

STATE OF MICHIGAN  
WORKER'S COMPENSATION APPELLATE COMMISSION

TONY KEAN,  
PLAINTIFF,

V

DOCKET #04-0101

COLASANTI CORPORATION AND  
NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,  
DEFENDANTS.

APPEAL FROM MAGISTRATE SLOSS.

KEVIN M. KAIN AND DARYL C ROYAL FOR PLAINTIFF,  
PHILLIP C. CHURCHILL, JR. FOR DEFENDANTS.

OPINION

WILL, COMMISSIONER

This matter was heard by Magistrate Sloss on January 12, 2004. Plaintiff was the only lay witness to testify. Plaintiff presented the deposition of Paul Fortin, M.D. as his medical testimony. The doctor is plaintiff's treating physician and a board certified orthopedic surgeon. The medical record contained no other depositions.

On February 25, 2004 the magistrate gave plaintiff an open award. We affirm his decision.

Between pages 3 and the middle of page 5 inclusive the magistrate summarized the evidence presented. We believe his summary while short is accurate and pursuant to MCL 418.861a(10), we adopt it as our own.

The magistrate concluded his decision with the following analysis and order:

Plaintiff alleges injury dates of July 8, 2000, and October 18, 2000, l.d.w.. In order to establish a work-related disability, Plaintiff must demonstrate that he has a limitation of his maximum wage-earning capacity in work suitable to his qualifications and training. MCL 418.301(4); MSA 17.237(301)(4); *Sington v Chrysler Corp*, 467 Mich 144, 154; 648 NW2d 624 (2002). An inability to return to the same or similar work is not enough to establish disability; the claimant is not disabled if the physical limitation does not affect the ability to earn maximum wages in work in which the claimant is qualified and trained. *Id*, p 156, citing *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201; 536 NW2d 542 (1995). In determining the claimant's maximum wage earning capacity, the factors that the magistrate is to consider include: (1) the particular work that the employee is both trained and qualified to perform; (2) whether there continues to be a substantial job market for such work, and (3) the wages typically

earned for such employment in comparison to the employee's wages on the date of injury, *Id*, p 157. Plaintiff carries the burden of proof by the preponderance of the evidence standard. *Aquilina v General Motors Corporation*, 403 Mich 206; 267 NW2d 923 (1978).

It is clear from the testimony and evidence presented in this matter that Plaintiff initially injured his ankle in a nonwork-related incident. Plaintiff himself was forthright in his testimony regarding the initial injury, and was consistent in the histories he provided to medical providers. Dr. Fortin, the only medical expert to testify in this case, is of the opinion that Plaintiff is presently disabled from returning to his work duties for Defendant due to the ankle injury. (Fortin Dep, p 15). The injury in question is a fracture of the talus bone with post-traumatic arthritis. (Fortin Dep, p 13). Plaintiff's inability to return to his former work duties is because of pain symptoms due to the post-traumatic arthritis (Fortin Dep, p 15).

Dr. Fortin testified that it is his opinion that Plaintiff's work activities for Defendant subsequent to the initial nonwork injury accelerated the development of the post-traumatic arthritis (Fortin Dep, pp 17, 25, 26), but that the arthritis could have developed over time even if Plaintiff had not returned to work. (Fortin dep, pp 26-27). No evidence or testimony was presented indicating that this arthritis is a condition of the aging process.

I find as fact that Plaintiff has met his burden of proving that he[sic] work activities for Defendant between July 8, 2000, and October 18, 2000, contributed to or aggravated the underlying pathology of his nonwork-related injury in that those work activities accelerated the post-traumatic arthritis. He has therefore established that he sustained a work-related personal injury as defined by the act as of October 18, 2000, his last day of work.

I also find as fact that Plaintiff established by a preponderance of the [A]ct that he has been disabled as defined by the act since the date of injury found, October 18, 2000. Since that time, Dr. Fortin has recommended restrictions against prolonged walking or standing, and no climbing or carrying due to his continuing symptoms of pain stemming from his injury, which has prevented him from returning to his former employment as a carpenter's apprentice. While there was testimony that Plaintiff successfully completed temporary employment in the field of carpentry, the evidence as a whole was not sufficient to prove that Plaintiff has a residual wage earning capacity in any employment. Accordingly, his present inability to earn wages in his employment as a carpenter's apprentice for defendant constitutes a limitation of his maximum wage-earning capacity in work suitable to his qualifications and training.

The parties have stipulated that Plaintiff had an average weekly wage of \$573.86 on the date of injury, and that his IRS filing status was single. Plaintiff failed to establish by a preponderance of the evidence that he had any dependents. His appropriate compensation rate is therefore \$342.41. Defendant shall therefore be

responsible for wage-loss benefits in that amount from October 18, 2000, subject to the appropriate credit for wages and benefits paid. Defendant shall also be responsible for reasonable and necessary medical expenses relating to treatment for this injury incurred after October 18, 2000.<sup>1</sup>

Defendants filed a timely claim for review. On July 26, 2004, defendants filed their brief on appeal offering the following arguments:

#### ARGUMENT I

Plaintiff's non-work injury was the cause of Plaintiff's alleged continuing disability

#### ARGUMENT II

Alternatively, if Plaintiff's employment aggravated Plaintiff's arthritis, any aggravation was only temporary and not permanent

#### ARGUMENT III

Plaintiff is not "disabled" pursuant to *Sington*

Inasmuch as defendants first and second arguments are so interrelated, we will review those arguments together. Defendants have supported their position pertaining to these two arguments, in pertinent part, as follows:

Plaintiff did not suffer a separate injury arising out of his employment with Defendant. Defendant's arthritis was one and the same resulting from the non-work related ankle fracture. *Kuecken v Vinbcam Human Res of Michigan, Inc.*, 2003 ACO 108. Plaintiff's arthritis is not a condition of the aging process. Plaintiff only suffered the non-work related injury in July 2000 and last worked for Defendant in October 2000.

Plaintiff confirmed that he only reported his non-work related injury after he returned to work in July 2000. Plaintiff admitted that he never reported any work related injury between July 2000 and October 2000. Plaintiff further admitted that he did not seek any medical treatment between July and October 2000.

Dr. Fortin was not able to opine within a reasonable degree of medical certainty that plaintiff's ankle condition resulted from anything other than the July 2000 non-work related injury and the passage of time. There was no aggravation of any arthritic condition as a result of working for defendant for barely three (3) months.

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<sup>1</sup> Magistrate's decision pp 5-7.

Plaintiff did not have surgery on his ankle until March 2001. Plaintiff was able to return to work for the Detroit Auto Show, Barnes and Noble, and Baker Concrete for more than a year after sustaining his non-work related injury. Plaintiff also collected one (1) year of unemployment benefits between the time of his injury and trial. A claimant is compensated for wage loss or disability, not for aggravation of pathology or an increase in symptoms.

\* \* \*

Dr. Fortin was not able to attribute any pathology to Plaintiff's work from July to October 2000. Plaintiff was not able to adduce any evidence to distinguish his condition from anything other than the July 2000 non-work related injury. Plaintiff suffered no personal injuries at Defendant's place of employment after July 2000. Plaintiff may have had pain or symptoms, but these were nothing beyond the manifestation of symptoms from the July 2000 non-work related injury. Plaintiff sought no medical treatment after returning to unrestricted work for Defendant in July 2000. There was absolutely no evidence whatsoever to establish by a preponderance of the evidence Plaintiff's job duties between July and October 2000 accelerated or aggravated Plaintiff's post non-work related ankle condition.<sup>2</sup>

Plaintiff responded to defendants' contentions pertaining to this issue as follows:

In that regard, plaintiff's treating surgeon, Dr. Fortin, repeatedly stated that he believed that plaintiff's post-fracture employment aggravated or accelerated the development of his post-traumatic arthritis:

"I think it's likely that a job that put that kind of demand on his ankle that he told me had, a job that required lifting, walking on uneven terrain, it's likely that that aggravated his condition. It probably accelerated the development of his posttraumatic arthritis." (F 17)

\* \* \*

"I think the most likely scenario is that he sustained injury in July 2000 and I think that it's likely that his job that required prolonged standing, walking, carrying, lifting, walking on uneven terrain, long hours, accelerated the development of his posttraumatic arthritis." (F 25)

\* \* \*

"I'm telling you that within a reasonable degree of medical certainty that I believe that working on uneven ground, carrying, lifting has aggravated and accelerated his post-traumatic arthritis." (F26)

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<sup>2</sup> Defendants brief pp 18-23.

This testimony, ~~from the only expert witness testifying~~, clearly constitutes substantial evidence supportive of the magistrate's conclusion. It is therefore binding on this Commission on appeal. MCL 418.861a(3). It also clearly discredits defendant's insistence that "Dr. Fortin was not able to attribute any pathology to Plaintiff's work from July to October 2000." Defendant's brief, at 22. Instead, he obviously did attribute pathology to work during that period.

\* \* \*

Quite obviously, as demonstrated by the very pages defendant cites, Dr. Fortin never indicated that he "was not able to state that within a reasonable degree of medical certainty that there was a causal relationship between Plaintiff's ankle condition and Plaintiff's alleged work activities." If that is how defense counsel remembers things, he did not produce a shred of record evidence to support that memory, while the sole testimony on this record proves otherwise. In fact, Dr. Fortin emphatically stated that he did not change his opinion over time:

"Q And now today, suddenly today, you are saying that his condition was aggravated as a result of his work at this point in time after that circumstance; isn't that correct, Doctor?"

"A I have not changed in my opinion of this case." (F29)

Clearly, despite its valiant efforts, defendant failed to prove that Dr. Fortin ever voiced an opinion at a prior date contrary to that contained repeatedly in his deposition. It may not now proceed as if it had not so failed, and still assert as true what the only evidence in this record establishes is false.<sup>3</sup>

The medical testimony from Dr. Fortin quoted and discussed above is more than adequate to establish a compensable disability. If Dr. Fortin's unchallenged testimony is not enough to establish compensability it would be most difficult to contemplate a medical record that would establish such.

Defendants final argument is that plaintiff is not disabled within the meaning of *Sington v Chrysler* 467 Mich 144 (2002). The essence of that argument is set forth below:

Plaintiff did not sustain any wage loss. Plaintiff collected one (1) year of unemployment benefits from October 2000 and the date of trial. Plaintiff testified that after being generally laid off with other co-workers in October 2000, Plaintiff returned to work for the Detroit Auto Show making more money than he did for Defendant. Subsequently, Plaintiff admitted that he returned to work for Baker Construction for more than one (1) year performing the same duties he performed for Defendant.

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<sup>3</sup> Plaintiff's brief on appeal pp 6-9.

Plaintiff testified that he has a GED and many years of experience as a security officer. Plaintiff was allowed to return to work by Dr. Fortin in October 2001 without restrictions. This evidence supports Plaintiff did not sustain any wage loss in work suitable to his education and experience. Plaintiff was not subsequently restricted until after Plaintiff presented with additional injuries sustained at Baker Concrete and prompting Dr. Fortin in preparation for deposition.

Plaintiff failed to prove disability or a limitation in wage earning capacity in work suitable to his qualifications and training. Plaintiff admitted that he would have returned to work for the Detroit Auto Show in subsequent years, making more money than he did for Defendant, if called upon by the union hall.

Plaintiff also failed to prove a wage limitation or wage loss resulting from a workplace injury. Plaintiff sustained a non-work related injury that caused a wage limitation, if any. To the contrary, Plaintiff returned to work performing in no lower classified position through the union hall than what he performed in October 2000. Plaintiff not only made more money after October 2000 with subsequent employers, Plaintiff also received scheduled wage increases every six (6) months.<sup>4</sup>

Plaintiff responded to this argument thusly:

Plaintiff has held employment since leaving defendant. He had temporary employment with the Detroit Auto Show doing light carpentry, but has received no more offers of that type of work. Furthermore, quite obviously, this type of work is not regularly available, in that the Auto Show comes only once a year. Nor has any further bookstore work appeared since Barney's

As a result, these brief periods of work are not enough to demonstrate an ongoing wage earning capacity. At the very least, the magistrate's indication that this employment was simply "temporary" is supported by the record, and therefore conclusive. MCL 418.861a(3).

The mere fact that plaintiff may occasionally be able to earn wages equal to those he earned with defendant does not mean that he can consistently and reliably do so. If his ability to earn is sporadic, it clearly represents a limitation of his wage earning capacity. In *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), the Court recognized that the language of the statute indicates that the phrases "wage earning capacity" and "wage loss" are not synonymous. *Id*, at 160, n 11. Consequently, plaintiff may have no wage loss, but still have a loss of wage earning capacity. This would obviously be the case during weeks plaintiff could do "temporary employment," and defendant would be entitled to credit accordingly. MCL 418.301(5). However, until he no longer had a limitation of his wage earning capacity, defendant would be liable for benefits in periods in which plaintiff did have a wage loss.

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<sup>4</sup> Defendants' brief pp 27-28.

Furthermore, plaintiff worked for a year for Baker Concrete, but had to leave as the result of symptoms caused by his work-related condition. As defendant noted elsewhere in its brief, the established[sic] of increased symptoms alone would not create a new injury date, *Rakestraw v General Dynamics Land Systems, Inc.*, 469 Mich 220; 666 NW2d 199 (2003), so that defendant would not escape liability because of these enhances[sic] systems. However, such symptoms from a work-related condition, which make it impossible to continue in post-injury work, constitute disability from that condition. Certainly, defendant would not suggest that plaintiff should be deemed to be capable of earning wages in work he is not capable of performing.

As a result the magistrate's opinion should be affirmed in all respects.<sup>5</sup>

Clearly, plaintiff has established that he has been unable to consistently earn or obtain maximum earning in work suitable to his qualifications and training thus establishing a *Sington* disability. Temporary earnings even at a higher rate than plaintiff's maximum earning or work that is lighter than plaintiff's work at the time of injury does not refute such disability.

The magistrate's decision is affirmed.

Commissioner Glaser and Chairperson Reamon concur.

Rodger G. Will

Martha M. Glaser

William G. Reamon, Jr.

Commissioners

Chairperson

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<sup>5</sup> Plaintiff's brief pp 11-12.

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This cause came before the Appellate Commission on defendants' appeal from Magistrate Andrew G. Sloss' decision, mailed February 25, 2004, 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.

Rodger G. Will

Martha M. Glaser

William G. Reamon, Jr.

Commissioners

Chairperson