

STATE OF MICHIGAN  
WORKER'S COMPENSATION APPELLATE COMMISSION

LORI L. HERNDON,  
PLAINTIFF,

V

DOCKET #02-0507

OAKWOOD HEALTHCARE, INCORPORATED,  
SELF INSURED,  
SECOND INJURY FUND (DUAL EMPLOYMENT PROVISIONS)  
DEFENDANTS.

APPEAL FROM MAGISTRATE BARNEY.

ROSEMARY E. JABBOUR FOR PLAINTIFF,  
DONALD H. HANNON AND DENISE L. CLEMMONS FOR DEFENDANT  
OAKWOOD HEALTHCARE, INCORPORATED,  
GERALD M. MARCINKOSKI FOR DEFENDANT SECOND INJURY FUND  
(DUAL EMPLOYMENT PROVISIONS).

OPINION

REAMON, CHAIRPERSON

Defendant Second Injury Fund (Dual Employment Provisions) appeals the decision by Magistrate Michael J. Barney, mailed on October 31, 2002, granting plaintiff an open award and further finding that plaintiff was dually employed.

Plaintiff was found by the magistrate to have injured her low back in the course of her employment with defendant Oakwood Hospital on September 16, 2000. This finding was not appealed. However, the Fund has appealed the dual employment issue on the following basis:

THE MAGISTRATE HAS ERRED AS A MATTER OF LAW BY READING CASE LAW TO CONCLUDE THE DUAL EMPLOYMENT PROVISION APPLIES EVEN IF THE CLAIMANT IS "NOT ... ACTIVELY ENGAGED IN SIMULTANEOUS EMPLOYMENT ... CLOSE TO THE DATE OF INJURY." THE WEIGHT OF CASE LAW FROM THE COMMISSION INDICATES THE CLAIMANT MUST DEMONSTRATE ACTIVE ENGAGEMENT IN SUCH WORK IN CLOSER PROXIMITY TO TIME OF THE WORK INJURY THAN HERE.

SHOULD THE COMMISSION NOT REVERSE THE CONCLUSION OF DUAL EMPLOYMENT, THE COMMISSION MUST CORRECT THE MAGISTRATE'S ORDER INSOFAR AS IT PROVIDES FOR DIRECT AND SEPARATE LIABILITY BY THE DUAL EMPLOYMENT FUND.

The magistrate summarized the factual background relevant to the dual employment portion of the proofs, as follows:

Ms. Herndon testified that she began her working life at age 22 as a nurse at Garden City Hospital in July of 1986. She continued to work full-time at Garden City Hospital through June 7, 2000. At the same time, she had a succession of simultaneous part-time jobs, first at Botsford Hospital from 1988 to 1999, then in 1999 for a short period of time as a dealer at the MGM Grand Casino and then in November of 1999 at Oakwood Hospital. She testified that eventually she was offered a full-time position at Oakwood Hospital which she accepted, as it paid more money than her full-time position at Garden City Hospital. However, after her switch to full-time at Oakwood, she testified that she remained on the Garden City active employee roster, fully intending to work one or two 12-hour shifts per week (as she had been doing at Oakwood when she worked full-time at Garden City) and indeed worked for four hours at Garden City on August 19, 2000 training her replacement. The reason that she did not work more between the time she started at Oakwood full-time in July of 2000 and her injury of September 16, 2000 was because she was still at a point as an employee at Oakwood where she couldn't control her own schedule. She was waiting for that to change before she was able to schedule herself at Garden City.

\* \* \*

Ms. Herndon told the court that after her switch from full-time to part-time at Garden City Hospital her job title and job duties remained the same, she merely went on part-time contingent status. She indicated that the four hours she worked on August 19, 2000 at Garden City training another nurse supervisor was the only time she had worked at Garden City between July 22, 2000 (when she went on part-time contingent status) and the accident of September 16, 2000. She did not remember whether she had previously agreed to come in on that day before she left full-time status or whether Garden City Hospital called her and asked her to come in on that day. She stated that she left Garden City for full-time at Oakwood because although she was doing the same work she got more money. In addition, at Garden City she worked 36 hours a week (72 hours per pay period) whereas at Oakwood she worked 80 hours per pay period, 44 hours one week, 36 hours the other. At Garden City when she was full-time, she would be able to schedule her own hours but when she started Oakwood she was not able to do that and that is why she had not been able to work any part-time shifts at Garden City before the September 16, 2000 injury.<sup>1</sup>

After his accurate review of the factual background of this issue, the magistrate issued the following findings:

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<sup>1</sup> Magistrate's opinion, pp 3-5.

The undisputed testimony shows that she was. Certainly she was an employee at Oakwood, where she suffered the injury. She had also performed some work (albeit minor) at Garden City Hospital subsequent to her going on full-time status at Oakwood in July 2000 but before her injury there on 9/16; Plaintiff's Exhibit 1 shows that on 8/19/00 she worked four hours, earning \$109.76. She also testified that she had every intention of working more hours once things got settled at Oakwood and she could be reasonably sure what days and shifts she could devote to Garden City. Moreover, there is Plaintiff's long history of working-two jobs, often but not exclusively two nursing jobs, simultaneously: she testified that this had been her pattern for at least the prior ten years. Finally, and most convincingly, there is Plaintiff's Exhibit 2, a letter to Plaintiff from the VP/Human Resources at Garden City Hospital, informing her that as of 1/22/02, her employment with the institution had been terminated. If Ms. Herndon had not been an employee of GCH prior to 1/22/02, there would have been no reason to send her a termination of employment letter of that date.

The determination of what constitutes dual employment has always been heavily fact-dependent, but there is some case law to guide the decision-maker. I find no case directly on point, but the fact situation in *Sakovitz v. City of Menominee*, 1999 ACO #103 comes closest. In *Sakovitz*, the claimant worked full time for the Menominee Fire Department. He was also employed part time elsewhere. As part of his employment arrangement with the part-time employer, he was allowed to not work for several months per year; it was during one of these hiatal periods that he was injured at the City. The SIF argued that Plaintiff had been "laid off" from his second job at the time of the injury, and that there was no dual employment. Magistrate Wagner found otherwise, and the Appellate Commission affirmed. From that case, at least, I can derive the principal that one need not be actively engaged in simultaneous employment with both employers on the day of, or even close to the date of injury. Based on the holding in that case, the facts here clearly constitute dual employment.<sup>2</sup>

The Fund argues that the magistrate committed legal error by his reading of the law and misapplication of that law to the facts. A series of cases are cited in support of the proposition, that a worker is dually employed only when "engaged" in the second employment. The facts of this case, the Fund posits, do not support a finding that plaintiff was "engaged" or "active in the work" as defined by *Francis v Scheper*, 326 Mich 441 (1949). The Fund further cites Commission case law on the question of the delay between plaintiff's last "active" work day for Garden City Hospital (8/19/00) and her injury date at Oakwood Hospital (9/16/00):

Similarly, in *Stephenson v Owosso Speedway, Inc*, 1994 ACO #417, the plaintiff worked for one employer when injured and was on a layoff from his second job. He claimed dual employment, arguing since he had worked just 17 days prior to his injury at the second employer it was "so close to the date of injury" he must be considered dually employed. The Commission rejected the contention saying:

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<sup>2</sup> *Id.*, p 8.

. . . Section 372 requires the claimant to be *currently working* at two jobs. To be laid off is not to be currently working or *engaged* in employment as required. (Emphasis added).

Similarly here, plaintiff was not “currently working” or “engaged” at Garden City Hospital at the time of the injury. Her last employment at the second employer was more remote in time than the 17 day gap in *Stephenson*.<sup>3</sup>

We believe the magistrate’s reliance on *Sakovitz, supra*, is warranted under the facts herein. In that regard, the plaintiff’s brief further explains the logical connection of her case to *Sakovitz*:

In *Sakovitz v City of Menominee, Michigan Municipal Workers’ Compensation Fund and Second Injury Fund (Dual Employment Provisions)*, 1999 ACO No. 103, plaintiff was a full-time Lieutenant with the City of Menominee Fire Department. He also did manual labor for Coleman Machine when he chose to and when work was available. He had no set hours and normally did not work during the months of July, August and November. He was injured on August 23, 1995 while working for the City of Menominee. He had not worked during that month for Coleman Machine.

The magistrate found that plaintiff was engaged in dual employment, stating.

“To do otherwise would unnecessarily punish both a hard working employee who holds down more than one job, albeit who works part-time at irregular hours, as well as punishing an employer who calculates all of an injured employee’s earnings in the formulation of an average weekly wage.”

The Appellate Commission agreed:

“We find the magistrate’s reasoning compelling. In this instance the peculiar facts of the case demonstrate that plaintiff has an established history of working for a second employer. These facts are not disputed. The dispute arises only in terms of the name attached to the time off work in July, August and November. The Fund urged the magistrate to find that plaintiff was laid off at the time of his injury. The primary employer noted, on the other hand, that plaintiff was neither laid off nor separated from his employment in any way at the time of injury. Obviously, Magistrate Wagner agreed with the employer’s viewpoint and rejected that of the Fund.

Given the work history as set forth in the stipulations, we cannot find fault with the magistrate’s fact-finding in this instance. This is not an

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<sup>3</sup> Defendant Fund’s brief, p 6.

instance of alternating employments. Rather, it is an instance where an industrious individual has sought out and obtained secondary and simultaneous employment under advantageous terms.”

Significantly, in finding dual employment the Appellate Commission relied in part on the fact that plaintiff had a history of holding a second job and that he was an industrious worker. Moreover, the Appellate Commission appropriately recognized the inequity of penalizing an industrious employee who seeks to augment [sic] his or her income by working additional hours for a second employer.

Defendant argues that the law requires that work be performed for the second employer in very close proximity to the date of injury. This same argument was rejected by this Commission in *Sakovitz, supra*. Defendant apparently seeks from this Commission a hard and fast rule indicating that if the employee did not perform work for the concurrent employer within one or two weeks of the work related injury, dual employment does not exist as a matter of law. Such an approach is totally at odds with the statutory language itself and with the principles underlying the Michigan Workers’ Compensation Act.

Plaintiff Herndon worked for Garden City Hospital for many years. As in *Sakovitz*, there was clearly a substantial relationship between Plaintiff Herndon and Garden City Hospital. This was not a casual employment relationship. Nevertheless, in spite of the fact that Plaintiff Herndon earned approximately \$1,000 per week from Garden City Hospital as a full time nurse, when she was injured shortly after becoming full time at Oakwood Healthcare, because of her prior part-time work there, her average weekly wage was calculated at \$641.68. This produced a weekly benefit rate of \$376.83 for an employee who had been earning over \$1,000 per week.

Garden City Hospital considered plaintiff to be a valuable employee. This is clear from the sentiments expressed by the hospital in the termination letter sent to plaintiff. It is also demonstrated by the fact that the hospital wanted plaintiff to train a new supervisor even after she had accepted full time employment elsewhere.<sup>4</sup>

The Commission has noted the fact-intensive nature of the dual employment issue:

Plaintiff references several Commission cases where the particular facts favored a finding of dual employment, but these very cases demonstrate how fact intensive the question of dual employment can be. In the instant case, the magistrate examined the unique facts carefully, weighed them judiciously, and concluded that plaintiff was not dually employed at the time of her alleged injury. Under our standard to review, that conclusion is reasonable and record-supported, and must therefore be affirmed. *Mudel*

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<sup>4</sup> Plaintiff’s brief, pp 5-7.



