

STATE OF MICHIGAN  
WORKERS' COMPENSATION APPELLATE COMMISSION

MARY E. GOLDING,  
PLAINTIFF,

V

DOCKET #04-0111

ALTERNATIVE LIVING SERVICES, INCORPORATED, AND  
CONNECTICUT INDEMNITY COMPANY,  
DEFENDANTS.

APPEAL FROM MAGISTRATE DAY.

TIMOTHY S. BURNS FOR PLAINTIFF,  
MICHAEL T. REINHOLM FOR DEFENDANT.

OPINION

WILL, COMMISSIONER

This matter was heard by Magistrate Day on February 3, 2004. Plaintiff testified on her own behalf. Adriene Kirksey, one of plaintiff's former supervisors testified on behalf of defendants. Plaintiff's medical testimony came by way of depositions from Wilbur J. Boike, M.D. and Jacquelyn G. Lockhart, M.D. Defendants' medical testimony came from two depositions of Nathan Gross, M.D. Received as exhibits to complete plaintiff's proofs were records from plaintiff's various treating physicians. Defendants' exhibits consisted of two letters to plaintiff and a document entitled "Offer of Work".

On March 11, 2004, the magistrate's decision was mailed. She granted plaintiff an open award. We affirm the magistrate's decision.

Beginning at the top of page 3 of her decision and ending at the bottom of page 9 thereof, the magistrate has done an excellent job of summarizing the testimony presented. Accordingly, pursuant to MCL 418.861a(10), we adopt her summary as our own. The magistrate concluded her decision with her "Additional Findings & Conclusions of Law":

The evidence demonstrates that plaintiff presented a very consistent work-injury history to all examining/treating physicians. It also establishes that plaintiff has worked consistently throughout her adult life at various low-paying, unskilled jobs. Her treatment history, including her willingness to twice undergo lumbar injections, persuades me that she continues to suffer from painful residuals to her low-back injury, which I find occurred on March 12, 1999, as she described at hearing. I accept her testimony that her back pain prevented her from thereafter performing her regular duties for defendant, the job that paid her the highest wages she had ever earned. This disability claim was amply supported by the treatment records admitted at hearing and

the testimony offered by Dr. Boike and Dr. Lockhart that plaintiff's work injury precipitated the need for restricted activities that, I find, would exceed the requirements of her regular duties. Plaintiff has thus established a limitation in her wage-earning capacity in work suitable to her qualifications and training resulting from her work injury. MCL 418.301(4). Her maximum reasonable wage-earning ability in work suitable to her qualifications and training has been reduced because of her injury. *Sington v Chrysler Corp*, 467 Mich 144 (2002).

I give the greatest weight to the testimony provided by plaintiff's treating physician, Dr. Boike, who would not restrict his patient as severely as Dr. Lockhart, but who found injury-residual limitations that Dr. Gross did not. I accept his testimony concerning the low-back pathology he has found on examination and diagnostic studies, as well as his opinion that his patient continues to suffer from low-back and radicular leg pain because of her work injury. According to Dr. Boike, plaintiff's condition necessitates lifting restrictions of 20 pounds and the avoidance of repetitive bending and twisting activities. I accept plaintiff's testimony that her regular duties for defendant and at all of her prior employments would exceed those restrictions.

The description provided by plaintiff and supervisor Kirksey, however, demonstrates that the employment plaintiff was provided in September 1999 would not exceed those restrictions and, thus, was reasonable. Both these witnesses readily agreed to the employer's willingness to accommodate plaintiff during her four days back at work at that time. However, plaintiff offered credible and un rebutted testimony that this reasonable employment was withdrawn when Randy Legault called her and told her she could no longer be accommodated. It is undisputed that no subsequent offer of reasonable employment has been made to plaintiff. I do not find the letter defendant sent to plaintiff the following year, defendant's exhibit #3, which contained no job description and simply referred to her regular, pre-injury position, a valid offer of reasonable employment. MCL 481.301(5)(a) and (9). Plaintiff is thus entitled to weekly benefits for her continuing work-related disability. MCL 418.301(5)(e).

Defendant is found liable for weekly benefits at the stipulated rate of \$215.15, from February 25, 2001, [MCL 418.833(1)], through the close of proofs on February 3, 2004, and thereafter until further order. Defendant is also responsible for the payment of all reasonable and necessary medical expenses, subject to cost containment, related to plaintiff's injury. MCL 418.315.<sup>1</sup>

The defendants filed a timely claim for review.

On July 14, 2004, defendants filed their brief on appeal raising two issues:

**The magistrate has misapplied the law of reasonable employment. Plaintiff unreasonably refused an offer of reasonable employment before defendant**

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<sup>1</sup> Magistrate's decision, pp. 9-10.

**withdrew it. Her right to weekly benefits is therefore suspended until she ends her unreasonable refusal. The fact that the offer may have been withdrawn after plaintiff refused it is irrelevant.**

**The magistrate erred in concluding that defendants' Exhibit #3 did not constitute a bona fide offer of reasonable employment in November 2000. The four corners of that document obligated plaintiff to contact defendant about the job, on pain of being considered to have withdrawn from the workforce if she did not. Plaintiff's benefits should be suspended as of November 8, 2000.**

In support of their claim that plaintiff unreasonably refused an offer of reasonable employment before the employer withdrew it, the defendants argued:

In the case at bar, the magistrate specifically found that the job plaintiff performed in September 1999 was reasonable employment. "The description provided by plaintiff and supervisor Kirksey, however, demonstrates that the employment plaintiff was provided in September 1999 would not exceed those restrictions and, thus, was reasonable. Both these witnesses readily agreed to the employer's willingness to accommodate plaintiff during her four days back at work at that time." (Magistrate, p 10). By definition, this means that that job was one "within the employee's capacity to perform". MCL 418.301(9). That is, plaintiff could perform the job. We know the job ended. The question is whether it was withdrawn or unreasonably refused.

Plaintiff testified that on her last day of work she could not do the job because of back pain. She showed up for work with a walker (59). She was eventually taken from the premises by EMS (59). And when asked if that was done "primarily because of your blood pressure was high"?, plaintiff answered, "No, ma'am. I was in pain. I was hurting and they called -- of course, yes, my blood pressure did go up. \*\*\* But it was all started because of the pain I was having." (60). In other words, plaintiff was saying that she could not perform the job because of pain associated with her work injury. In contrast, the magistrate found that the job was within plaintiff's capacity to perform.

It appears that it was *after* this that the job was withdrawn. The magistrate found that "plaintiff offered credible and un rebutted testimony that this reasonable employment was withdrawn when Randy Legault called her and told her she could no longer be accommodated." (Magistrate, p 10). When was this call? Plaintiff testified that this was "after I had gone to emergency, on 9-1-1, after he had called 9-1-1." (71) This was in a phone call to plaintiff's daughter (71). So, the job was withdrawn after plaintiff refused it.

Finally, plaintiff has never ended her refusal. She admitted that since her last day with defendant not only has she not worked, but she has not looked for work (61). She is not in the workforce.

To conclude, plaintiff's benefits should be suspended. Plaintiff in essence testified that she could no longer perform the job that was offered; the magistrate in fact found that this was a job within plaintiff's capacity to perform. The fact that it was withdrawn after she refused to perform it is irrelevant. Plaintiff's benefits should be suspended as of September 30, 1999.<sup>2</sup>

Plaintiff responded:

In addition, the Plaintiff did not refuse offered employment. The Michigan Supreme Court has indicated that it is the worker's willingness to return to work that is controlling. *McJunkin v Cellasto Plastic Corp*, 461 Mich 590 (2000). Contrary to Defendant's repeated assertion that she refused reasonable employment as defined under the statute, the Plaintiff returned day after day to her employment until she was informed by her employer that there was no work available to her. (T 36-37). The Plaintiff and her supervisor, Adriene Kirskey, testified that her employer was willing to accommodate her, that is, until Randy Legault withdrew that reasonable employment.<sup>3</sup>

Defendants' argument in this regard falls of its own weight because plaintiff continued to perform the reasonable employment as best she could until the offer was withdrawn. Plaintiff never refused the employment.

Defendants began their second argument by acknowledging the fatal weakness in the first argument:

Assuming that defendant withdrew its offer of reasonable employment in September 1999, before plaintiff refused it, defendant made an offer anew in November 2000. The magistrate, however, found that the offer was not a bona fide offer of reasonable employment. This conclusion is erroneous as a matter of law.

After noting that the September 1999 offer was withdrawn, the magistrate found that "that no subsequent offer of reasonable employment has been made to plaintiff. I do not find the letter defendant sent to plaintiff the following year, defendant's exhibit #3, which contained no job description and simply referred to her regular, pre-injury position, a valid offer of reasonable employment." (Magistrate, p 10). While citing the applicable statutes, the magistrate cited no applicable case law, and this led her astray.

An employer's obligation is to offer specific employment with established responsibilities within the employee's limitations. *Price v City of Westland Police Department*, 451 Mich 329, 337, 341; 547 NW2d 24 (1996). The job must be described with a fair degree of specificity. *Id.* at 337. As a point of contrast, a "general invitation for a disabled employee to come in, and something will be found is an insufficient offer." *Id.*

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<sup>2</sup> Defendants' brief on appeal, pp. 10-11.

<sup>3</sup> Plaintiff's brief, p. 11.

The job offer was admitted as defendants' Exhibit #3. The job identified is resident assistant. Concededly, plaintiff testified that this was her regular job, and she could not perform it (39-41). But, the offer makes clear that plaintiff was not simply being called back to her regular job. At the top of the letter it states that this was an offer to return to a transitional job. The letter also sets forth defendant's return to work policy - defendant is committed to providing an opportunity to those with work-related injuries or disease an opportunity to return to work "within documented capabilities". Further along, it states that the position identified "has been developed with full consideration of the work restrictions set out by your physician as a result of your work-related injury." Concededly, the document indicated that a job description was attached, but it does not appear in fact that one was. But, the letter concludes by stating the name of plaintiff's direct supervisor and indicating that "[I]f you have questions, please ask you[r] immediate supervisor. We hope this transitional work assignment will assist you in your recovery."<sup>4</sup>

Plaintiff's response to the above included the following:

The Defendant asserts that "as a matter of law, this letter provided enough information to obligate plaintiff to at least contact defendant with any additional questions she may have had." However, this so-called job offer failed to comply with requirements of the statute. The "offer" failed to provide any specific details pertaining to the "alleged" reasonable employment. The testimony at the time of trial indicated that the job offer referred to the job as the Plaintiff's regular pre-injury job. However, it also stated that the job was within the Plaintiff's restrictions. This creates a significant amount of ambiguity as to the exact nature of the job. Magistrate Day noted in her opinion that "according to Dr. Boike, plaintiff's condition necessitates lifting restrictions of 20 pounds and the avoidance of repetitive bending and twisting activities. I accept plaintiff's testimony that her regular duties for defendant and at all of her prior employments would exceed those restrictions." (O 10) The job offer provided by the Defendant indicated that a description was attached, however, this was not attached.

Because the burden of proving that a bona fide offer of reasonable employment was made is on the Defendant, any ambiguity must be construed in favor of Plaintiff. *Kolenko, supra* at 162. Clearly, in this case, the Defendant has created that ambiguity by not providing a detailed description of the actual duties that the Plaintiff would be required to engage in. Therefore, the Defendant has not carried its burden in this case.

In addition, the Defendant asserts that "both the employer and the employee must be judged against standards of good faith and reasonableness," as set forth in *Pulver v Dundee Cement Co*, 445 Mich 68, 77 (1994). However, in *Kolenko*, the court stated that "the law does not compel [the plaintiff] to submit to the capricious dictates of an employer with regard to the kind of work [that] must [be] accepted[ed] in order to

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<sup>4</sup> Defendants' brief, pp. 12-13.

show cooperation.” Certainly, in this case, the only lack of cooperation is on the part of the Defendant. *Id.* at 162.<sup>5</sup>

Pursuant to *Price v The City of Westland Police Dep*, 451 Mich 329 (1996), we affirm the magistrate’s determination in this regard. An important factor in this determination is that the magistrate found plaintiff to be credible and where plaintiff testified that this offer was for her old job, a job she clearly could not perform with her work-related disability, the magistrate’s award of continuing benefits is most appropriate. Finally, it is noted that the letter in question is a form letter rather than a letter advising plaintiff of her work duties and there was no description of the job attached even though the letter received by plaintiff claimed that such description was attached.<sup>6</sup>

The decision of the magistrate is affirmed.

Commissioners Kent and Glaser concur.

Rodger G. Will

James J. Kent

Martha M. Glaser

Commissioners

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<sup>5</sup> Plaintiff’s brief, pp. 14-16.

<sup>6</sup> Trial transcript, p. 87.

S T A T E O F M I C H I G A N  
W O R K E R S ' C O M P E N S A T I O N A P P E L L A T E C O M M I S S I O N

MARY E. GOLDING,  
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ALTERNATIVE LIVING SERVICES, INCORPORATED, AND  
CONNECTICUT INDEMNITY COMPANY,  
DEFENDANTS.

This cause came before the Appellate Commission on defendant's appeal from Magistrate Nancy J. Day's decision, mailed March 11, 2004, granting plaintiff an open award. 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.

Rodger G. Will

James J. Kent

Martha M. Glaser

Commissioners