2004 ACO #27

S T A T E O F M I C H I G A N
WORKER'S COMPENSATION APPELLATE COMMISSION

DAVID C. RILEY,
PLAINTIFF,

V DOCKET #02-0496

BAY LOGISTICS, INCORPORATED, AND
AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY,
DEFENDANT.

APPEAL FROM MAGISTRATE BLOCK.

FREDERICK W. BLEAKLEY FOR PLAINTIFF,
ARTHUR G. KIRCHNER AND REBECCA S. AUSTIN FOR DEFENDANT.

OPINION

KENT, COMMISSIONER

This matter comes to us on defendant's appeal from the open award granted by Magistrate Kenneth L. Block.[1] In its appeal brief, defendant argues both that the magistrate's finding of work-related disability with respect to appellee's low back pain was not supported by competent, material, and substantial evidence of the whole record, and that he failed to properly apply the standards pronounced in *Sington v Chrysler Corp,* 467 Mich 144 (2002), in making his disability determinations.[2]

Plaintiff counters indicating in its brief that:[3]

The magistrate's crediting of plaintiff over the defense witnesses is conclusive.

The magistrate's crediting Dr. Helle over defense examiner Jakubiak is conclusive.

Plaintiff is disabled under *Sington*.

By way of background, we repeat select portions of the magistrate's opinion below:

[1] The magistrate's opinion was mailed to the parties on October 28, 2002. The case became ready for review by this Commission on October 28, 2003.

[2] See the statement of issue on page 9 of defendant's brief and its argument on pages 14-17.

[3] See plaintiff's responsive brief on appeal, pages 9,12, and 13.

This opinion begins and ends with comments from defendants' expert, Dr. Jakubiak. His testimony observed that, among other points discussed later, plaintiff was a "pleasant man" and that:

> Well, if his history is verifiable, then I'm a conduit, and I record what a person says, and he makes a relationship between that [work] and the discomfort that he was having, and I didn't disbelieve him.

I find that plaintiff's history was verifiable, and, to put it in a more positive context, it was believable, especially when contrasted with the conflicting testimony of James Rush, Bay's director of operations. Plaintiff made straightforward, prompt responses to questions. Rush's responses beat around the bush - a bush that was never shown to exist in metaphoric terms.

Plaintiff testified that on August 23, 2001, his low back was injured while moving a pull-down/roll-up-door on a trailer. The trailer in question was identified as having serial number 50102 and was part of eight to ten year old stocks that Bay acquired and then renovated. One of the renovations was to remove all roll-up doors with swing doors. Bay claimed that there were no roll-up doors on the trailers used by plaintiff after May, 2001. Rush claimed that Bays' quarterly maintenance/inspection records would show that 50102 had no roll-up door on the alleged date of injury. In response to this claim, I adjourned the trial for purposes of producing those records. At the second trial, no such records were tendered because they had been purged. Any regard that I had for Rush's testimony vanished with this news. Plaintiff's account of the incident was totally acceptable.

Missing records also wiped out another prong of defendants' challenge. Bay claimed that plaintiff did not work around the time of the claimed injury or that his injury was the result of an alleged volleyball incident. Neither of these claims has been substantiated by the proofs.

* * *

Actually, the 'it" is best medically explained in terms of plaintiff's nine years of driving trucks. Plaintiff had minor back pains every now and then when working or not working, but he experienced nothing like the pain that set in on August 23, 2001. Both examining doctors recognized that plaintiff was afflicted with degenerative disc disease, but they differed greatly in their conclusions. The better medical rationale is found in the testimony of Dr. Helle. His testimony, of course, was dependent upon plaintiff's description of his work exposures - which also varied from the lack of exposures recited by Rush. Up until February, 2001, plaintiff loaded and unloaded daily local shuttle runs while being jarred in the seat of his truck. After February, 2001, he no longer had to load and unload, but he was in-and-out of the truck and bended and twisted while cranking up the trailer and hooking or unhooking air hoses.

Consequently, I agree with Dr. Helle's assessment of this case:

> It's my opinion that that heavy work that you described over those several years significantly contributed to the underlying degenerative changes because degenerative changes are nothing more than the accumulative effects of wear and tear over time.
>
> * * *
>
> Yes, it's my opinion that they are causally related.
>
> * * *

Dr. Jakubiak had little regard for FCE results. He used to rely upon them, but he decided that they were too subjective and not helpful. Dr. Helle, appropriately, disagreed. Tests premised upon subjectivity still have some value. Regardless of FCE results, Dr. Jakubiak took issue with plaintiff's disability for other reasons and would allow plaintiff to return to unrestricted work. However, in making these assessments, Dr. Jakubiak erroneously downplayed the importance of the positive MRI findings as discussed by Dr. Helle, and he ignored some of his own clinical findings. Specifically, he noted, "discomfort which is minor on palpation of the mid and upper sacrum and to a lesser degree at the L5-S1 level in the midline and slightly to the left of midline." The fact that the discomfort could be measured in degrees infers some significance, especially in light of the MRI findings that correlate to the same area.

Finally, Dr. Jakubiak only subscribed to two universally accepted reasons for the development of degenerative changes: age and genetics. He totally rejected defense counsel's suggestion that "work as a truck driver, the bouncing around, having to pull on different levers, all of that contributed to, caused or aggravated degenerative changes." This opinion ignores the realities of hard workers like plaintiff herein.

The initial thrust of defendant's position on appeal is its disagreement with the magistrate's clear acceptance of the credibility of plaintiff. This is illustrated in the following excerpt from its brief:

To begin, the Magistrate's acceptance of Appellee's testimony is questionable since his testimony is biased and his complaints are subjective and lack any objective support. Mr. Rush testified that the trailer in question did not have pull-down doors on August 23, 2001. Mr. Rush further testified under oath, and during cross-examination, that he personally inspected the trailer in question. Specifically stating:

Q. Okay. Are you testifying here under oath that you were absolutely certain that Trailer Number 50102 on August 23, 2001 was not a pull-down or - or a trailer?

A. Correct.

> *Q.* Okay. How - how do we verify, how do we know what 50 - how do you know that 50102 when you checked it last week was not a pull-down if it could be - if there's 1800 trailers and it could be anywhere?
>
> *A.* **Because I physically went out and looked at it.** See Trial Transcript at pp 127. [Emphasis in original.]
>
> Mr. Rush has worked in the trucking industry for 18 years. His testimony regarding the condition and service of Appellant's trailers should be given the utmost weight. According to this qualified testimony, all trailers with roll-up doors were gone by June of 2001. The Magistrate[']s disregard for this testimony reveals his failure to rely on competent, material, and substantial evidence.
>
> The Magistrate based his decision upon Appellee's alleged "account of the incident." Such a decision was erroneous and failed to rely on the record as a whole.

On questions of credibility involving testimony of a witness at trial, where the magistrate, as trier of fact, has the unique opportunity to view witnesses and hear his or her testimony, we generally defer to the magistrate's determination on credibility, which has support on the record. It is true, as we have stated in the past, we may reject the magistrate's credibility finding when it is contradicted by serious inconsistencies and incongruities.

Defendant claims there are facts on this record that contradict plaintiff, most notably the testimony of Mr. Rush. However, the magistrate also had an opportunity see and hear his testimony, and indicated he was willing to review the employment records that would have corroborated his claims. Despite adjournment of the hearing for production of the records, defendant was unable to provide them.

We do not believe the inconsistencies referred to by defendant rise to the level of serious incongruity to merit overturning the magistrate's credibility findings, especially considering the fact the magistrate considered and explained them in his ruling. Thus, despite defendant's concerns over these inconsistencies, we yield to the magistrate's decision on this issue, as his findings are supported in the record.

Beyond that, defendant's numerous contentions concerning the magistrate's acceptance of Dr. Helle's opinion as more persuasive than Dr. Jakubiak are simply a reargument of the relative strengths of the testimony provided by each side's medical witness, and amount to no more than an attempt to have us reweigh that evidence and reach a different conclusion than that of the magistrate.

The Appellate Commission will not reverse a magistrate for choosing between two reasonable but differing views. It is well within the magistrate's discretion to accept the medical testimony he finds

most persuasive. As long as there is a reasonable basis for his findings, as is the case here, we will not displace them.[4]

This is consistent with the Michigan Supreme Court's holding in *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000), where it pointed out we do not have the power to disregard the weight given testimony by the magistrate in his or her fact finding, while at the same time reminding us that our duty is to review a magistrate's fact findings in a qualitative and quantitative fashion to discern if they are supported by competent, material, and substantial evidence, as required by MCL 418.861(a)(3).

Finally, we turn to defendant's contention the magistrate misapplied the *Sington* standard in making his disability determination, reflected in the following excerpt from its brief:

> According to the Michigan Supreme Court[']s decision in *Sington v Daimler Chrysler*, 467 Mich 144 (2002), the Appellee must establish that he suffered a "disability" pursuant to his low back condition. Further, he must show that the alleged condition resulted in a limitation in his wage earning capacity in work suitable to his qualifications and training. Id at pp 165.
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> Both his Aqua Therapy and Functional Capacity Evaluation reveal that Appellee can continue to haul trailers within his work restrictions. Not only can he continue to do his job with Appellant, he is trained and able to do a variety of other well paying jobs. Appellee has an extensive work history and has been trained in a variety of trades. His work restrictions are minimal and do not limit his wage earning capacity. Appellee's own testimony reveals his ability to continue working within his trade. His alleged injury has not limited his wage earning ability or ability to work in a number of different fields.
>
> The Appellee testified at trial to his work experience in the trucking industry. Specifically Appellee testified to doing refrigeration work, appliance work, foundry work, lawn maintenance, bus driving, and truck driving. In regard to his lawn maintenance experience, the Plaintiff indicated that the heaviest weight he would lift was 25 to 30 pounds. See Trial Transcript at pp 35. Plaintiff also formerly owned David Riley Refrigeration, where he did refrigeration and appliance work. Appellee indicated that

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[4] For instance, the magistrate notes that Dr. Jakubiak testified (in essence) that a trauma-type injury cannot contribute to development of degenerative change, despite the fact that is outside accepted medical norm:

> Finally, Dr. Jakubiak only subscribed to two universally accepted reasons for the development of degenerative changes; age and genetics. He totally rejected defense counsel's suggestion that "work as a truck driver, the bouncing around, having to pull on different leveler, all of that contributed to, caused or aggravated degenerative changes." This opinion ignores the realities of hard workers like plaintiff herein.

On the other hand, the magistrate noted he felt Dr. Helle was more persuasive based on plaintiff's subjective credibility and independent objective tests (MRI).

he answered service calls, sold used appliances, and diagnosed, and repaired appliances. When moving appliances the Appellee indicated that he used a dolly.

While we generally prefer a more detailed analysis in explaining the steps required by *Sington*, we believe the magistrate did in fact come to the right conclusion, when he stated plaintiff could not do all of the jobs he was either trained to do or had done in the past:

> Dr. Helle's opinion regarding causation and resulting restrictions disable plaintiff from undertaking all of his prior jobs and training within the meaning of MCL 418.301(4) and *Sington v Chrysler Corporation*, ____ Mich ____, (2002), docket number 119291. Helle's medical opinion was premised primarily upon plaintiff's subjective complaints and a positive MRI. Dr. Helle took in the whole clinical picture. His perception was enhanced by the results of a Functional Capacity Evaluation (referred to as FCE hereafter - exhibit 6.) Although he did not premise his opinion upon the results of this test and although at the time of his deposition it was clearly hearsay, the test was subsequently admitted. And this brings us back to Dr. Jakubiak.

At trial, the plaintiff testified at some length concerning the jobs he was trained to do and had performed in the past. With a ninth grade education, absent formal training, plaintiff is limited to the type of jobs he performed, many of which involved heavy lifting well beyond his stated work restrictions.[5]

For instance, we believe the record supports a finding that plaintiff could not return to foundry work. The evidence concerning plaintiff's lifting requirements rules out the various driving jobs as plaintiff could no longer sit for such prolonged periods as those jobs required. Along the same lines, he is unable to perform electronic/refrigeration repair, as he had to load and unload units weighing several hundred pounds. When carefully reviewed, the record reveals every job plaintiff did in the past, or was qualified to do, appears to be beyond his work-related physical restrictions, which supports the magistrate's finding he cannot perform "all" (magistrate's emphasis) of the jobs within his qualifications and training".

In making these fact-findings, we believe the initial requirements imposed on plaintiff to establish a threshold disability by *Sington* have been met. As has been stated in past Commission discussions on this question, in reaching a determination on disability, the fact-finder should make such determinations and findings as are required in any given case from the list of factors first enumerated in *Sington v Chrysler Corp (On Remand)*, 2003 ACO #92, and *Kethman v Lear Seating*, 2003 ACO #205. Particularly regarding the progression of changes in the burden of proofs at trial, created by the specific requirements of *Sington*, we adopt the restatement of *Kethman* found in Commissioner Kent's separate opinion in *Peacock v General Motors Corporation*, 2003 ACO #274.

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[5] In the absence of a detailed analysis by the magistrate, we exercise our limited fact-finding powers under *Mudel*, *supra*, which included an expression that should the magistrate fail to make required findings of fact, we may then make an independent finding of our own, in order to avoid the waste of judicial resources which would occur by remanding.

In reaching her decision on remand, the magistrate should make the specific determinations and findings enumerated in *Kethman v Lear Seating* , 2003 ACO #205 and *Sington (On Remand)*:

1. Has plaintiff established the universe of jobs for which he or she is qualified and trained, and how much do they pay?

2. Has plaintiff established his or her work related physical or mental impairment, which does not permit him or her to perform jobs within his qualifications and training causing him to lose wages?

3. Has plaintiff established that he or she was either unable to perform (or obtain because such jobs were not reasonably available) all the jobs within his qualifications and training that pay his maximum wage (for the purpose of establishing his Section 301(4) threshold disability).

At this point, if each question is answered by the fact finder in the affirmative, according to the express language of the Michigan Supreme Court[6] in *Sington*, plaintiff has proven a threshold disability (or stated differently, plaintiff's work injury has caused his Section 301(4) disability):

> If an employee is no longer able to perform any of the jobs that pay the maximum wages, given the employees training and qualifications**, a disability has been established under Sec. 301(4).** [Emphasis added.]

However, in order to receive benefits, plaintiff also has to establish a wage loss as required by Section 361. He or she does so by proving either an inability to perform (or to obtain because such jobs were not reasonably available) all the jobs within his or her qualifications and training that pay lesser wages[7], establishing a prima facie wage loss (for the purposes of Section 361).

If the magistrate finds plaintiff has put in a prima facie case as outlined above, the burden of persuasion shifts to the defendant, and she should then determine if defendant has brought forth sufficient proofs to show there did exist jobs (real jobs in the real world) within plaintiff's qualifications and training, and physical ability to perform, which were reasonably available to him or her and paid either the maximum wage (rebutting

[6] Cited above, but recited here for emphasis. This language is used several times in the Supreme Court's decision in *Sington,* see pages 155, 157 and 159.

[7] This also requires plaintiff to prove he or she made a good faith effort to determine which such jobs were reasonably available within his work restrictions.

plaintiff's threshold disability under Section 301(4), or a lesser wage for the purposes of rebutting plaintiff's prima facie showing under Section 361.

As noted in *Sington* (*On Remand*), I believe the Commission lacks the prescience necessary to anticipate all the economic considerations necessary to make decisions about which jobs are "available" or "unavailable" without reference to specific evidence in a particular case. In that case we wrote:

> We feel, as noted elsewhere in this opinion, that the Supreme Court indicated a starting point would be to consider principles spelled out in the pre-*Haske* appellate and Commission decisions, such as those found in the *Braddock/Sobotka* line of cases.

However, as noted above, on remand the magistrate should consider the actual availability of such jobs, and plaintiff's post injury effort in seeking such jobs.

Following that model, and based on the magistrate's finding that plaintiff's work-related physical impairment prevents him from performing all the jobs for which he is qualified or trained, by necessary inference plaintiff has established that he can no longer perform all of those such jobs which paid the maximum and may have been reasonably available.[8]

Having met his threshold burden of proof, plaintiff has established a prima facie case of disability,[9] and the burden of persuasion shifted to defendant to bring forth proofs of real jobs in the real world within claimant's qualifications and training, which were both reasonably available and within his physical capacity to perform. Given the proofs at trial, neither the magistrate nor we felt defendant meet that shifted burden. Accordingly, we affirm the magistrate.

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[8] While not directly argued by these parties, we note that by the same token, plaintiff has also established that there exists no jobs reasonably available which he can physically perform which pay less than the maximum, thus establishing a prima facie wage loss for the purpose of Section 361.

[9] As stated in *Mullins v Faygo Beverage*, 2003 ACO #268, this can be accomplished by credible testimo ny of plaintiff, either alone, or in combination with supportive expert medical testimony:

> While plaintiff's initial burden of proving a threshold disability can be relatively light, it nonetheless must be met. As indicated in *Kethman*, this may consist of credible testimony from the plaintiff as to his education, training, and background relative to what job skills he has and what they pay, establishing his qualifications and training and maximum wage, and that he can no longer do all of those jobs[5] either because of his physical impairment or because such jobs are not available.
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> ____
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> [5] As noted in *Kethman*, testimony establishing physical or mental impairment is certainly stronger when corroborated or established by expert medical testimony, but in certain limited scenarios, plaintiff's testimony, if deemed credible, can be enough. See *Sanford v Ryerson & Haynes*, 396 Mich 630 (1976).
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Commissioners Glaser and Will concur.

James J. Kent

Martha M. Glaser

Rodger G. Will Commissioners

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BAY LOGISTICS, INCORPORATED, AND
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DEFENDANT.

This cause came before the Appellate Commission on defendant’s appeal from Magistrate Kenneth L. Block’s decision, mailed October 28, 2002, 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

Martha M. Glaser

Rodger G. Will Commissioners