

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

BRENDA BOUDREAUX,
PLAINTIFF,

AND

BLUE CROSS/BLUE SHIELD OF MICHIGAN,
BCS LIFE INSURANCE AND
CONNECTICUT GENERAL LIFE INSURANCE COMPANY (CIGNA),
INTERVENING PLAINTIFF,

V

DOCKET #03-0057

SOUTHFIELD PUBLIC SCHOOLS,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE HARRIS.

GARY M. BUSCH AND JAMES A. MOWRY FOR PLAINTIFF,
ALLAN R. GURVITZ FOR INTERVENING PLAINTIFF,
THOMAS L. FLEURY FOR DEFENDANT.

OPINION

KENT, COMMISSIONER

Defendant appeals the open award granted by Magistrate Michael T. Harris, stating the following issues on appeal¹:

- I. THE MAGISTRATE ERRED AS A MATTER OF LAW BY DETERMINING THAT PLAINTIFF WAS DISABLED BY A DISABLING DEPRESSIVE ORDER.
 - A. The Magistrate Failed To Apply the Four-Factor Test To Determine Whether Occupational Contributors Constituted a Vital Component to the Progression of Plaintiff's Depression.
 - B. The Magistrate Failed To Apply the Objective Standard of Review To The Actual Events Accurately Perceived Test.

¹ The magistrate's opinion was mailed to the parties on January 13, 2003, and was assigned as ready for review by this panel of the Commission in April of 2004.

- II. THE MAGISTRATE FAILED TO APPROPRIATELY APPLY THE *SINGTON* STANDARD.
- III. THE MAGISTRATE LEGALLY ERRED IN FINDING PLAINTIFF SUFFERED A COMPENSABLE PERSONAL INJURY PURSUANT TO §301(1).
- IV. THE MAGISTRATE'S FINDINGS ARE NOT SUPPORTED BY COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE.

By way of background, we repeat the magistrate's recitation of the basic facts below:

Plaintiff has a Master's degree in Organizational Communication and Public Relations, plus 30 credit hours. She has worked as a executive secretary for General Motors, typing, answering the phone and other work as needed. She was with GM for 14 years.

Plaintiff went to work at Southfield Public Schools in 1995 and passed a pre-employment physical. She describes herself as being in excellent health, both physically and mentally. The Arthur Ashe Academy where she was assigned is for troubled students with learning and behavior problems and that's where she worked. She taught Speech, English and Marketing. She was also a Co-op teacher. Originally she was there at the Arthur Ashe campus for a full seven hours. Later, she worked from 7:15 to noon, at Oakland County Community College, and then went to Arthur Ashe to input the attendance and performance records there, to meet with others and to call parents as necessary. When she put in her information at the Arthur Ashe location, she was usually there a couple of hours. She had to put in attendance records and maybe send a letter to parents. About 45 minutes of her job involved typing. Before this she just taught all day.

There were classroom disruptions every day and sometimes it was necessary to get security or the male teachers or the principal involved. These students were those who would have been suspended, but are placed in a special program instead. They are kept in modular classrooms outside the regular building at the Arthur Ashe campus. Many of her classes were taught at OCC (Oakland Community College) so she had to bring her books and supplies in with her. Plaintiff never taught mainstream students.

She was walking on a wooden deck on a modular classroom in February of 1996 and slipped and fell. The same thing happened in January or February of 1997. She reported these falls to the principal and wrote up an accident report. She did not seek medical treatment but started having a right hip pain. She missed a few days of work and did see the school doctor. Following the second fall she was reporting a sharp pain in the hip.

Her job requires her to stand and do hall duty and lunchroom duty and keep track of the kids at all times, all of which required standing. She estimates that 75% of her time is spent on her feet. After 1997 she got more treatment for her hip. She lost control of her leg in 1999 and saw Dr. Matlen for her hip. He x-rayed it and advised her. In the fall of 1999 she went back to work for the school system. She saw a consultant for a rheumatoid condition in her hip.

On January 11, 2001 she intervened in a disagreement between two students. A chair was thrown by one student, knocking plaintiff down and breaking a fluorescent light fixture, which put glass into her eye. She fell backwards, toward her right side, on her hip. Immediately she had a sharp pain in her eye and "they" took her for an eyewash. The principal and police came and a teacher took her over to Providence Hospital. First, she saw someone at the school clinic. The hand was swollen at the school clinic but they eventually got her rings off. They x-rayed her eye, and her left arm, but not her hip. This was a radiating pain, which she had never had before. The buttock was sore for the first time.

Defendant bases its first argument on the premise that the magistrate erred in finding plaintiff disabled due to her psychiatric condition. At least in part they overlook an essential portion of the magistrate's finding, that plaintiff's disability was also caused by a work related physical condition:

1. Plaintiff met with personal injury arising out of and in the course of her employment with the defendant on or about 1/11/01 when she was struck by a chair and fell to the floor, injuring her left wrist, her back and aggravating the arthritic condition in her right hip. I find plaintiff's testimony to be credible in all respects.
2. As a result of her injuries, plaintiff has, since 1/11/01, experienced an actual reduction of her maximum reasonable wage earning ability in work suitable to her qualifications and training in the ordinary job market for such work. See MCL 418.301(4); and *Sington v Chrysler Corp*, 467 Mich 144 (2002). Not only does plaintiff suffer a reduction of her maximum earning *ability*, she also experiences an actual loss as well, being currently unable to earn a comparable wage at any type of employment available with her education, training and experience. Her teaching job represents her maximum earning ability and there are no other jobs for which she is qualified that she can perform and earn a comparable wage given her current physical and mental disabilities.
3. In making finding number 2, I have considered as completely credible and reliable the testimony of Dr. Rottenberg. As her treating doctor and as a specialist in the field of physical medicine and rehabilitation he has the best perspective to evaluate the nature of her complaints and physical limitations. I find that the physical aspects of her disability are from the hip injury, and I find that the fall to the floor aggravated and accelerated the degenerative changes in her hip to a significant degree. I do not find that the wrist/hand injury is the

cause or source of her disability at this time though I have no doubt that it remains painful and that she has less than full use of it.

4. In making finding number 2, I also rely on the testimony of the treating psychiatrist, Dr. Kumar, and find that plaintiff suffers from a major depressive disorder caused by her injury and the sequelae of it. I am not impressed completely with Dr. Kumar's opinions and do not find that plaintiff suffered from a post-traumatic stress disorder from the incident and injury. As the treating psychiatrist, Dr. Kumar is in a good position to regularly see and evaluate plaintiff's condition. While it is conceivable that such an event as happened to this lady *could* cause a PTSD, I am certainly not convinced that she has proved more probably than not that she still does have such a disorder. **Nonetheless, her major depression combined with the severe physical limitations caused by her hip injury renders this plaintiff disabled within the meaning of the statute, MCL 418.301(4), and case law. See *Sington, supra*.**

That being said, it remains important to determine if the disability was properly found work related.² First, we hold that while the magistrate did not go into great detail in reciting the four factors outlined in the *Martin*³ decision, his finding remains on solid footing.

It is true, as defendant points out, that in applying the significant manner test, the fact finder must weigh the totality of the non-occupational factors against the work related factors to determine if work whether the injury was significantly caused by work-related events.⁴ It is also true that in *Martin*, this Commission outlined in the past factors to consider, if applicable, in making that determination.

That being said, we agree with plaintiff's assessment, that, while it is preferable for a magistrate to perform an analysis of the various occupational and non-occupational factors in line with the Commission's decision in *Martin*, such an analysis is not a strict legal requirement so long as the persuasive medical testimony establishes significant aggravation in sufficient detail for appellate review.⁵

Based on the supportive testimony of Dr. Kumar, the magistrate found work to be in essence the sole cause of plaintiff's emotional problems. Hence, while we prefer a more detailed analysis, on these facts, the standard was met.

Nor do we agree with defendant's contention that the magistrate failed to properly apply the "objective standard to the actual event requirement of Section 301(2)⁶:

² If it were not, then the question would be if the physical restrictions, standing alone, meet the test of compensable disability.

³ *Martin v City of Pontiac*, 2001 ACO #118.

⁴ *Farrington v Total Petroleum, Inc*, 442 Mich 201 (1993).

⁵ *Lhamon v Munson Health Care*, 2004 ACO #369. See also *Hunt v Clariant Corp*, 2004 ACO #122.

⁶ See Defendant's brief on appeal, page 31.

When assessing whether Plaintiff's perception is grounded in fact or reality, the magistrate must make a determination in "assess[ing] the factual circumstances in terms of how a reasonable person would have viewed them." *Robertson*, 465 Mich at 754-755. More specifically, the supreme court has instructed that:

In analyzing whether a claimant's perception of the actual events of employment had a basis in fact or reality, the factfinder must apply an objective review, that is, examine all the facts and circumstances surrounding the actual employment events in order to determine if the claimant's perception of the actual events was reasonably grounded in fact or reality. *Robertson* 465 Mich at 584 (emphasis added).

In reaching its decision that an objective standard be employed in the statutory construction analysis of §301(2) the *Robertson* court relied in part upon *Ratke v Everett*, 442 Mich 368, 386-387; 501 NW2d 155 (1993) finding it analogous. *Robertson*, 465 Mich at 579. *Ratke*, required an objective reasonableness standard be applied to hostile work environment claims brought pursuant the Michigan Elliott Larsen Civil Rights Act. Importantly, *Ratke, supra*, explains that application of the objective standard prevents accepting "plaintiffs' subjective evaluations of conduct, thereby imposing upon employers liability for behavior that, for idiosyncratic reasons, is offensive to an employee." Thus, even if Plaintiff is able to establish the existence of a mental disability, she must also establish it was caused by the employment and her subjective conclusions will not be enough to sustain her claims.

Recent opinions at the Commission have stressed this important nuance in applying this sometimes troublesome test⁷:

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 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

⁷ *Wolf v General Motors Corp*, 2003 ACO # 68. See also *Golota v American Axle*, 2003 ACO # 261.

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 required 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 with 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.

That being said, we see nothing in the magistrate’s decision which indicates he did not properly apply *Robertson*.

In its “second” issue, defendant argues the magistrate failed to appropriately apply the *Sington* standard. While couched in legal terms, defendant’s argument on this point is really factual. It contends that the testimony of Mr. Wilson, a former employee, established that plaintiff could in fact obtain other positions within defendant’s system which would accommodate both her physical and psychological restrictions.

The magistrate gave a detailed and accurate summary of Mr. Wilson’s testimony (as well as that of each lay and medial expert who testified at trial), but found it unpersuasive:

. . . Last, in making finding 2 I have largely discounted the optimistic testimony of Mr. Wilson. His ideas that plaintiff could go back to work are in direct conflict with the believable testimony of plaintiff and her treating physicians. Further, he no longer works

for the school district and so his opinions that they would do whatever was necessary to accommodate her cannot be taken as those of the schools since he lacks authority to make such a commitment owing to his separation from service there.

Instead, based on plaintiff's testimony which he characterized as "the clear appearance in the courtroom of a person suffering from a major depression/anxiety disorder and I have previously found her to be credible in all respects", as well as what he found to be the more persuasive medical testimony, he held she was unable to perform any (all) job(s) within her qualifications and training.

While we have later⁸ indicated we would prefer a much more detailed analysis concerning each of the elements of a *Sington* claim⁹, his findings, which are supported on the record, suffice.

Finally, we turn to defendant's final issue, in which it contends both legally and factually the Magistrate failed to properly apply *Rakestraw v Gen Dynamics Land Sys*, 469 Mich 220 (2003) when he found plaintiff's work to have caused her disability, especially as it relates to her hip. While couched partially in terms of a legal argument based on the *Rakestraw* test, when boiled to its essence, defendant contests the weight and interpretation of the evidence by the magistrate as it relates to causation.

It is axiomatic the Appellate Commission will not reverse a magistrate for choosing between two reasonable but differing views offered in the testimony of the medical experts. 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 we find there is competent, material, and substantial evidence on the whole record to support the magistrate's finding.

Supportive evidence is present in the deposition of Dr. Rottenberg,¹⁰ plaintiff's treating physician, as recited in the magistrate's opinion, which we adopt. MCL 418.861a(10). Affirmed.

Chairperson Reamon and Commissioner Will concur.

James J. Kent Commissioner

William G. Reamon, Jr. Chairperson

Rodger G. Will Commissioner

⁸ This case was decided prior to many of our decisions which detailed our guidance to the Board on such matters.

⁹ See for instance, *Riley v Bay Logistics*, 2004 ACO # 27 and *Wegienka v Monsanto Chemical Co.*, 2004 ACO # 324.

¹⁰ See Dr. Rottenberg's deposition at pp. 22-24, 41-45.

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

BRENDA BOUDREAUX,
PLAINTIFF,

AND

BLUE CROSS/BLUE SHIELD OF MICHIGAN,
BCS LIFE INSURANCE AND
CONNECTICUT GENERAL LIFE INSURANCE COMPANY (CIGNA),
INTERVENING PLAINTIFF,

V

DOCKET #03-0057

SOUTHFIELD PUBLIC SCHOOLS,
SELF INSURED,
DEFENDANT.

This cause came before the Appellate Commission on defendant's appeal from Magistrate Michael T. Harris' decision, mailed January 13, 2003, granting plaintiff an open award of 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

Commissioner

William G. Reamon, Jr.

Chairperson

Rodger G. Will Commissioner