

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

SHANNON BRANCH,
PLAINTIFF,

V

DOCKET #03-0350

SPEEDWAY TOWING & SERVICES AND
ACCIDENT FUND INSURANCE COMPANY OF AMERICA,
DEFENDANTS.

APPEAL FROM MAGISTRATE QUIST.

CHRISTOPHER D. MORRIS FOR PLAINTIFF,
GERALD M. MARCINKOSKI FOR DEFENDANTS.

OPINION

GLASER, COMMISSIONER

Plaintiff appeals the decision of Magistrate G. Jay Quist, mailed on August 6, 2003, denying plaintiff an open award on a finding of an occupational shoulder injury. We affirm the magistrate's decision.

This matter was initiated by plaintiff filing an Application for Mediation or Hearing, Form A, on August 7, 2001. An Application, Form C, was filed on October 16, 2002, but dismissed by stipulation of the parties at trial. An Application, Form B, was filed on January 2, 2003.

Plaintiff alleged injury to his left shoulder as a result of specific injuries occurring in March of 2001 and on July 29, 2001. Defendants denied any liability. A trial was held on July 15, 2003 at which time plaintiff appeared and testified on his own behalf. Dr. Christ testified by deposition for plaintiff. Defendants presented testimony of two lay witnesses, Russell Cowper and Cynthia Thompson. Following that trial, the magistrate issued a decision finding that plaintiff had established work-related injuries in March 2001 and on July 29, 2001. He awarded plaintiff all reasonable and necessary medical benefits arising out of those injuries, however, he denied request for reimbursement from Advanced Medical Management as no proofs were presented relating that treatment to the work injuries. He denied also, plaintiff's claim for disability benefits.

Plaintiff filed a timely appeal setting forth several arguments.¹

Plaintiff first argued that the magistrate misapplied the facts of this case in his analysis of disability, pursuant to *Sington v Chrysler Corp*, 467 Mich 144 (2002). He argues that his highest

¹ Defendants initially filed a timely cross-appeal but withdrew same at page one of their brief.

paying job was that of a semi-truck driver. He further argues that the question for disability is whether plaintiff had an unlimited ability to perform work as a semi-truck driver following the date of injury.

Defendants respond that the magistrate applied the correct legal analysis by inquiring into the injuries' affect on plaintiff's ability to earn maximum wages at available work for which he is qualified and trained.

We have addressed the analysis to be performed to determine disability, post *Sington*, in the case of *Riley v Bay Logistics, Inc*, 2004 ACO #27, and others:

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 Court⁶ in *Sington*, plaintiff has proven a threshold disability (or stated differently, plaintiff's work injury has caused his Section 301(4) disability):

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.

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 wages⁷, establishing a prima facie wage loss (for the purposes of Section 361).²

² *Riley v Bay Logistics, Inc*, 2004 ACO #27.

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.

The magistrate explained his analysis in this way:

The second issue is whether the plaintiff established a disability. The Michigan Supreme Court defined disability in *Sington v Chrysler Corporation*, 467 Mich 144 (2002). Based on my interpretation of the *Sington* case, a disability is a physical limitation which affects a worker's ability to earn maximum wages at available work which he or she is qualified and trained to perform. Based on the evidence submitted, the plaintiff's disability claim must be denied. Although the plaintiff suffered work-related injuries to his left shoulder, he failed to establish that those injuries resulted in a disability. The plaintiff did not leave any of his employments as a result of his left shoulder condition. He left his employments at Speedway Towing, American Transport, and Cindy's Towing as a result of lack of work or communication difficulties with his employers. It is also significant that the plaintiff testified that he earned more money as a semi truck driver for American Transport than he did as a tow truck driver for Speedway Towing. When asked if he could still work as a truck driver, the plaintiff simply responded that he did not know. The plaintiff has applied for other truck driving jobs. The plaintiff's treating physician, Dr. Christ, did not issue any specific restrictions with respect to the plaintiff's left shoulder condition. Moreover, plaintiff's testimony that he could not work as a tow truck driver as a result of his left shoulder condition is not credible. He did not leave his employment at Speedway Towing or Cindy's Towing as a result of his left shoulder condition. Therefore, when the evidence is reviewed as a whole, the plaintiff's claim that he suffered a work-related disability must be denied.³

We find that the magistrate did apply the correct legal analysis, and affirm his finding that no compensable disability was established.⁴ Since no compensable disability was established, plaintiff's assertion that his case should be evaluated under 301(5)e is in error.

Plaintiff next argues that the magistrate erred as a matter of law in failing to strike the testimony of defense witness, Cynthia Thompson, citing Rule 6. We find this argument to be totally without merit, as plaintiff withdrew his request to strike Thompson's testimony at the time of trial, and never renewed it.⁵ Therefore, such objection is waived. *Clark v Supreme Machined Products, Inc*, 2002 ACO #182.

³ Magistrate's opinion, p 7.

⁴ Plaintiff asserts that the magistrate should have considered medical treatment in the form of surgery to the shoulder and its affect on his ability to perform work activity. If there had been a change of condition the proper forum is a new petition before the Board of Magistrates and not the Commission.

⁵ Trial transcript p. 143

Plaintiff's last argument was expressed as follows:

The last question involved in this case is whether the magistrate properly ruled on the issues of contempt and/or violation of §222 of the Act. The employer never supplied wage records in this matter. Plaintiff moved that Defendant be precluded from presenting a defense for violation of §222 of the Act. The magistrate concluded that §222 does not apply where a Defendant/Employer fails to supply necessary information (I, 40). The magistrate is incorrect in his application of §222.⁶

The relevant portion of the magistrate's decision, which plaintiff's final argument addresses is:

Based on the language of the statute, it is unclear whether I have the authority to hold Mr. Cowper in contempt of court. A decision issued by the Workers' Compensation Appeal Board suggests that a magistrate does not have authority to hold a witness in contempt. However, a magistrate may find facts which may subsequently lead a circuit court judge to make a finding of contempt. *Lewis v Chrysler* 1991 WCABO 362.

Regardless of what authority I may or may not have, I do not find that the facts in this case support a contempt finding against Mr. Cowper. Mr. Cowper credibly testified that he did not receive subpoenas issued by Mr. Morris prior to 2003. Mr. Cowper sold Speedway Towing in February of 2002 and the new owner did not accept mail for him at his former business address. When Mr. Cowper finally received the relevant subpoena in 2003, I find that he made a good faith effort to comply with it. He produced numerous wage and employment records at trial. I find his testimony credible that he did not intentionally refuse to comply with any subpoena. Therefore, the facts do not support a contempt finding against Mr. Cowper.⁷

Defendants responded:

Although this ruling was cast more in the "contempt" of court language because that was the legal provision primarily pressed by plaintiff at trial, it is obvious that Mr. Cowper's "good faith" to comply with the subpoena means he was not willfully disregarding any exchange of information so as to be in non-compliance with MCL 418.222. The cases cited by plaintiff for the opposite conclusion were cases where there were factual findings of willful non-compliance.⁸

In order to impose any sanctions on a party for violation of section 222, the occurrence of the violation must be supported by competent evidence, and it must be willful-a factual determination to be

⁶ Plaintiff's brief, p 12.

⁷ Magistrate's opinion, p 8.

⁸ Defendants' brief, p 19.

made by the magistrate.⁹ *McComber v McGuire Steel Erection Inc*, 251 Mich Application 491 2002 (rev'd on other grounds, 468 Mich 870 (2003)).

The magistrate has made a factual finding that Mr. Cowper did not willfully fail to comply with any subpoena. That finding is supported by the evidence on this record. It matters not that a different interpretation of the facts could be had. We are bound to affirm any fact finding where, as here, there is competent, material and substantial evidence to support it. *Mudel v Great Atlantic and Pacific Tea Co*, 462 Mich 691 (2000).

Commissioners Kent and Will concur.

Martha M. Glaser

James J. Kent

Rodger G. Will

Commissioners

⁹ *Harris v DaimlerChryslerCorp*, 2004 ACO #328, quoting with approval from the opinion of Magistrate Barney. Also see *Blye v Allied Systems, Incorporated*, 2003 ACO #9 and *Snell v Thyssen Steel Group*, 2003 ACO #85

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This cause came before the Appellate Commission on plaintiff's appeal from Magistrate G. Jay Quist's decision, mailed August 6, 2003, denying 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.

Martha M. Glaser

James J. Kent

Rodger G. Will

Commissioners