

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

LUCAS FLOYD,
PLAINTIFF,

V

DOCKET #03-0064

DETROIT DIESEL CORPORATION,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE GUYTON.

STEPHEN M. FRIEDMAN FOR PLAINTIFF,
MICHAEL T. REINHOLM FOR DEFENDANT.

OPINION

KENT, COMMISSIONER

Defendant appeals the open award granted plaintiff by Magistrate Carol R. Guyton¹, listing two issues in its appeal brief:

The medical testimony establishes that if plaintiff had fractured his wrist on that date, he would not have been able to perform the activities he did for the next nine days until he first sought medical treatment. Is the magistrate's findings of fact that plaintiff injured [sic] his wrist at work on July 23, 2000, not supported by competent, material, and substantial evidence?

The magistrate found that plaintiff could do his regular job, but that there were other jobs for defendant that plaintiff could not do. Still, she found plaintiff disabled and entitled to weekly benefits. Did the magistrate misapply the law of disability?

For clarity, we repeat select portions of the magistrate's recitation of the basic facts:

Prior to working at Detroit Diesel plaintiff was employed with General Motors, Cadillac Division from 1984 to 1987. He was laid off when the plant closed. He worked as a welder where he hung and buffed metal bumpers. The job involved manual work, lifting bumpers. When he left the Cadillac Plant he started going to community college and he received unemployment. He attended school from 1987 to 1990.

In February of 1990 plaintiff started working at the defendant. He passed a pre-employment physical and was employed as a machine operator where he lifted blocks

¹ Mailed to the parties January 28, 2003.

off the line. A crane was used for lifting the blocks. The blocks were placed at a table and he recorded the block numbers on a paper along with the type of block and then the block was moved to a pallet. He said the physical duties of this job were not too bad. The job was basically easy. Plaintiff is right-handed. He said that on some occasions he had to perform other jobs in the plant when defendant was short handed. On the night that he was injured he was changing drills.

* * *

On July 22, 2000 he had taken someone else's place on the drill job. The job had twelve different stations. At the 10th station coolant had leaked onto the floor, which caused him to slip as he was going to check on a block. He said he caught himself on a table and jammed his right wrist. This happened around 2:00 a.m. during the midnight shift. He did not realize that he had been injured so he continued to work. His job was easy for the balance of the night. The next day he worked four hours but he did not perform much activity because the machine was broke. He basically played cards at work. He had arranged to take time off work to travel to Florida as an assistant coach for his son's basketball team. He left work early that day in order to catch his plane. His [sic] said his wrist felt tight but he did not think much of it.

Plaintiff described that he had fractured the same wrist in 1993. He was able to return to work in October of 1993, initially to light work but eventually he returned to regular work.

Away from work, plaintiff has spent his free time as a basketball coach for children through AAU and in the city high schools. While in Florida in July of 2000 he swam everyday and eventually the swelling went out of his wrist. He said he noticed pain when he turned his wrist to remove bottle tops. Plaintiff testified that he did not perform any physical activities as a coach while in Florida. He basically talked to the kids and used a blackboard to explain plays.

Plaintiff said that while traveling back to Michigan, handling his luggage he heard a click and he felt a pinch in his wrist. Upon returning home he sought treatment at the St. John Emergency Room on either Sunday or Monday, August 1, 2000. His wrist was x-rayed and it was placed in a cast. He then called defendant and advised his department that he would not be reporting to work because he fractured his wrist the last day that he worked. He ultimately had surgery on the wrist in November of 2000 and completed a physical therapy program. During the surgery his wrist was fused.

* * *

In its first argument, the defendant takes an articulate and somewhat appealing "common-sense" approach regarding the post-injury symptoms (or lack thereof) reported by plaintiff:

Plaintiff testified that he slipped at work on July 23, 2000, and struck his right hand on a machine. He asks all to believe that this caused a fracture in his right wrist.

* * *

Further, the medical evidence supports a finding that a fractured wrist such as plaintiff's would have been too painful to ignore. Dr. Mune Gowda, board certified in plastic surgery with an added qualification in hand surgery, testified that *if* one had hyper-extended his wrist as described by plaintiff that caused a significant injury, that is a fracture, one would expect a person to go see a doctor with significant pain and swelling (GO 38-39). Dr. Jerry Taylor agreed that the injury described could be very painful (T 28). Dr. Taylor testified that he received a history that indeed it was very painful at the time of the injury (T 28-29), but that is inaccurate (T 14).

Here is where the magistrate made her major error. Nowhere did the magistrate acknowledge plaintiff's repeated testimony that his wrist was tight, but it did *not* hurt following the alleged injury (63-64). It was tight but did *not* hurt the next day while he was working (26). It was tight while he was in Florida (27), but did not hurt until the third day (72). Again, the doctors agreed that if plaintiff had fractured his wrist as described, it would have been very painful. It wasn't, and plaintiff didn't.

To summarize, the finding that plaintiff injured his wrist at work is not supported by competent, material, and substantial evidence. The failure to report it and the failure to treat it for nine days leave plaintiff's story simply unbelievable.

To begin with, the magistrate considered the question of plaintiff's post-injury symptoms and activity and based in large part on her perception of his credibility, found his actions and version of what occurred plausible:

He testified that on July 22, 2000, of the midnight shift, he was filling in for another employee on the drill job when he slipped on oil that had leaked onto the floor. In trying to catch his fall he jammed his right wrist on a table. He said he did not initially know he injured his wrist. He finished working that shift. The next day, the machine was broke so he played cards at work and left work early to start his vacation in Florida, where he was the assistant coach for his son's basketball team. He said his wrist felt tight, but he thought nothing of it.

While in Florida, he noticed swelling in his wrist and the wrist was painful when he twisted it to remove bottle tops. He denied doing anything physical while in Florida. Upon handling his luggage on the return trip home, he heard a click and felt a pinch in his wrist. He sought medical attention within a day of his return to Michigan and discovered he had fractured his wrist. He emphasized that when he fractured his wrist in 1993 it took a few months to discover the fracture.

The history plaintiff provided when he sought medical treatment is consistent with a work related injury. Dr. Garver testified that plaintiff had an unstable wrist from the initial injury in 1993. He thought that the slip and fall at work aggravated the initial fracture resulting in another scaphoid fracture, which required a wrist fusion and second surgery. Dr. Jerry Taylor and Dr. Mune Gowda agreed that if plaintiff fractured his wrist in July 2000 he should have experienced significant pain and swelling. Plaintiff did testify that he had pain and swelling while in Florida, within days of the injury. On his last day of work, July 24, 2000, the machine was broke, so he was not forcefully using the wrist. There is no indication that plaintiff injured his wrist while in Florida. Although he had symptoms while handling his luggage, there is no indication medically that that incident was a factor in his wrist fracture. Plaintiff's explanation for the delay in reporting the injury and seeking medical treatment is plausible and un rebutted; thus, I accept his explanation as truthful. He has always been athletic and said he tried to work through his initial discomfort.

While it is true, as asserted by defendant, Dr. Gowda indicated he would expect a "normal" person to report a hyper-extension injury to a doctor, he did so not in a time context, but more in relation to the possibility plaintiff may have further injured that wrist while on vacation in Florida:

- A. If you have a significant injury that's the incident of a slip and fall, a hyperextension injury, if there is significant pathology I expect a normal person to go to see a doctor with significant pain and swelling to change the pathology of the previous old fracture.

Based on that, he did go to vacation after that and also he was involved in some activities, and there is a possibility that other activities could have made the condition worse, as you described.

Q. Make it worse in terms of pathology, symptoms, or --

A. Pathology and symptoms.

Q. As a consequence, is there any way to determine whether or not there's a relationship between this slip and fall and the need for the surgery that was subsequently carried out?

A. Just reasonably with common sense saying that he had a fall, a slip and fall. If the pathology of the injury was so serious, really, just go and see a doctor. That's what -- if you have a significant aggravation of a fracture.

If that did not happen, then you question whether that caused the aggravation or some other activities during the vacation caused the aggravation. Definitely playing volleyball has a lot of impact on the wrist, per say. All the volleyball really is hyperextension type of injury, each time you extend the wrist and push the volleyball and just hit the volleyball.

More importantly, Dr. Taylor's testimony in fact supports a finding that plaintiff did have immediate pain:

He indicates that all of his body weight was placed on his right palm and wrist. He indicates that "it felt like I jammed my right wrist." He did not report this injury initially and continued to work. He was off work the next day which was Saturday. He worked as scheduled for one half day the following day, and then was off work for the next 7 days for a planned out of town vacation. His right wrist continued to ache and he had swelling of his right wrist and a feeling of weakness of the right wrist in the absence of any trauma.

* * *

- A. His history is that it did hurt a lot. He had immediate sudden pain and it was significant pain. That's what he told me, and that would be consistent.

Based on our review of the evidence at trial, we find the magistrate's interpretation consistent, accurate, and supported by the requisite competent, material, and substantial evidence.

In its second issue, defendant contends since plaintiff was not prevented from performing certain job classifications at his plant, he is not disabled within the meaning of that statutory definition. Citing the impact of *Sington*² on previous case law, defendant asserts that it is no longer sufficient for a claimant to merely show he or she can no longer perform one job, where there are others he or she can still perform. As a basic concept, defendant is correct. The Commission has on multiple occasions acknowledged the sea change from *Haske*³ to *Sington*, especially regarding the effect of inability to do one single job.

In the most recent of the multiple decisions in *Sington*⁴ itself, we noted that if there is proof a viable real job for which defendant would hire others to do, which plaintiff can still perform at his former employer, he has not met the "threshold" definition of disability:

In the case at bar, as noted below, after hearing testimony which clarified what plaintiff physically could and could not do at the Chrysler plant post-injury/pre-stroke, the magistrate found plaintiff failed to establish even a threshold disability under Section 301(4). Thus, there was no need for him to consider our further instructions concerning how to determine if plaintiff had established a "wage loss in order to compute wage loss benefits under MCL 418.361", as called for in footnote 11 (page 160) of the Supreme Court's Opinion in *Sington*.

² *Sington v Chrysler Corp*, 467 Mich 144 (2002).

³ *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997).

⁴ See our recent decision on remand, *Sington v Chrysler Corp*, 2004 ACO #220 (08-06-04).

After reopening the record to allow the parties to put forth whatever proofs they felt were necessary to comport with the Supreme Court's definitional requirements, the magistrate found there existed a real job in the real world at Chrysler that plaintiff was performing before his non-work-related injury. In a well-written and well-reasoned opinion, Magistrate Wierzbicki indicated at the very start of his opinion he was tuned in to the essence of the Supreme Court's question concerning the underlying facts in this case:

The Appellate Commission affirmed this magistrate's decision, the Court of Appeals reversed, and the Supreme Court remanded the case for further findings. *Sington*, id.

In its decision, the Supreme Court stated, "In order to establish that he had a 'disability' because of the left shoulder injury, plaintiff had to show that that injury resulted in a limitation in his wage earning capacity in work suitable to his qualifications and training. . . . An inquiry must be made regarding whether the 'regular job' was suitable to plaintiff's qualifications and training at the time of the injury. Also, if plaintiff's injuries only enabled him to perform that 'regular job' because of accommodations provided by defendant, his wage earning capacity might be less than his actual wages." *Sington*, supra, at 165-166.

The Court further stated that " . . . a work-related injury that has a de minimum effect on the employee's related duties might not amount to a disability. This is because many employers might disregard such minor limitations in hiring applicants generally, meaning that such minor conditions would not effect [sic] an employee's ability to perform his top paying job and would therefore not limit his wage earning capacity. A useful perspective for the WCAC in considering this case on remand might be considering whether plaintiff's injuries would prevent him from competing in the marketplace with other workers for the 'regular job.' The WCAC might also consider whether defendant would have continued plaintiff in the 'regular job' at the same rate of pay if he was injured in a non-work-related incident. If plaintiff would have been hired or retained despite his injury, this would indicate that plaintiff did not suffer a disability because the pertinent injury did not impair his wage earning capacity. Conversely, if defendant would not have hired or would not have accommodated plaintiff's injury except for it being work related, that would be indicative of a limitation in wage earning capacity." *Sington*, supra, at 166, footnote 12.

* * *

After a thorough and accurate summary of the witness testimony at the subsequent hearing, the magistrate determined that there existed 17 job classifications that plaintiff was qualified to perform at Chrysler, and that plaintiff remained capable of performing 13 of them. More importantly, the fact finder determined that all of these 13 positions were regular or real jobs and not make work or special jobs for injured workers, for which defendant would hire other workers to do in plaintiff's absence.

* * *

His conclusions/findings took into account the direct observations by the Michigan Supreme Court in this case that a "useful perspective" could include whether "plaintiff would have been hired or continued" in his jobs despite his injury. Magistrate Wierzbicki, having heard the live testimony of both plaintiff's and defendant's witness, determined as noted above that defendant would have hired and placed a new worker with similar physical limitations (PQX vs. PQ) in at least 13 regular full-time classified positions. Further, the magistrate found plaintiff able to continue in such full-time-classified positions despite a *de-minimus* physical limitation. Finally, while it remains true a giant manufacturer has the flexibility in moving employees from one job to the next that a small "mom and pop" operation might not have, given the facts as found by the magistrate, these were real jobs in which plaintiff could have been replaced with new unrestricted workers.

In his oft quoted treatise, Professor Ed Welch commented on the potential proof problems confronting a plaintiff, such as Mr. Sington, who has a history of successfully performing viable subsequent employment. In a portion of his comments which is directly on point to the issue now confronting us, Professor Welch articulated in singular, direct terms this basic yet sometimes overlooked principle:⁵

Successfully performing subsequent work may demonstrate that there is no loss from the workers' maximum capacity. If it does, he or she does not meet the definition and is not entitled to benefits.

Thus, the magistrate was legally correct in holding such a job would be a regular (or real) job for which there continued to be a substantial job market⁶ (in the real world).

In the case at bar, the critical difference is found in the magistrate's holding, and a practical differentiation between the size and scope of the employers operation:

⁵ Welch, Workers Compensation in Michigan: Law and Practice (4th ed). Section 8.2(e), p 822 (04 supplement).

⁶ We find no merit in plaintiff's contention there was no proof that there remained a substantial job market for this position, as plaintiff's supervisor testified that particular plant had seen no new hires for several years (plaintiff's supplemental brief, pgs 9 and 10).

I find that plaintiff remains partially disabled from his injury of July 23, 2000. Dr. Jerry Taylor and Dr. Mune Gowda both examined plaintiff in April 2001. They concluded that plaintiff needed work restrictions. Dr. Taylor restricted plaintiff to no lifting over 10 pounds and no forceful grasping, pushing, pulling or twisting with the right hand. Dr. Gowda said plaintiff should avoid repetitive flexion/extension and heavy pulling, grasping and work with high torque equipment. Dr. Gowda emphasized that plaintiff's restrictions were temporary, until the completion of physical therapy. Dr. Donald Garver actually released plaintiff to return to work on August 15, 2001. Plaintiff's range of motion was restricted but his strength had improved. During his deposition, Dr. Garver testified that plaintiff is disabled from the drill operator job, and he would have trouble working with cutting tools that weigh 20 pounds, along with forceful grasping, pulling, and twisting activities. He said the return to work in August 2001 was on a trial basis. He anticipated plaintiff would have further problems if he performed heavy work.

Plaintiff testified that his primary job as a machine operator, moving cylinder heads (blocks), was basically easy. If this were all he was required to do then he would not have a continuing disability. However, plaintiff testified that occasionally he was required to fill in for other employees and he worked the drill job. This job involved tugging on drills and lifting up to 60 pounds. Hal Watson confirmed that if plaintiff had lifting restrictions he could not perform the drill changing job. **There is no indication at trial that plaintiff could have only performed the block moving job.** [Emphasis added.]

Mr. Watson mentioned a job in the M8 Building where the parts were only two to three pounds. This job appeared to be within plaintiff's restrictions; however, there was no indication that the job was actually available. According to *Stanton v Great Lakes Employment*, 2002 ACO #251, there must be some showing that the job is available.

Had the magistrate held that the primary job as a machine operator moving cylinder heads did not also require occasional work on the drill job, he, like Mr Sington, would not have met the threshold disability definition. However, somewhat as a function of the scope and size of this employer's operation vis a vis a giant manufacturer such as Chrysler, there was not evidence on this record the cylinder head job was one which defendant would hire others to do without also requiring them to help with the drill job.

In other words, the actual job plaintiff performed for this employer was one with two tasks (the cylinder head portion and the drill job portion). As the drill job "task" was outside plaintiff's physical ability to perform, he was unable to perform all of the jobs with defendant which paid the maximum within his qualifications and training.⁷

We affirm the magistrate.

⁷ See *Sington v Chrysler Corp (on Remand)*, 2003 ACO #92; *Riley v Bay Logistics*, 2004 ACO #27.

Chairperson Reamon and Commissioner Will concur.

James J. Kent

William G. Reamon, Jr.

Rodger G. Will

Chairperson

Commissioners

STATE OF MICHIGAN
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LUCAS FLOYD,
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DETROIT DIESEL CORPORATION,
SELF INSURED,
DEFENDANT.

This cause came before the Appellate Commission on defendant's appeal from Magistrate Carol R. Guyton's decision, mailed January 28, 2003, granting benefits. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed. Therefore,

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

James J. Kent

William G. Reamon, Jr.

Chairperson

Rodger G. Will

Commissioners