

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

JOAN E. PARKS,
PLAINTIFF,

V

DOCKET #03-0158
#04-0239

QUALEX, INCORPORATED AND
OLD REPUBLIC INSURANCE COMPANY,
DEFENDANTS.

APPEAL FROM MAGISTRATE BRENNAN.

PETER B. BUNDARIN FOR PLAINTIFF,
DONALD H. HANNON AND DENISE L. CLEMMONS FOR DEFENDANTS.

OPINION

GLASER, CHAIRPERSON

This matter comes to the Commission on consolidated appeals. Defendants filed an appeal of a decision by Magistrate Mary C. Brennan mailed on March 27, 2003, and plaintiff filed an appeal of a decision by Magistrate Mary C. Brennan mailed on June 9, 2004. In our order mailed July 16, 2004, Docket #03-0158 and Docket #04-0239 were consolidated.

The magistrate had previously issued an open award of benefits to plaintiff for her work-related back condition, mailed January 17, 2001. That open award was affirmed by the Commission in an order mailed September 14, 2001. Thereafter, defendant filed a Petition to Stop alleging that plaintiff refused to become involved with job placement or exploration activity, and that plaintiff was engaging in work avoidance. Plaintiff also filed a petition requesting authorization for psychological treatment due to the disabling chronic pain. In her March 27, 2003 decision, the magistrate denied both petitions. Defendant appealed that decision, plaintiff did not.

The magistrate provided a detailed summary of the testimony from the February 27, 2003 trial. We reprint relevant portions here for reference:

At the hearing plaintiff acknowledged that she had met with Tracy Butler, a vocational rehabilitation counselor, on 5/29/02. She stated they discussed the possibility of her return to work and she indicated to Ms. Butler that she wanted to return to work. They discussed the preparation of her resume but no testing or evaluation was performed at this meeting. She met with Ms. Butler again in June 2002 at which time Ms. Butler advised her that Dr. Femminineo had cleared her for

light duty work. Plaintiff conceded that as of June 2002 she had not provided a home phone number to Ms. Butler to place on her resume. She explained that she had disconnected her home phone because she believed she was receiving harassing calls from insurance company employees disguised as telephone solicitors. However, she testified that she gave her cell phone number to Ms. Butler to use in place of her home phone. Plaintiff met with Ms. Butler a third and final time in July 2002. At this meeting, plaintiff advised Ms. Butler that Dr. Richardson considered her to be totally disabled and unable to work. However, she denied that she told Ms. Butler that she was unwilling to work or that she had quit looking for work. Plaintiff testified that Ms. Butler never provided her with any contact sheets or names of any employers to contact. She acknowledged that she had received the classified ads, Defendants' Ex#5, but testified that she was physically unable to perform those jobs.

Plaintiff acknowledged that she received the package from Expediter in January 2003 and stated that she attempted to complete the application and fax it to the identified prospective employer, DiCenzo Personnel Specialists. Plaintiff understood that the proposed job allowed her to work from her home and required only 30 minutes of phone work in every work hour. She stated that she would try to perform this job if offered.

* * *

On direct examination, plaintiff testified that she has constant pain in her back and neck and extreme weakness in her legs. She spends most of her day lying down. As a result of her extreme pain, she began to experience emotional problems in May 2002 and Dr. Richardson advised her to seek psychiatric help. Because she was unable to find a physician on her own, she contacted Mr. Bundarin's office where she was referred to Dr. Rizzo, a psychologist. She testified that her treatment with Dr. Rizzo has been limited due to her financial constraints.

Trudy Butler is a Senior Vocational Consultant employed by Crawford Management Company.

* * *

They reviewed plaintiff's rights under the workers' compensation act and the process of preparing a resume and performing a job search. She instructed plaintiff to begin looking through the classified ads to start identifying areas of interest within her restrictions. After the meeting, Ms. Butler prepared the Vocational Assessment Report wherein she identified plaintiff's transferable skills. She met with plaintiff again on June 24, 2002, at which time she had performed a labor market survey that listed prospective employers within a 25-mile radius of her home. She suggested that plaintiff begin contacting 5 to 10 employers each week and presented plaintiff with contact sheets and asked plaintiff to identify the results on the contact sheets.

Ms. Butler also expressed her concern that plaintiff did not have a home phone and was unwilling to place her cell phone number on her resume, thereby making it very difficult for any contacts with prospective employers.

Dr. Richard Rizzo is a licensed psychologist and has seen plaintiff on three occasions, the first being September 11, 2002. He found her to be very depressed, anxious and insecure and diagnosed a mood disorder due to chronic pain. When asked by plaintiff's counsel whether psychological treatment would be beneficial to plaintiff, Dr. Rizzo responded: "We're trying. It's a very difficult task with her because of her inability to get into the sessions." He noted that since his evaluation in September, plaintiff had only attended three sessions and had actually missed more sessions than she had attended. He opined that plaintiff's emotional condition made it impossible for her to sustain any type of regular work activity.

Dr. Edward Klarman, a psychiatrist, examined plaintiff on June 5, 2002. He described plaintiff as very theatrical and noted that she exhibited a lot of pain behaviors. He did not believe that plaintiff exhibited any signs of depression, "There is not the slightest indication of apathy, sluggishness and psychomotor retardation" and doubted that psychotherapy would be of any benefit. "She is not reflective and her focus is on pain and I doubt if much is going to be accomplished in terms of psychotherapy." Dr. Klarman noted that plaintiff's numerous absences from scheduled psychotherapy sessions were evidence of the inappropriateness of psychotherapy. He did conclude that plaintiff suffers from a pain disorder but felt that from a psychiatric perspective, she could perform work within her physical restrictions.¹

The magistrate ultimately concluded that while she was persuaded that plaintiff was not making a good-faith effort to cooperate with vocational rehabilitation, no offer of reasonable employment was established by defendant and she did not have jurisdiction to suspend benefits for non-cooperation with vocational rehabilitation.

Defendants argue that plaintiff is no longer disabled, as she was found to be disabled under the former standard established in *Haske v Transport Leasing Inc*, 455 Mich 628 (1997), which held that proof that an injured employee could not perform a single job within his qualifications and training established disability under MCL 418.301(4). *Sington v Chrysler Corp*, 467 Mich 144 (2002), overturned that standard and held that an injured employee must establish that there is no work which he could perform, given his qualifications and training, that pay the maximum wages to be found disabled. Under the *Sington* standard, they argue, she must establish that she has a limitation in her wage-earning capacity as a result of her work-related conditions in the ordinary job market. They continue that plaintiff must demonstrate that she is unable to perform the types of work identified by defendants as being within her qualifications and training in order to be found disabled.

¹ Magistrate's opinion, March 27, 2004, pgs. 2-4.

We soundly reject this argument. Plaintiff was found to be disabled in a decision mailed January 17, 2001, which was affirmed by the Commission on September 14, 2001. That determination is *res judicata*, and cannot be reversed absent a showing of recovery or change of circumstance, which is defendant's burden.² A change in the interpretation of the statute is not sufficient. Further, defendants did not assert this defense at trial and are therefore considered to have waived it.

Defendants next argue that plaintiff's failure to follow through with their job leads which would create new employment opportunities is a form of unreasonable refusal to perform reasonable employment. We disagree with defendants. A job offer is not the same as a job lead. We agree with the magistrate that defendant was attempting vocational rehabilitation, and that the proper forum for that dispute is with the Director.

We adopt the magistrate's March 27, 2003 order and opinion in whole as our own, pursuant to MCL 418.861a(10) and affirm.

Following the issuance of the magistrate's March 27, 2003 decision, defendants again attempted to secure an offer of reasonable employment for plaintiff. They filed another Petition to Stop on December 12, 2003, alleging an unreasonable refusal of reasonable employment and seeking suspension of benefits pursuant to MCL 418.301(5)(a). This time the magistrate found that defendants had established a reasonable offer to plaintiff and that plaintiff unreasonably refused. The decision was mailed June 9, 2004. Plaintiff appealed.

The magistrate again provided a detailed summary of the evidence presented at trial on March 25, 2004. We reprint relevant portions of that summary for reference:

Leigh Ann McGinnis is employed by Expediter, a company that attempts to secure work for disabled individuals. Ms. McGinnis is not a rehabilitation counselor and Expediter does not offer vocational rehabilitation services. Rather, it attempts to match disabled employees with employers who will allow the individuals to work from their homes. Ms. McGinnis testified that Expediter matched plaintiff with one such employer, Information Directive, where she was to work from her home as a customer service surveyor, calling various businesses whose names and numbers were provided on a list, in order to verify information. Expediter provided plaintiff with a phone to use at her home. The job duties involved making the phone calls, asking the requisite questions, and recording the information. Plaintiff was expected to work 40 hours per week but was able to set her hours and work at her convenience; the work could be completed Monday through Friday from 8:30 a.m. to 9:00 p.m., or Saturday and Sunday from 10:00 am to 7:00 pm. Plaintiff was required to keep a time log of her work hours and submit it to Expediter. Plaintiff is paid \$9.00 per hour with no fringe benefits. Ms. McGinnis

² See *Kosiel v Arrow Liquors Corp*, 446 Mich 374 (1994).

testified that plaintiff had never worked 40 hours and defendant submitted plaintiff's time sheets, which show that plaintiff did not even complete 20 hours of work per week. (Defendants' Ex#2) Ms. McGinnis testified that the job could be revised to part-time but plaintiff had not provided any medical documentation that she was unable to work 40 hours per week.

Plaintiff testified that the job can only be performed while sitting since it requires her to complete forms and that she is unable to sit for more than 15 to 45 minutes before she loses feeling in her legs. She stated that she also has difficulty moving her head from side to side and thus has difficulty performing the paperwork aspect of the job. She stated that she performs the job for as many hours as she is physically capable. She explained that she has significant difficulty sleeping at night and frequently falls asleep during the day. She also takes Zoloft, Valium and Vicodin on a daily basis. Moreover, although the work hours prescribed by Expediter are wide-ranging, many of the businesses she is assigned to call are not operating during those work hours and thus she does not have the flexibility the job description suggests. In addition, plaintiff stated she receives social security disability and it is her belief that if she works on a full time basis she will lose her eligibility for social security benefits, which would also jeopardize her health insurance. On cross-examination, plaintiff acknowledged that she did not actually know the social security guidelines regarding employment and had not made any inquiries of that agency regarding the effect of full time employment on her current benefit level.³

Plaintiff's first argument was timely raised at trial, in a Motion to Quash defendants' Petition to Stop, for failure to pay benefits pursuant to the previous Bureau Order. There is no dispute that defendants did not file any proof of payment of compensation within 15 days of the filing of their Petition to Stop, pursuant to Rule 10. There is no dispute that defendants dropped the ball and failed to pay benefits from January 2004 until the March 25, 2004 trial date. There is no indication that the failure to pay was anything other than an unfortunate and unintentional oversight. There is no indication that the benefits were not immediately reinstated and continued until the June 9, 2004 decision was issued.

The question before us is whether the magistrate was required to dismiss defendants' Petition to Stop for failure to file proof of payment, or does she have discretion to weigh the circumstances. If she has discretion, there is nothing on this record to lead one to believe that she abused that discretion. On the other hand, if dismissal is mandatory as argued by plaintiff, then defendants' entire case falls, and they must start over.

We find the case of *Reiss v Pepsi Cola Metropolitan Bottling Co, Inc*, 249 Mich App 631 (2002), helpful. There the Court of Appeals affirmed the Commission's holding that the magistrate's refusal to dismiss a Petition to Stop, where defendant had filed the proof of payment

³ Magistrate's opinion, May 20, 2004, pgs. 2-3.

two months after the Petition to Stop, was discretionary. The Petition was considered to be defective until the proof of payment was filed. Once that proof was filed, the petition was considered perfected. Defendant was unable to recoup more than one year prior to the date of perfection rather than one year prior to the date of filing the petition.⁴ Here, defendants never filed written proof of payment. However, they did establish, through their attorney at trial, that all benefits would be current as of that date and would continue until further order. The absence of any further complaint of non-payment by plaintiff, especially in light of the magistrate's invitation to come forward if payments were not received, leads to the magistrate's reasonable conclusion that, in fact, payments were being made.

The statements made by defendants' attorney on the record act as proof of payment in lieu of a written affidavit. We find that defendants' Petition to Stop was not "perfected" until March 25, 2004, as opposed to the filing date of the Petition to Stop. We further find that as of March 25, 2004, it was in the magistrate's discretion whether or not to proceed on that petition. She did not abuse that discretion.

Plaintiff's next argument is that defendants should have had her evaluated by a neurosurgeon prior to the Petition to Stop being heard and decided. She relies on an evaluation by defendants' examiner, Dr. Femminineo, who in 2002 had suggested a surgical referral. While it is true that plaintiff testified that she asked for the referral and it was refused, there is no evidence to establish when this request was made. As noted by the magistrate, there was no petition filed with the Bureau seeking this "medical treatment". The parties were before the magistrate in February of 2003, and while plaintiff requested other medical treatment, no mention of a surgical referral was made. We find, as did the magistrate, that this argument by plaintiff is without any merit.

Plaintiff's third argument is that the Expeditor job offer was not within her capacity to perform. She cites testimony of pain and inability to sit for long periods of time. She refers to the medication she takes, which she states established the severity of her pain. Plaintiff presented absolutely no current medical evidence in support of her claim that her condition had significantly worsened. She relied on the medical testimony from previous hearings, which established that she was, in fact, capable of performing the job. Plaintiff in essence is requesting a reweighing of the evidence in her favor.

The magistrate stated:

Upon consideration of the evidence presented, I find the job offered to plaintiff is within her physical capacity to perform. Although there is medical support for plaintiff's complaints and the necessity for restrictions, I am unable to accept her testimony regarding the extent of her disability and limitations. I found her testimony to be exaggerated and inconsistent with the medical evidence

⁴ See MCL 418.833(2). When an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period which is more than one year prior to the date of taking such action.

presented. The job as offered provides plaintiff the ability to sit for short periods then change positions at will. She is not limited to regular hours and can pace her calls at her discretion and convenience. In addition, I note that plaintiff has in the past exhibited a marked unwillingness to participate with vocational rehabilitation and job placement attempts that now affects her credibility when describing her physical limitations at this hearing.

We generally defer to the magistrate's determination on credibility, as long as it has support on the record. *Milazzo v Frankenmuth Bavarian Inn*, 2002 ACO #70. We are very cautious as a reviewing body, not to substitute our opinion as to how the facts should be interpreted, for that of the trier of fact. Particularly, as the magistrate has the opportunity to view the witnesses and make determinations as to credibility. The magistrate has articulated her observations and reasoning for not accepting plaintiff's assertions that the job which was offered was beyond her capabilities. We find nothing in this record which would lend support to reverse that credibility finding. We affirm the magistrate's finding that plaintiff was capable of performing the job 40 hours a week.

Plaintiff also argues that refusal of a job offer is reasonable where the effort, risk, sacrifice or expense in accepting the offer is such that an ordinary reasonable person would not accept the offer, citing *Pulver v Dundee Cement Co*, 445 Mich 68 (1994) and *Saad v Thorn Apple Valley, Inc*, 1997 ACO #585. While we agree with plaintiff that "reasonable employment" and "reasonable or unreasonable refusal" are findings of fact for the magistrate, plaintiff must produce evidence to establish that acceptance of the job offer would expose her to such effort, risk, sacrifice or expense that an ordinary reasonable person would not accept the offer. While plaintiff here may have had legitimate concerns about the effect on her receipt of Social Security benefits and Medicare, if she were to work the full 40-hour week, she simply did not provide any evidence that could establish the risk or sacrifice or expense she alleged.

The question that remains is whether working less than the full amount of hours offered constitutes an unreasonable "refusal" within the meaning of MCL 418.301(5)(a). Can an injured employee be said to have **refused** reasonable employment when he/she is actually performing that employment? We find no specific case law on this particular issue, but look to *Perez v. Keeler Brass Co*, 461 Mich. 602 (Mich.,2000) for guidance. That court in determining whether quitting reasonable employment was the same as refusing reasonable employment, stated:

In this endeavor, it is essential to remember that we are looking to the words of the statute in an attempt to divine the intent of the Legislature. *In re MCI*, 460 Mich. 396, 411, 596 N.W.2d 164 (1999).

Subsection (a) refers to an employee who "refuses [reasonable] employment." We conclude that that phrase, standing alone, is ambiguous on the question whether it encompasses quitting. On one hand, the term "refuses" could be construed narrowly to apply only to an employee's rejection of the employer's initial offer of reasonable employment. On the other hand, "refuses" can be read more broadly to encompass an employee's refusal to do the offered work, even if the

employee has performed the work previously. Such ambiguity is often easily resolved by reference to other language in a statute.⁷

⁷ For instance, if the Legislature had included a subsection expressly dealing with employees who "quit reasonable employment," we would have no trouble concluding that the Legislature intended something different when it referred to an employee who "refuses [reasonable] employment." See *Guitar v Bieniek*, 402 Mich 152, 158, 262 N.W.2d 9 (1978) ("doubtful or ambiguous provisions of a statute are construed not in isolation but with reference to and in the context of related provisions"). *Perez v Keeler Brass Co*, 461 Mich. 602 (Mich 2000).

The statute is also ambiguous as to whether partial acceptance is to be considered "refusal". However, when construed not in isolation but with reference to MCL 418.361(1) we conclude that this is not a refusal. Section 361(1) provides that the defendants may use the entire amount that plaintiff would have been "able to earn", \$ 360⁵ per week, to calculate her partial benefit. MCL 418.361(1) provides:

Sec. 361. (1) While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355.

Here, per the finding of the magistrate, plaintiff was able to earn \$360 per week. She chose to work less hours, resulting in a lower wage. Defendants' liability is the same, as long as the 40 hour reasonable employment remains available, whether plaintiff works ten hours or 40 hours.⁶ Plaintiff, on the other hand, would increase her income by working more hours.⁷

We hold that performance of reasonable employment, even if not for the full amount of hours available, is not a refusal, such as would invoke the sanctions of Section 301(5)(a).

⁵ Plaintiff was offered 40 hours per week at \$9.00 per hour, which the magistrate found she would have been able to perform.

⁶ Defendants' liability will be \$105.74 which represents 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury per MCL 418.361(1)

⁷ If plaintiff does at some point unreasonably refuse to perform the job at all, then benefits would be forfeited for the period of refusal.

Commissioners Kent and Will concur.

Martha M. Glaser

Chairperson

James J. Kent

Rodger G. Will

Commissioners

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QUALEX, INCORPORATED AND
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This cause came before the Appellate Commission on defendant's appeal from Magistrate Mary C. Brennan's decision, mailed March 27, 2003, and plaintiff's appeal from Magistrate Mary C. Brennan's decision, mailed June 9, 2004. The Commission has considered the record and counsels' 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

Chairperson

James J. Kent

Rodger G. Will

Commissioners