

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

KATHY KNOBLETT,
PLAINTIFF,

V

DOCKET #04-0306

SAM'S CLUB AND
AMERICAN HOME ASSURANCE COMPANY,
DEFENDANTS.

APPEAL FROM MAGISTRATE GRATTAN.

DENNIS J. CONANT FOR PLAINTIFF,
JON D. VANDER PLOEG FOR DEFENDANTS.

OPINION

WILL, COMMISSIONER

This case was heard by Magistrate Crary E. Grattan on three dates in December 2003 and January 2004. Plaintiff testified on her own behalf. Defendant presented the testimony of four lay witnesses.

Robert Thomas, M.D., board certified orthopedic surgeon and plaintiff's treating doctor., testified for plaintiff at a deposition held on January 22, 2003. Charles Syrjamaki, M.D., specializing in occupational medicine and board certified in internal medicine, testified for defendant at a deposition held on February 12, 2003. The doctor had examined plaintiff on February 5, 2003 at defendant's request.

On July 28, 2004 the magistrate's decision was mailed. He gave plaintiff an open award.

Defendant filed a claim for review. On November 3, 2004, defendant filed its brief on appeal raising two issues to be resolved by the Commission:

CONSIDERING THE WHOLE RECORD, THE EVIDENCE IS NOT
COMPETENT, MATERIAL, AND SUBSTANTIAL TO SUPPORT THE
PLAINTIFF'S CLAIM THAT HER ELBOW CONDITION IN JANUARY 2002
RESULTED FROM THE SEPTEMBER 17, 2001 FORKLIFT INCIDENT.

PLAINTIFF HAS NOT OFFERED COMPETENT, MATERIAL, AND
SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD THAT SHE HAS A

CONTINUING DISABILITY, PARTICULARLY AS THAT IS DEFINED BY
SINGTON V CHRYSLER CORP.

Suffice it to say that insofar as the first issue is concerned the magistrate found plaintiff to be credible even though her testimony on some issues differed from that of the defendant's witnesses. The magistrate's discussion of the testimony offered by all of the lay witnesses is convincing that the magistrate had a thorough understanding of these material differences on some points between plaintiff and defendant's witnesses.

Key to affirming the magistrate on this first issue is that he observed all of the witnesses as they testified and was in a much better position than this Commission to judge the credibility of all five lay witnesses. Thus having found plaintiff to be credible, the magistrate had every right to rely upon the testimony of plaintiff's treating physician, Dr. Thomas, to find plaintiff suffering from a work-related condition.

Insofar as the second issue is concerned, prior to *Sington v Chrysler Corporation*, 467 Mich 144 (2002), the Commission would have been in a position to affirm that plaintiff is suffering from a compensable work-related disability. *Haske v Transportation Leasing, Inc* 455 Mich 628 (1997).

Pertaining to the *Sington* standards pertaining to disability defendant argued:

The Magistrate was wrong to conclude that plaintiff's proofs satisfied *Sington's* definition of disability. His decision is not supported by the competent, material, and substantial evidence on the whole record. Moreover, plaintiff's proofs were simply deficient for failing to address the *Sington* analysis.

In fact, the Magistrate quoted the Commission's decisions in *Davis C. Riley v Bay Logistics, Inc*, 2004 ACO #27, and *Kethman v Lear Seating*, 2003 ACO #205, as providing the model for applying *Sington*. The first question for analysis is whether the plaintiff established the universe of jobs for which she is qualified and trained and how much those jobs pay. Plaintiff gave no testimony regarding the universe of jobs she has performed in her work life, or the training or education she may have had for them. She merely talked about the work that she did at Sam's and claimed that she could return to certain of that work with lifting restrictions. As for the other education, training, and experience in the plaintiff's work life, she gave no testimony at all.

The second question for analysis is whether the plaintiff established a work-related physical impairment which would prohibit her from performing jobs within those qualifications and training, causing a wage loss. Again, plaintiff did not even so much as describe her education, training, or other employments, let alone suggest that she has a physical limitation impairing her ability to perform whatever those jobs might be.

The third inquiry is whether the plaintiff established that she is unable to perform all of the jobs within her qualifications and training that pay the maximum wage. Again, plaintiff gave no testimony regarding her education, qualifications, training, or other employments in her work life.

In sum, plaintiff's proofs failed to even address the *Sington* analysis. It was her burden to do so, and without that, her claim must fail. The Magistrate's conclusion that plaintiff offered proofs meeting the *Sington* standard, lacks any competent, material, and substantial evidence to support it. The Magistrate's conclusion must be reversed.¹

We have carefully reviewed plaintiff's testimony and find that plaintiff gave no testimony regarding her education, qualifications, training and prior work experience. Under these circumstances it is impossible to determine whether plaintiff is unable to perform any work within her qualifications and training which pays maximum wages or that such work is not reasonably available to her because we know nothing whatsoever about her qualifications, training, education and prior work.

Credible testimony from plaintiff establishing that she can do none of her past work or such work is not reasonably available to her could establish threshold disability and wage loss.

Plaintiff's testimony reveals that she does not claim total disability. Under these circumstances, testimony from plaintiff pertaining to her education, training, qualifications, past employment and wages for such employment is absolutely essential to affirm an award of wage loss benefits.

Pertaining to plaintiff's ability to work and her willingness to work, her testimony on direct examination included the following:

Q. Have you been able to engage in any kind of employment since -- since -- 9-5-02 or since you had the surgery on 9-9-02?

A. No. I mean, I was released to go back, if that's what you're asking.

Q. You're on -- you are on permanent restrictions, is that correct?

A. Correct.

* * *

¹ Defendant's brief on appeal, pp 27-28.

Q. You'd be willing to go back to Sam's Club at any rate and work in the jewelry department as long as it was within the restrictions that Dr. Thomas had given you.

A. I'm willing to go back at the same rate that I left, yes. Or the door greeter.

Q. Anything that's within your restrictions?

A. Correct.²

On cross-examination plaintiff offered additional testimony pertaining to her availability for reasonable employment post surgery:

Q. And as you sit here today, Wal-Mart has not terminated you, correct?

A. Correct.

Q. You're still technically an employee of theirs, correct?

A. Correct.

Q. Okay. There's nothing that prevents you from looking for work elsewhere, is there?

A. No.

Q. Okay. But as I understand it here we sit thirteen months later after December, 2002 and you've not looked for work anywhere else.

A. No. I'm still employed with Wal-Mart.

* * *

Q. Okay. From this day forward do you plan to look for work anywhere else?

A. No, I'm still employed with Wal-Mart.

Q. Okay, but you haven't worked there in over a year.

A. No, but I'm still employed with Wal-Mart.

² Trial transcript of December 3, 2003, pp 28 & 37.

Q. So you don't plan to look for work anywhere else at this time?

A. I'm still employed with Wal-Mart.

Q. I understand that. Are you going to look for work anywhere else?

A. Once I'm not employed with Wal-Mart.³

Absent *Sington* proofs as to employment providing maximum earnings, qualifications, education and training, these proofs do not establish that employment providing maximum earnings commensurate with plaintiff's qualifications and training is not reasonably available to her.

Under these circumstances we would like nothing better than to remand this case to the magistrate so that additional proofs can be offered as to plaintiff's education, training, qualifications, past employment and wages for such employment, together with testimony from plaintiff as to her ability to perform such employment and its availability. However, because this case went to trial more than a year after *Sington* was decided by the Supreme Court, we are forced to reverse the decision of the magistrate because the burden of proof is on the plaintiff to establish all of the elements of her case. *Aquilina v General Motors*, 403 Mich 206 (1978).

Commissioners Ries and Przybylo concur.

Rodger G. Will

Granner S. Ries

Gregory A. Przybylo

Commissioners

³ Trial transcript of January 13, 2004, pp 55-56, 57.

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This cause came before the Appellate Commission on defendants' appeal from Magistrate Crary E. Grattan's decision, mailed July 28, 2004, granting an open award of benefits. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be reversed. Therefore,

IT IS ORDERED that the magistrate's decision is reversed.

Rodger G. Will

Granner S. Ries

Gregory A. Przybylo

Commissioners