

STATE OF MICHIGAN  
WORKER'S COMPENSATION APPELLATE COMMISSION

MARVIN VOSS,  
PLAINTIFF,

V

DOCKET #02-0509

AMSTED INDUSTRIES, INCORPORATED  
(BURGESS-NORTON),  
SELF INSURED,  
DEFENDANT.

APPEAL FROM MAGISTRATE BLOCK.

GARY T. NEAL FOR PLAINTIFF,  
DAVID B. MERWIN FOR DEFENDANT.

OPINION

LESLIE, COMMISSIONER

Plaintiff appeals the decision of Magistrate Kenneth L. Block mailed October 31, 2002 denying his claim for differential benefits between wages he was able to earn at the time of his injury and reduced earnings at the present time. Based on a stipulated set of facts, the magistrate ruled that *Sington v Chrysler Corp*, 467 Mich 144 (2002) precluded an award of benefits. Plaintiff asserts this is legal error. Defendant responds the magistrate's decision denying weekly compensation is correct because plaintiff returned to work at his regular job, and overtime in that position has been reduced for all employees. Defendant does, however, cross-appeal the magistrate's decision, claiming the finding of a work-related injury to plaintiff's back is not supported by competent, material and substantial evidence. Plaintiff replies that this portion of the magistrate's decision is supported by sufficient evidence in the form of favorable medical opinions and the stipulated facts. We affirm the magistrate's finding of work-related injury, reverse his conclusion plaintiff has proven no compensable disability and modify the award to reflect continuing partial weekly compensation benefits to the extent plaintiff's injury is responsible for the loss of overtime work.

After reciting the entire stipulated set of facts, the magistrate found a work-related injury and restrictions limiting overtime related to that injury. He denied any partial weekly benefits with the following analysis:

The above-stipulated "facts" are primarily claims that are very dependant upon a review of the medical proofs and an application of law. The controlling facts as advocated by plaintiff are that he sustained a work-related injury on April 22, 1996, and that his work-injury has prevented him from working more than forty-hour week. For reasons outlined below, I find that the preponderant medical proofs support such positions. However, plaintiff's demonstrated capacity to still earn wages " in work

suitable to his . . . “qualifications and training” (MCL 418.301[4]) defeats his claim of disability as interpreted by *Sington v Chrysler Corporation*, \_\_\_\_ Mich \_\_\_\_, (2002), docket number 119291.

Dr. Matheson, plaintiff’s treating physician, confirmed the work-relatedness of plaintiff’s injury and imposed the controversial 40-hour work week limitation. More devastating to defendant position, however, is the testimony of Dr. Russo—one of defendant’s own doctors. He testified, “Overall, I think he is falling within appropriate restrictions of a 4—hour work week, and “I still feel that there is a historical relationship between his alleged work related injury and the onset of his symptoms as he presented to me in June of 1997.”

Even Dr. Hyatt historically related plaintiff’s unabated symptoms to the April, 1996, incident. I find that this historical association is accurate and overcomes the bulk of Dr. Hyatt’s testimony. Most of Dr. Hyatt’s testimony is devoted to the position that plaintiff has degenerative disc disease/osteoarthritis and that those disease processes are responsible for plaintiff’s condition. Defense counsel has referenced twelve daily living incidents (mostly hunting activities) that allegedly give rise to an inference that plaintiff could work more than forty hours. However, the desired inference fails because the activities in no way come close to replicating energies expended during his forty-hour week.

It is that same forty-four work week that operates to preclude recovery on the basis of no disability within the meaning of *Sington, supra*. Citing *Kurz v Michigan Wheel Corporation*, 236 Mich App 508 (1999), and a couple Appellate Commission opinions, plaintiff contends that his high weekly wage in 1996 – due to substantial overtime – justifies the payment of differential benefits when compared to his unavailability and/or the decreased hours of overtime due to economic conditions. In the context of MCL 418.301(5)(b) and wage calculations, this argument has merits. However, that section is pre-empted by the necessity of first deciding whether plaintiff is disabled within the meaning of MCL 418.301(4). As pointed out on pages 5 and 6 of *Sington, supra*: “[A]s a prerequisite to being considered a participant in reasonable employment (MCL 418[5]) an employee must first suffer a “disability” as defined in MCL 418.301(4).”

*Sington, supra*, introduced a simplistic, objective test that is almost more plain in meaning than the statue itself. On page 16 of the slip opinion, the Supreme Court reasoned: “If the employee is no longer able to perform any of the jobs that pay the maximum wage, given the employee’s training and qualifications, a disability has been established under section 301(4).” Plaintiff herein performed almost all of his duties as a millwright/electrician and received maximum hourly wages that were increased over the years. As I view *Sington, supra*, this means that he not disabled.<sup>1</sup>

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<sup>1</sup> Magistrate's opinion at 4-5.

Plaintiff first asks for a correction to the magistrate's order. The green sheet does not recite the finding of a work-related personal injury which the magistrate found as fact in his opinion. Plaintiff requests the order be changed to conform with the findings in the opinion. Because this argument implicates defendant's cross-appeal issue, we proceed to consider the evidentiary support for the magistrate's finding of a work-related injury to plaintiff's lower back on April 22, 1996.

Defendant contends the medical testimony supports a conclusion that whatever continuing medical impairment plaintiff experiences results from an ordinary disease of life and not the incident at work in 1996. Defendant first notes that the magistrate's summary of the medical testimony is "cursory at best".<sup>2</sup> Defendant then makes a detailed factual argument, focusing on the weaknesses in plaintiff's proofs and highlighting the favorable testimony of its own medical witness, Dr. Hyatt. Defendant first points out the discrepancy in the history to Dr. Matheson that plaintiff fell and landed on his buttocks, and the other evidence which shows only the onset of significant pain while using a wrench. Defendant also details numerous non-occupational outdoor activities which defendant asserts show plaintiff has opted to reduce his work hours to accommodate his lifestyle choices. In that regard defendant also states the magistrate had no basis to conclude these activities are not comparable to plaintiff's job duties, since the statement of facts does not contain such information.

The stipulated facts include the occurrence of events at work necessitating medical treatment. Although we agree with defendant that the magistrate's summary of the medical testimony is cursory, a fair reading of the magistrate's opinion shows that he accepted the testimony of Dr. Matheson because he is the treating doctor.<sup>3</sup> In addition, the conclusions of Dr. Matheson were supported by those of Dr. Russo, one of defendant's medical experts. As the magistrate found, this testimony supports plaintiff's claim he suffers from an inability to work overtime because of his work-related injury. Regarding the question of job duties, the records of Dr. Matheson contain a specific reference to plaintiff performing a lot of bending down while installing machinery. In addition, during the doctor's deposition defense counsel described the nature of plaintiff's work, albeit to highlight the fact that the amount of physical work varied.<sup>4</sup> As a result, the magistrate had a basis to compare plaintiff's work with his avocational activity. Also, Dr. Matheson discussed these activities and noted that he felt the limitation of plaintiff's work hours and being careful in non-vocational activity allowed plaintiff to continue working.<sup>5</sup> Defendant has provided no argument why the magistrate's preference for Drs. Matheson and Russo is unreasonable. As a result, we defer to that choice.<sup>6</sup> The magistrate's finding of a continuing work-related injury necessitating restriction of work to 40 hours is supported by competent, material and

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<sup>2</sup> Defendant's brief at 8.

<sup>3</sup> A magistrate's opinion is inadequate under MCL 418.847(1) only if the Commission is unable to trace the magistrate's path through the evidence without speculation. See *e.g.*, *Burns v Tendercare Properties, Inc*, 2004 ACO # 10.

<sup>4</sup> January 5, 2001 deposition of Dr. Matheson at 20-21.

<sup>5</sup> *Id.* at 21-25.

<sup>6</sup> See, *e.g.*, *Wilde v Ann Arbor Public Schools*, 1997 ACO #96.

substantial evidence. Thus, we deny defendant's cross-appeal, and we agree with plaintiff that the order should be corrected to reflect an injury date of April 22, 1996.

Plaintiff next contends the magistrate erroneously interpreted *Sington* by focusing on plaintiff's hourly wage, rather than his maximum overall wages. Plaintiff correctly argues: "In short, 'wage earning capacity' does not consist solely of an hourly rate, as the magistrate would have it. Rather it includes consideration of the number of hours a worker can work."<sup>7</sup> Plaintiff then states that he is disabled within the meaning of *Sington* because he is unable to perform all the work he was able to do prior to his injury, *i.e.*, the overtime which he performed up until Dr. Matheson placed him on restrictions in 1997. We agree with plaintiff that the magistrate's *Sington* analysis was flawed, leading to an improper denial of benefits.

The Commission recently confronted an identical factual scenario in *McKinney v Ford Motor Company*, 2003 ACO #270. In that case the magistrate found plaintiff was no longer able to perform overtime work in his position as a millwright. Defendant contended loss of maximum wage earning capacity could not be established simply by comparing wages earned at the time of injury with wages earned thereafter because plaintiff had returned to his regular pre-injury work. Although agreeing with defendant's general proposition, we found no error in the magistrate's award. In affirming the award of continuing partial disability benefits based on the loss of overtime, we wrote:

*Sington* divides the concept of compensable disability into two realms, the realm of impairment of maximum wage earning capacity and the realm of wage loss. Loss of wage earning capacity is governed by §301(4). Wage loss is governed by §361(1) and §301(5)(b).

In a situation where the employee is completely unable to perform a particular type of work, the inquiry under *Sington* must include an exploration and determination of what other types of work the employee can perform and what wages those employments provide. As part of this inquiry the fact finder decides whether any of those lines of work represent an ability to earn wages based on plaintiff's physical limitations and qualifications and training.

Once the employee meets the burden of proving that no work paying the maximum is available the inquiry turns to wage loss. We recently described the allocation of the burden of proof and burden of going forward with evidence on these questions in *Kethman v Lear Seating Corp*, 2003 ACO #205. We wrote:

From our reading of *Sington*, in order to establish a prima facie case of disability and keeping in mind an economic focus rather than a medical impairment focus, the employee must demonstrate:

1. his work qualifications and training, and what jobs they translate to, and

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<sup>7</sup> Plaintiff's brief at 6.

2. that he has a work-related physical or mental impairment which does not permit him to perform jobs within his qualifications and training and that he has lost wages, and
3. that he is either unable to perform or cannot obtain employment at all those jobs within his qualifications and training that pay his maximum income, which are reasonably available

\* \* \*

After putting in proofs which the fact finder accepts as sufficient to establish the three factors listed above, plaintiff has established a prima facie case, and the burden of going forward concerning these matters shifts to defendants. At this point defendants can bring forth proofs to show there were jobs reasonably available to plaintiff within her qualifications and training which she remained physically able to perform and which paid either her maximum wage, or less for the purposes of a section 361 wage-loss determination. (footnotes omitted).

In *Sington*, the employee returned to his usual work, but earned the same amount of money until he lost his job due to a non-occupational medical condition. The question was whether the work he returned to, within his qualifications and training, represented reasonable maximum ability to earn, or whether it was restricted work which did not have a corresponding market value in the real world. Thus, the question directly considered in *Sington* was not wage loss but what is the realm of the employee's maximum wage earning capacity and whether the work he performed after injury represented such a capacity.

In this case the employee returned to work at his usual job, but was earning less money.

We agree with defendant that mere loss of wages after injury is not the test of impaired wage earning capacity. However, under the proper circumstances, actual wages can be the most realistic measure of the employee's capacity. (Footnotes omitted)

In *McKinney*, we held that once a magistrate determines the loss of wages is related to the work injury, then the actual diminution of wages may be used to prove loss of maximum wage earning capacity as well as to prove the extent of the loss in wages caused by the injury. We wrote:

Both in its direct language, and in the recitation of the language from *Pulley [v Detroit Engineering Co, 378 Mich 418 (1966)]*, the Supreme Court has included the difference in wages as one element to be used in measuring the employee's lost wage earning capacity. As long as the loss is attributable to the injury and represents the employee's loss of maximum wage earning capacity use of the difference in actual wages can be the basis for determining the amount of wage loss and compensation payable.

Thus, the question becomes whether the magistrate simply accepted the wage loss in and of itself as an automatic indicator of loss of wage earning capacity, or whether she complied with the rulings of the Supreme Court and properly used wage loss in the context of loss of wage earning capacity and work-related injury to measure the employee's entitlement to compensation.

Thus, to the extent plaintiff in this case has demonstrated an injury-related loss of wages in the field of employment paying the highest wages, he is entitled to weekly compensation benefits based on that difference under MCL 418.361(1).<sup>8</sup>

Because the magistrate ruled out a compensability disability simply because plaintiff was still working at the same job he had at the time of injury, it was legally erroneous. We reverse his conclusion plaintiff is not entitled to partial disability benefits. Plaintiff is entitled to compensation for any wage loss which is related to his injury.<sup>9</sup> Although the defendant contended plaintiff's lack of overtime results from a general reduction in overtime, and, as such, is not compensable, the stipulated set of facts contains the following statement:

It should be noted that shortly after March of 1997, the hours available to maintenance workers at Burgess-Norton were significantly reduced because business was slow. The four hours per week which was paid to Mr. Voss in the Voluntary Payment Agreement represented our best calculation as to the amount of overtime that he was losing per week (in comparison with other maintenance workers) as a result of his alleged forty hour per week restrictions.

Mr. Voss then filed his second Petition in early 2000. This Petition sought the payment of differential benefits. Between July of 1998 up through May of 2000, employer calculations concerning the hours worked by Mr. Voss compared with those worked by other similarly situated co-workers, in the maintenance department, indicated that he "was losing" about two hours per week of overtime that they were working. In October of 2000 Mr. Voss' hourly rate was \$13.68.<sup>10</sup>

Based on this factual stipulation, plaintiff is entitled to continuing benefits based on the loss of two hours of overtime per week.

Plaintiff contends for compensation based on the full difference between his average weekly wage at the time of injury and his current average earnings. He relies on MCL 418.301(5)(b) as interpreted in the Court of Appeals decision in *Kurz v Michigan Wheel Corp*, 236 Mich App 508

<sup>8</sup> Defendant does not contend plaintiff's current work is less than his actual maximum wage earning capacity after injury, or that there is comparable work at 40 hours per week with defendant or elsewhere which would pay wages equal to plaintiff's average weekly wage at the time of injury.

<sup>9</sup> *McKinney, supra*.

<sup>10</sup> Magistrate's opinion at 3.

(1999). As we observed in *McKinney*: “...the continuing vitality of *Kurz* is in question given that it was decided under the now discredited *Haske* definition of disability.” *Sington* requires that the employee establish a link between the wage loss and the injury. The factual stipulation establishes the loss of overtime due to injury is two hours per week. Plaintiff is entitled to compensation based this amount. The magistrate’s decision is modified to reflect this entitlement.

Defendant raises two additional cross-appeal issues. First, defendant asks for application of the presumption of new wage earning capacity found in MCL 418.301(5)(d)(i) on the ground plaintiff has worked after injury for 250 weeks or more. Second, defendant asks for remand to further develop the factual record over and above the stipulated set of facts. We find no merit in either of these contentions.

§301(5)(d) applies only where the employee “loses his or her job” after working 100 weeks or more. The Commission has consistently held this phrase means exactly what it says, that no issue of new wage earning capacity arises while the employee continues to work.<sup>11</sup> Moreover, any new wage earning capacity exists only at the level of wages earned in the post-injury job.<sup>12</sup> As a result, application of the presumption of new wage earning capacity does not preclude plaintiff from receiving partial compensation benefits based on the amount of lost overtime attributable to the injury. Nor do we agree with defendant that further proceedings are appropriate under *Sington*. The stipulated set of facts was dated September 5, 2002, nearly five weeks after the Supreme Court issued its decision. Had defendant wished to develop more proofs than contained in the proposed statement of facts, it could have declined to stipulate.

We affirm the magistrate’s finding of work-related injury and related medical impairment. We reverse the denial of entitlement to continuing partial benefits. Applying the stipulated facts we find plaintiff entitled benefits based on the loss of two hours of overtime per week.

Commissioners Will and Kent concur.

Richard B. Leslie

Rodger G. Will

James J. Kent

Commissioners

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<sup>11</sup> See, e.g., *Harvey v Wolpin Co*, 2001 ACO# 112.

<sup>12</sup> See, e.g., *Fields-Parker v Wal-Mart Stores, Inc*, 2001 ACO #342.

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This cause came before the Appellate Commission on plaintiff appeal from Magistrate Kenneth L. Block's decision mailed October 31, 2002 denying his claim for differential benefits. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed in part and reversed in part. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed in part and reversed in part, in accordance with the attached opinion.

Richard B. Leslie

Rodger G. Will

James J. Kent

Commissioners