while working in the same department as plaintiff, we find that even if such testimony were disregarded, there is substantial evidence to support the magistrate. We note, as did the magistrate that defendant presented no testimony to dispute the allegations that threats had been made against plaintiff. The magistrate explained why she felt plaintiff's perceptions were reasonable:

I found plaintiff's fears and concerns regarding her safety and the suspicions that her actions were being monitored to be well founded in reality. Plaintiff was going against the system; she was involved in a civil action as a witness in her official capacity as a union representative. Plaintiff was not the only individual that had concerns about employment and safety. . . .⁴

² Magistrate's opinion after remand, mailed August 20, 2004, p 2.

³ Defendant's brief after remand, pp 16-17.

⁴ Magistrate's opinion after remand, pp 1-2.

We find nothing deficient in the magistrate's analysis.

Defendant next argues that the magistrate did not perform a "significant manner" analysis after completing the *Robertson* analysis, citing *Martin v City of Pontiac School District*, 2001 ACO #118.

Plaintiff submitted that once the findings pursuant to *Robertson* have been made and the earlier steps in the analysis completed, the significant manner test applied by the magistrate in the initial opinion is valid.

We repeat our previous caution that the factors enumerated in *Martin v City of Pontiac School District*, 2001 ACO #118 should act merely as guides aiding the fact finder in his or her often difficult task of weighing the evidence before them, and not as a Bright-Line test. In the final analysis, we must keep in mind the legislature placed the responsibility and power to determine what is significant in the hands of the magistrate. If the legislature had wanted a more detailed definition of significant, we believe they would have included it within the language of the statute.

We refer back to the magistrate's initial opinion, mailed February 10, 2003. At that time she stated:

There was no evidence contained in plaintiff's treating medical that indicated she was subjected to or suffered from any outside stressors that could have caused her mental disability. Dr. Ager has set forth numerous theories as to why plaintiff's disability was related to outside stressors rather than work-related stress. Although the situations and events appear to have actually happened or involved the plaintiff, they were remote in time in regards to plaintiff's current disability. Based on the above, the testimony of the plaintiff, and the medical testimony, I find that plaintiff has established that it was the specific work-related events that significantly affected plaintiff and resulted in her mental disability.⁵

When there are no non-occupational stressors or factors, a *Martin* analysis is not required. In this case, the magistrate found that any non-occupational stressors were so remote in time that none of them were contributors to the current disability. Defendant asks that we consider the following:

Both testifying psychiatrists indicated that this woman's personality developed long before her employment with General Motors played a significant role in her reaction to whatever occurred at work. The possible long-term [e]ffects of dealing with the psychological aftermath of both a rape discussed with Dr. Ager and Plaintiff's treating psychiatrist as well as a prior bout with cancer are at least worthy of consideration in undertaking the requisite analysis as to relationship. It is evident as well as from both the treatment records of Dr. Nutakki and the report of Dr. Ager that the Plaintiff continued to grieve the loss of her mother and be concerned about her multiple medical problems, both clear stressors likely to contribute to depression, at points in time closely proximate to the Plaintiff's last day of work. Additionally, the Magistrate chose not to address in any fashion Dr. Ager's testimony that any panic disorder would

⁵ Magistrate's opinion mailed February 10, 2003, p 12.

be biochemical in origin, that persons with surgically induced menopause may develop depression on that basis and that her personality traits which may predispose her to psychiatric problems are unrelated to employment. (A-16, 18, 36.)⁶

We find defendant's argument here more persuasive than plaintiff's. We believe that the magistrate's 301(2) "significant manner" analysis is deficient. We also believe the record is sufficient to perform such an analysis. As such, in the spirit of judicial economy, we invoke our fact finding powers pursuant to section 861a and the Supreme Court's holding in *Mudel v Great Atlantic and Pacific Tea Co*, 462 Mich 691 (2000).

We do agree with the magistrate that for the most part, the non-occupational stressors are so remote as to be irrelevant to this analysis. Included in those remote factors are: 1) The death of plaintiff's brothers in 1965, 35 years before her date of injury; 2) plaintiff's rape by a male hairdresser in 1968, 32 years before her date of injury; 3) the fact that she and her husband both had extra-marital affairs; 4) plaintiff underwent a partial hysterectomy in 1974, 26 years before her date of injury; 5) plaintiff had complications with thalassemia in 1976, 24 years before her date of injury; 6) plaintiff underwent a mastectomy in 1993, 7 years before her date of injury; and 7) plaintiff's daughter was in an automobile accident in 1996, 4 years before her date of injury and her daughter has recovered.

The only relevant non-occupational stressors seem to be the death of plaintiff's mother, her father's chronic illness, her autoimmune type of chronic hepatitis as well as arthritis. We find that these non-occupational stressors dwarf in light of the overwhelming factors of her hostile work environment, as well as her reasonable fear for her own personal health and safety from that same environment.

Dr. Nutakki testified:

A. Initially when I first started seeing her on June 7 I diagnosed her with adjustment disorder with severe anxiety and depressive symptoms. Over the course of treatment I did change it to major depression severe, single episode, along with post traumatic stress disorder symptoms, and also added panic disorder with agoraphobia.

* * *

A. Initially she present[ed the] first episode saying that she's very stressed out at work, there has been a lot of stressors. If I can look, she said she's been harassed at work and was told to change the deposition and lie for a witness on behalf of an employee who was terminated. She is quite concerned about her own personal safety and her job as she had subtle threats given to her at various times. And she said this has been going on for quite some[]time before she came to see us at the Hillside Center. At that time she has constant ruminations, severe insomnia, irritability, feeling dizzy, constant fear, headaches, hopelessness, crying spells, sad, depressed, and also she describes one severe

⁶ Defendant's brief, p 18.

panic attack before she came to see us, particularly in the parking lot when she went home on her last day of work, if I remember correctly.

Q. And are these the factors that you're outlining there[,] are those, do those factors all fit into things that you would look for under DSM-IV, is that the, to arrive at a diagnosis?

A. Yes, we do.

* * *

Q. Now Dr. Ager has mentioned a number of, you know, outside or nonwork related factors and he's talked about some health problems that she's had with a condition called thalassemia, he also mentioned diabetes, breast cancer, the fact that she had a hysterectomy. When she comes in and talks to you and gives you a history of what is on her mind when she sees you how do you go about balancing or determining, you know, what the cause of the condition you have diagnosed is between what she's medically presenting to you and with what she has consistently presented to you with [sic] as opposed to the things that Dr. Ager has mentioned[,] basically these health conditions?

A. I do think medical conditions play a part but at this point and in this case I do not think that they played a significant role because they have been there for a long time. The last medical, serious medical condition she had was in '93 with the right breast mastectomy following breast cancer and if I remember correct she had a hysterectomy in '75, then she had an ovariectomy, they removed her ovaries in '94, and she had splenectomy for the thalassemia in 1976, and I think the last severe really medical condition she had was seven years ago when she almost died with severe bleeding in her last delivery of her child but since then she has been pretty much stable and her blood hemoglobin was between 11 and 12 which is pretty normal for that. I mean, she does have hypertension, diabetes, arthritis of hands, which do play a little bit of a part in her overall ability, but she has mentioned [she] was fairly well before this court case came about.

* * *

Q. Now the judge that reads the deposition and will be listening to Mary Ann Dow's testimony has to make a weighing process between occupational and nonoccupational factors. You've certainly seen this lady and you have your notes before you, you have looked at the list of nonoccupational factors that Dr. Ager has listed and in your opinion do the occupational factors that you have been presented with significantly outweigh the other factors that have been listed by Dr. Ager in the cause of the psychiatric condition that you have diagnosed?

A. Yes, I do.

Q. And why do you think that?

A. Because she has been functioning fairly well with the same medical conditions for more than ten years prior to this incident when all this stress at work started and as you yourself mentioned she worked for ten hours a day for almost five to seven days a week and she did have all these medical conditions all through this period and they were pretty much stable. And even now in spite of all this her primary care physician has written [a] note to me that most of her medical conditions are stable and that whatever reason it is that might be stress related, that's the reason I have been giving her the medical leave.⁷

The magistrate found plaintiff to be a credible witness. We generally defer to the magistrate's determination on credibility, as long as it has support on the record. *Milazzo v Frankenmuth Bavarian Inn*, 2002 ACO #70. We are very cautious as a reviewing body, not to substitute our opinion as to how the facts should be interpreted, for that of the trier of fact. Particularly, as the magistrate has the opportunity to view the witnesses and make determinations as to credibility. The magistrate is also free to accept the medical evidence he/she finds most persuasive and where, as here, there is a reasonable basis for his findings, we will not displace them. *Miklik v Michigan Special Machine Co*, 415 Mich 364 (1982).

The above quoted testimony from plaintiff's treating psychiatrist in combination with plaintiff's credible testimony provide a preponderance of evidence to support a finding that plaintiff's work stressors were significant contributing factors in her disabling depression. We so find.

We affirm.

Commissioner Will concurs.

Martha M. Glaser

Rodger G. Will

Commissioners

KENT, COMMISSIONER, CONCURRING IN PART AND DISSENTING IN PART

I concur with my colleagues that the Magistrate failed to apply the significant manner test. However, recognizing that these are close calls on questions involving intricate facts, I would not affirm the magistrate findings as my colleagues would, but would instead remand for further findings by the fact finder in accord with our original instructions.

Nor am I convinced the magistrate complied with our instructions to apply *Robertson*.

As noted in the majority opinion, this matter was remanded to the fact finder with specific instructions to both apply the *Robertson* test, and, if she found plaintiff had established that a personal

⁷ Dr. Nutakki's deposition, pp 5-9, 14-15.

injury did arise out of and in the course of plaintiff's employment, the magistrate was to apply the significant manner analysis. In so doing, we specifically advised the Magistrate:

We agree with defendant that the magistrate must analyze these facts under the new standard set forth in *Robertson v DaimlerChrysler Corp*, 465 Mich 732 (2002). *Robertson* set forth a two part test:

We conclude that, to satisfy the mental disability requirements of the second sentence of § 301(2), a claimant must demonstrate: (a) that there has been an actual employment event leading to his disability, that is, that the event in question occurred in connection with employment and actually took place; and (b) that the claimant's perception of such actual employment event was not unfounded, that is, that such perception or apprehension was grounded in fact or reality, not in the delusion or the imagination of an impaired mind.

The magistrate correctly applied the first part to find that actual events of employment occurred. We find that on that point, the magistrate is well supported by the evidence on this record. Defendant does not dispute this fact. However, the magistrate did not perform the second part of the test. Instead, she moved directly to the "significant manner" test pursuant to MCL 418.301(2).

The magistrate found that the mental disability was caused by the specific work related events. However, this finding is premature.

We remand for the magistrate to complete the analysis for determining whether a personal injury occurred. In doing so an objective standard should be used to determine whether plaintiff's perceptions of the actual events were founded or unfounded. Considering all of the circumstances, would a reasonable person have perceived the events the way plaintiff did. If so, then a subjective standard is applied to the plaintiff's reaction.

After taking the additional steps under *Robertson*, if the magistrate finds that a personal injury did arise out of and in the course of plaintiff's employment, then the magistrate should apply the "significant manner" analysis.

We remand for completion of the analysis under *Robertson*, and further findings consistent with this order.

In her remand, the magistrate stressed her opinion that a "reasonable person" could take the actions of the UAW as a threat, which would "cause apprehension and the fear of reprisal." From there, without analysis of whether this is a perception based or grounded in fact, or consideration of how a reasonable person would have reacted to the work event, the magistrate concludes "plaintiff's perception of the events that occurred were [not] delusional or the imagination of an impaired mind."

Defendant contends¹ the magistrate only paid lip service to the analysis required by *Robertson*, and that she failed to recognize the implications of the Supreme Court’s statements in footnote 9 of that opinion:

[T]he Magistrate on remand essentially gave lip service only to the first determination and made no effort to engage in the second despite having been directed so by this Commission.

The Magistrate couched her “objective” analysis of actual events of employment in remarkably subjective terminology and seems to equate Plaintiff’s reaction to whatever actual events occurred to be events of employment themselves. That “reasonable persons could perceive that going against the wishes of a boss . . . could cause apprehension and fear of reprisal” relates not to the nature of events but to persons[’] subjective reaction thereto. Likewise “worry about the consequences of taking action against their union” certainly describes concerns rather than events.

It appears as well that the Magistrate attempted to rely upon evidence not in the record in suggesting that “undisputed testimony . . . suggested that at least two other employees apparently had similar types of issues while working in the same department as Plaintiff.” The testimony was utterly insufficient to give the Magistrate knowledge of the nature of the “problems” that the other employees had, what their perceptions were regarding the employment situation, or whether they were the same as those perceived by the Plaintiff or different.

* * *

The Magistrate’s discussion in the Opinion on Remand simply makes no clear finding of what Plaintiff’s perception of actual events of employment was as opposed to her fears and concerns based on those perceptions. That such a finding of the nature of the events is required is established by footnote 9 of *Robertson v DaimlerChrysler, supra*, above which indicates that a correct perception of an innocuous event may be sufficient under some circumstances to establish compensability but that the well-founded perception of such an event must then be evaluated in connection with whether it contributed to the injury in a “significant manner.”²

We have in the past recognized that implementation of the portion of the statute relating the effect of a mental disability to the perceptions of an injured worker and employment events:³

Perhaps some of the difficulty in this case stems from the varying nature and significance of actual events of employment. Some events have significance in and of themselves. Other events, such as those described in *Robertson*, have little meaning in

¹ See its supplemental brief on remand, p15-17.

² Defendant’s brief, p 15-17.

³ *Wolf v General Motors Corp.*, 2003 ACO # 68. See also *Golota v American Axle*, 2003 ACO # 261.

and of themselves. Rather, they have significance for worker's compensation purposes only when the employee's characterization of those events is considered. Their significance lies not just in the occurrence of the event, but in the reason the event occurred. Their emotional impact ties directly into the motivation of the principal participants or in the unfairness of certain actions.

For example, when plaintiff says: "I was demoted", there must be a determination that this actual event occurred. If plaintiff says: "I was upset because I was demoted", then the magistrate must then determine whether plaintiff's description of his own reaction is honest. Under *Robertson*, the magistrate does not, in my opinion, have to determine whether plaintiff's reaction meets with some objective criterion for being upset, i.e., that it was reasonable to be upset, or that the average person or an objective observer would be upset.¹

In contrast, when plaintiff says: "This event upset me because it was done to punish me for speaking out against corruption.", not only the occurrence of the event, but also plaintiff's characterization of the motivation of the actors must be assessed and be reasonably grounded.

Where, as here, plaintiff says certain work events caused him embarrassment or stress, it is only necessary for the magistrate to decide whether plaintiff is credible regarding the occurrence of the events and in his reaction to those events. If there is testimony which shows a reaction inconsistent with plaintiff's being embarrassed or stressed, the magistrate may decline to accept plaintiff's statement as to the impact or significance of the event. Also, if it is unbelievable that a trivial event caused the emotional response, the magistrate is equally free to reject plaintiff's testimony. However, once the magistrate accepts the plaintiff's statement of his subjective reaction to the event, no further inquiry on this point needs to be made if that reaction was based on real events.

In this case plaintiff described both types of events. Plaintiff said he was humiliated by the behavior of certain co-workers. He testified that certain production standards were stressful. He described being embarrassed. Having accepted plaintiff's testimony as credible, the magistrate need do no more under *Robertson*. However, plaintiff also described events which fall into the category of harassment or intentional conduct, where the motivation of the actors or the fairness of the events is in issue. The magistrate also accepted plaintiff's characterization of events, including the motivations of the principal actors. By accepting plaintiff's testimony regarding the motivation of his supervisors to be credible, the magistrate necessarily found his description of the events to be reasonably grounded in the actual events. He incorporated these findings in this supplemental opinion by reference. *Robertson* does not require any further inquiry, fact finding or analysis.

The majority in *Robertson* recognized the subtle, but significant difference between an employee's reasonable interpretation of actual events and an objective evaluation of the employee's reaction to actual events. In footnote 12, which ended the passage quoted above, the court noted the difference between its interpretation of the

word “unfounded” and the understanding of former Justice Brickley who dissented in *Gardner v Van Buren Schools*, 445 Mich 23 (1994). The court stated:

This standard of review varies slightly from that articulated by Justice Brickley, namely, that a claimant’s perception of the actual employment events must be “well-founded.” *Gardner*, supra at 57. [W]e find nothing in the language of § 301(2) that qualifies “perception” in this way. “Well-founded” evinces a standard that may be construed as more demanding than a reasonableness standard. Thus, we do not agree that the perceptions at issue must be “well-founded.” Instead, all that is require is that the claimant’s perception of the actual employment events be reasonably founded.

This is the difference between the events here and those in *Robertson*. In *Robertson* plaintiff alleged he was unjustifiably demoted because he refused to perform certain personal services for his supervisor on company time. There was no argument that an actual event took place, plaintiff’s demotion. The real issue was whether plaintiff’s characterization of these events was reasonable. There was testimony in the record from plaintiff’s supervisor which showed plaintiff was demoted purely for economic considerations and for no reason connected with alleged abuse of company time. The Court of Appeals held the characterization of the events was irrelevant. The Supreme Court reversed, holding that plaintiff’s characterization of the reason for the demotion must be reasonable.

In this case, the magistrate found actual events and further accepted plaintiff’s characterization of certain events at work as being intentional. He then accepted as believable plaintiff’s reaction to all of these work events. As a result, the magistrate fully complied the requirement of *Robertson* that an employee’s understanding of actual events be reasonable. To require more is to cross the line from the requirement of a reasonable understanding of actual events to a requirement that the employee’s understanding of events be “well-founded”.

¹ Certainly, if plaintiff’s reaction to events is extreme or unexpected, this may well reflect a pre-existing emotional condition which would come into play in the evaluation of whether the event was significant based on the comparison of plaintiff’s occupational and non-occupational contributors.

Recognizing the importance of this concept, the Michigan Court of Appeals in *Wolf*⁴ stressed the need for the Magistrate to “assess the factual circumstances in terms of how a reasonable person would have viewed them”:⁵

⁴ See 262 Mich 1 (2004).

⁵ *Robertson*, p 754-755.

Gardner ultimately concluded, “The statute, by excluding ‘unfounded perceptions’ of the actual events of employment, excludes situations in which the claimed events never occurred (i.e., where they are imagined, hallucinatory or delusional).” *Id.* at 49. In essence, *Gardner* held that, under the second sentence of MCL 418.301(2), the key is whether actual events of employment occurred; a claimant’s perception of those events, no matter how badly misconstrued, was irrelevant.

Recently, in *Robertson*, our Supreme Court overruled *Gardner*. As mentioned, according to *Robertson*, *Gardner* was inconsistent with the plain language of MCL 418.301(2). **The Court stated that, contrary to *Gardner*, the plain language of the statute “requires a distinct analysis concerning a claimant’s perception or apprehension of the actual events of employment.”** *Robertson, supra* at 750. The Court indicated that the perception must be “founded,” that is, “based or grounded in fact.” *Id.* . . .

* * *

The *Robertson* Court then went on to state that when determining whether a claimant’s perceptions were “founded,” an objective standard is applied, i.e., “the factfinder must assess the factual circumstances in terms of how a reasonable person would have viewed them.” *Id.* at 755. The Court made a point to note that there is a distinction between a claimant’s perception of an event and a claimant’s reaction to that event, and it is only the former that is evaluated objectively. (emphasis added)

What is difficult in a case such as this, (and accordantly is in my opinion lacking), is proper coordination of the Supreme Court’s choice of terminology, and the gray area explored by this Commission and the Court of Appeals in *Wolf*. Specifically, the Supreme Court in *Robertson* stressed the need for an objective review of all the facts and circumstances to determine whether the claimant’s perception of such events was “grounded in fact or reality, and how would a reasonable person “have viewed them”:

By the Legislature’s use of these terms in the second sentence of § 301(2), it is clear, that in determining whether actual events occurred and whether a claimant’s perceptions were “founded,” the factfinder must assess the factual circumstances in terms of how a reasonable person would have viewed them.¹¹

Thus, in applying the proper statutory test, the factfinder must first determine whether actual events of employment indeed occurred. Then, in analyzing whether a claimant’s perception of the actual events of employment had a basis in fact or reality, i.e., the claimant’s perception was “founded”, the factfinder must apply an objective review by examining all the facts and circumstances surrounding the actual employment events in question to determine whether the claimant’s perception of such events was reasonably grounded in fact or reality. (Footnote omitted.)

¹¹ Application of an objective standard is also consistent with the underlying purpose of the WDCA, as reasonably inferred through its text. These have been invariably understood to be to compensate those who are injured in the workplace if the injury arose out of the work. *Hills v Blair*, 182 Mich 20, 25; 148 NW 243 (1914) (“Under the provisions of this act, only that employee is entitled to compensation who ‘receives personal injuries arising out of and in the course of his employment.’ It is to be borne in mind that the act does not provide insurance for the employed workman to compensate any other kind of accident or injury which may befall him.”). It would be inconsistent with this purpose to award compensation to those whose injuries were merely *coincident* with a period of employment, but whose injuries did not “arise out of” that employment. Thus, it is not surprising that the Legislature that enacted § 301(2) sought to limit compensation to mental disabilities that arose out of actual events of employment, not to those that were attributable to the mere imaginings of the employee.

Yet as aptly noted by the Court in *Wolf*, in the same breath,⁶ the Court indicated that the reaction to the events can be “atypical”:

Additionally, although the perception inquiry is to be undertaken pursuant to an objective standard, we emphasize in an effort to dispel potential confusion that the “reaction” inquiry,” i.e., how a potential claimant “reacts” to actual events of employment, is to be undertaken pursuant to a subjective standard. As Justice Brickley observed, “[a] claimant with a psychiatric disability cannot be expected to *react* to certain events, properly perceived, in a manner entirely consistent with that of a normal healthy individual. . . . While a claimant’s *perception* of the event must be objectively well-founded, that same claimant’s *reaction* to the event can be very atypical.” *Gardner, supra* at 58. In sum, a claimant’s perception is evaluated objectively under the second sentence of § 301(2), while his subsequent reaction is evaluated subjectively under the first sentence provision.

Thus, what was required here was an analysis of whether plaintiff’s perception of the actual event she testified to was “grounded in fact or reality,” using the second part of the *Robertson* framework.⁷ First, the fact finder needed to determine whether the claimant’s perception of the somewhat vague (in my opinion) statement that (as the parties and plaintiff consistently characterized it) plaintiff better “cover her ass” as a threat of physical violence was how a reasonable person would have viewed it using an objective standard.

Only if that first hurdle is met do we get to the “allowance” from footnote 10 that the reaction (which in this case is plaintiff’s mental reaction, including panic attacks, high anxiety, etc.) may be atypical. Given what was said, and what plaintiff perceived the statements to mean, I profess I am troubled by the fact-finder’s conclusion.

⁶ *Robertson*, Footnote 10, p 754.

⁷ This initial prong of this test, that an actual event had in fact occurred, was previously held to have been established.

My concern begins with a close look at what plaintiff testified was said at the meeting and her “perception” of the meaning of those statements. Keep in mind that she testified prior to the meeting with the union president, she was fine. At that meeting, she indicated he told her (and apparently other potential witnesses) to basically be careful in what they say:

A. . . . The president had told us before we gave our deposition that we better cover our ass, we better know what we’re doing and he told us that several times. He told us to go in and just answer yes or no, don’t volunteer any other information and at that point there was a person in the office that was watching and reporting everything I did, there [were] people going by the office that was glassed in all the time watching what I was doing so they could report it.⁸

After more testimony clarifying that this meeting was in relation to her subpoenaed testimony in workers’ compensation cases involving a co-worker,⁹ plaintiff again indicated the sum and substance of the conversation was that, in the vernacular, she should “cover her ass,” which she interpreted as a threat of physical violence:

A. I was frightened and scared because there’s a lot of people in that plant and I didn’t know what was going to happen. When somebody tells you to cover your ass, all kinds of things went through my mind. I didn’t know if I was going to be run down by a fork truck, if, I was just frightened.

Q. And, I mean why would you be concerned about physical violence at the plant?

A. Because anybody familiar with plant life and the mentality, there’s quite a bit of violence in the plants.¹⁰

Plaintiff did go on to testify that after this incident, she gave the deposition testimony, and then she thought people were “avoiding” her, and that the president of her union would not let her get her mail:

Q. And then when you gave the deposition, what happened?

A. Things got worse, they escalated. I had more people watching me, the president wouldn’t let me have my mail anymore when I stopped at the union hall. He stopped me from going down there on Thursdays. He didn’t want me around, he said I was a liability to the union so I couldn’t go to the union hall anymore.¹¹

⁸ Trial transcript, p 25.

⁹ See *Id.* p 26-28, where plaintiff clarifies that the meeting was between herself, the Union Local President, Brian Cosbar, and one Dorothy Mattis, who plaintiff inferred was also being “forewarned” as a potential witness.

¹⁰ *Id.* p 30.

¹¹ *Id.* p 31.

However, at no point in her trial testimony did plaintiff make any statement such as those the magistrate attributes to her via the history given Dr. Ager (discussed in detail below).

To apply this portion of the *Robertson* actual event analysis, one must analyze not plaintiff's reactions to what occurred, but did she realistically (objectively) perceive the actual event (in this case the statement of the Local Union President). In my view, her testimony standing alone falls far short of establishing a perception "reasonably founded"¹² on the actual event as a "reasonable person would have viewed" it.

In other words, given all the facts and circumstances surrounding that statement, would an ordinary reasonable person simply take it as a less than gentle reminder that in matters of "corporate policy" or "union politics" that one must always consider the ramifications of what one does or says, especially when testifying in court. Without more facts or testimony than plaintiff gave, why would such a "reasonable" person view the Union President's statements as a physical threat to her safety.

Curiously, the magistrate draws her conclusion that such a threat existed from two sources outside plaintiff's testimony, one being her conclusion that there existed an ongoing agenda of threats to union employees:

I found plaintiff's fears and concerns regarding her safety and the suspicions that her actions were being monitored to be well founded in reality. Plaintiff was going against the system; she was involved in a civil action as a witness in her official capacity as a union representative. Plaintiff was not the only individual that had concerns about their employment and safety. Undisputed testimony presented at trial suggested that at least two other employees apparently had similar types of issues while working in the same department as plaintiff. The defendants presented no testimony to dispute the allegations that threats had been made against the plaintiff.¹³

I find no testimony to support that conclusion, at least as it relates to safety. What the plaintiff testified was that she felt the union was not treating them fairly.¹⁴

Next, despite noting that both plaintiff's treating physician, Dr. Nutakki and defendant's expert, Dr. Ager, found plaintiff to suffer signs of paranoid disorder including possible paranoid misperceptions, the magistrate claimed the best "accounting of the actual events" was found in Dr. Ager's deposition:

The best accounting of the actual events that occurred are set forth in Dr. Ager's deposition. The doctor's history includes an accounting of the actual events that occurred including names, places, dates, and pertinent information. Dr. Ager stated, "Only having heard Ms. Dow's side of the story, frankly I do not know what to believe in terms of her complaints about the UAW." "Her perceptions may simply represent

¹² See *Robertson*, p 755, ft 12.

¹³ Magistrate's decision, p 1-2.

¹⁴ Trial Transcript, p 44-45.

paranoid misconceptions, they could, I suppose, represent reality, and I really have no way of measuring the accuracy of this woman's history." . . .

In examining whether the events that happened at work actually constituted "threats or harassment" I looked to Dr. Ager's history given to him by the plaintiff. Dr. Ager's deposition succinctly set for what plaintiff believed to have occurred. According to the history her supervisors, with who[m] she could talk to at work, told plaintiff that she was a target. Those individuals who did not support or actually had crossed her bosses were found to be taboo, association with those individuals resulted in reprisal. Plaintiff was told that her supervisor did not like her because she wasn't "loyal." The supervisors stated in an open meeting that he wanted to take a crowbar to one of plaintiff's coworkers because the International Union would not allow him to remove this particular representative from his position. Plaintiff was told to monitor her testimony she was to give at a deposition and if not to "cover your ass."¹⁵

For one thing, I am troubled basing a finding not on the testimony of a live witness (in this case, plaintiff), but instead on the "history" given to a psychiatrist by a patient he believes to be suffering from possible paranoid misconceptions. The picture painted by the magistrate of Dr. Ager's concern over plaintiff's mental state is understated. He testified:

She feels she is being followed and that her life is in danger. Sometimes she hears voices talking to her. She has never actually been homicidal, but she states she wishes certain people were "dead."

* * *

Affect: She was tearful periodically during the interview. She also appeared tense, anxious, and quite paranoid.

Thought Content: She admits to hearing voices. She admits to feeling people are following her and watching her. Her stream of consciousness was logical, linear, and goal-oriented in nature. She tended to be obsessive and overly inclusive with details.

* * *

Judgment: Her judgment was possibly impaired on an operational basis.

DIAGNOSTIC IMPRESSION:

Axis I: Possible major depressive disorder with paranoid, somatic, and anxiety features. Possible panic disorder with agoraphobic features.

Axis II: Paranoid, obsessive-compulsive personality traits.

¹⁵ Magistrate's decision, p 2.

* * *

Q. Okay. Doctor, you characterize Ms. Dow as obsessive and paranoid. What kind of characteristics are manifested by those types of conditions?

A. An obsessive person tends to be ruminative, and they focus on small details excessively. They may have rituals they perform, although she really didn't have that problem.

As far as paranoid, a person can be suspicious. They can lack insight. They can feel other people are trying to persecute them. And it can get to the point where, as she said, they actually hear voices and she feels people are out stalking her or trying to kill her or they're watching her. Those are some of the symptoms of paranoia.

Q. Would it be fair to say that a paranoid person might be prone to exaggerate or misperceive events?

A. By definition, if you're actually paranoid or have paranoia, you are misperceiving, to some extent, reality.¹⁶

Dr. Ager goes on to describe plaintiff as quite paranoid on several occasions. He makes it very clear he has no real confidence in the accuracy of her history:

Only having heard Ms. Dow's side of the story, **frankly I do not know what to believe in terms of her complaints about the UAW.** She is alleging that she has been and continues to be "stalked." She claims she was intimidated by the president and chairman of the union when she went to testify favorably at a deposition for a fellow UAW benefits person, a Dan Seyfreid. She goes so far as to claim she feels her life is in danger. Her perceptions may simply represent paranoid misconceptions, they could, I suppose represent reality, **I really have no way of measuring the accuracy of this woman's history.**¹⁷

Given that, we are left with only the testimony of plaintiff, or, at best, with the unanswered question, why, in her day in court, did she leave out the many "threats" of violence found in her history to Dr. Ager.

I am also troubled with a finding that plaintiff has carried her burden of proving her mental problems were significantly contributed to by work.¹⁸ Given plaintiff's testimony at trial, the fact finder should have balanced on the one hand the relatively innocuous indication she should take care in her testimony against a smorgasbord of non work related stressors testified to by Dr. Ager:

¹⁶ Dr. Ager's deposition, p 34, 35, 39-40.

¹⁷ *Id.* p 36-37.

¹⁸ Once again, I would again remand for a proper analysis and findings by the magistrate on this issue.

Q. Okay. Doctor, in addition to the history you took from her regarding the, for lack of a better term, union politics, you took a significant history of nonoccupational factors, isn't that correct?

A. There were quite a few of them, yes.

Q. And could you briefly summarize those?

A. Well, going backwards in time, in terms of which were most proximate to her last day of work, or when she received the subpoena to testify in May of 2000, would be April of 2000 when her son came home, he had had a number of problems; part of that, in May of '99 when her mother died; part of that, in '97 when she was diagnosed with hepatitis and underwent a liver biopsy; a few years before that, in '94 when she had her ovaries removed. Also in '96 there was an accident, I think, her daughter was in with a closed-head injury; and then in '93 with the surgery for breast cancer; and then the thalassemia, anemia problems where she was off work for two-and-a-half years; and had her spleen removed in '76; and finally perhaps going back to '74 when she had her initial partial hysterectomy.

So there were a lot of significant stressors in her life over a number of years.

Q. Did you receive a history that she indicated to you she had never been hospitalized for psychiatric problems?

A. Correct. In December of last year, she was in what's called the IOP program, which is an intensive outpatient, but it was not an inpatient setting.¹⁹

These are factual matters requiring much more depth than are present in the magistrate's opinion. I agree with defendant that the magistrate did not properly perform that test, and would remand for such findings.

James J. Kent

Commissioners

¹⁹ Dr. Ager's deposition, p 38-39.

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

MARY ANN DOW,
PLAINTIFF,

V

DOCKET #03-0098

GENERAL MOTORS CORPORATION,
SELF INSURED,
DEFENDANT.

This cause returns to the Appellate Commission after remand to Magistrate Melody Paige, whose supplemental decision was mailed August 24, 2004. 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 supplemental decision is affirmed.

Martha M. Glaser

Rodger G. Will

Commissioners