

STATE OF MICHIGAN  
WORKERS' COMPENSATION APPELLATE COMMISSION

THERESA SAGE,  
PLAINTIFF,

V

DOCKET #04-0019

BRIGHTON INTERIOR SYSTEM, AND  
CONTINENTAL CASUALTY COMPANY,  
DEFENDANTS.

APPEAL FROM MAGISTRATE SMITH.

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

OPINION

GLASER, COMMISSIONER

Defendants appeal the decision of Magistrate L'Mell Smith, mailed on January 12, 2004, granting plaintiff an open award on a finding of a work related groin injury. We affirm the magistrate's decision.

This case was initiated by plaintiff filing an Application for Mediation or Hearing on April 18, 2002 alleging disability as a result of tripping over a box of belt molding causing severe stretch strain pain into the stomach area on June 10, 1999 and further aggravation by continued work to May 25, 2000.

A trial was held on December 11, 2003 at which time plaintiff appeared and testified personally. She also presented the deposition testimony of Dr. Dermot O'Brien and Dr. J. Steven Schultz. Defendants presented live testimony from Denise Ricketts and Cindy Swartz. They submitted the deposition testimony of Dr. Shlomo S. Mandel. Following that trial, the magistrate issued a decision which was mailed on January 12, 2004, in which she found that plaintiff was disabled as a result of her work related injury. Defendants filed a timely appeal.

In her opinion, the magistrate summarized plaintiff's testimony. Relevant parts of that summary are as follows:

Theresa Sage was born December 3, 1950 and graduated from high school in 1969. Thereafter she attended beauty college and obtained her license in 1977. She went to work in a beauty salon and was on her feet for about 7½ hours per day and the job required twisting and bending but no lifting. She had no physical difficulties performing this job. She also worked at a grocery store w[h]ere she was a cashier and in a gas station. In both of these jobs she waited on customers, stocked shelves and

cleaned. She had no physical difficulties in either of those jobs. She was also self-employed as a home health attendant for hospice patients for about three years. This required that she lift patients out of bed from time to time but she had no physical difficulties with that job either.

Plaintiff was hired by defendant in August 1998 as a laborer. . . .

On June 10, 1999 plaintiff removed a door from the rack and she got [sic] thought several of the door panels looked unusual. She took the door panel to show her supervisor and when she turned around she tripped over a box of belt molding and “whipped myself around” falling to the ground while reaching for a molding rack. Plaintiff testified that she injured the entire left outside hip area from her groin to her back. She got up and returned to work for about 20 minutes but then complained to a supervisor who sent her to the plant nurse. She was then sent to McPherson Hospital to be checked.

Plaintiff testified that at first her left leg and foot also hurt and she missed three days of work. She returned to the same job but had assistance and only had to work on one machine. She testified that she got through the days by taking Motrin and Aleve and continued to work but had good days and bad days and was never pain free. She finally treated with Dr. O’Brien and was eventually taken off work. . . .

. . . In October 2000 she was forced to return to work with restrictions against any prolonged activity of any type including walking, bending, twisting and sitting. She was put on a job where she attached the interior panels to a door but only worked about 45 minutes and was taken off the job by an individual from Human Resources who sent her home. She was never able to return to work and she was never called or contacted by defendant and received a termination notice the following June.<sup>1</sup>

The magistrate also summarized defendants’ witness, Cindy Swartz’s testimony:

Cindy Swartz was a vocational consultant who wrote two reports which were entered into evidence as Defendant’s Exhibit #1. The first report was put together before plaintiff was seen personally and the second was put together after she personally met with plaintiff. The first report was prepared after a review of plaintiff’s education, training, work history, and a transferable skills analysis. Ms. Swartz felt that plaintiff was appropriately qualified for jobs as a front desk clerk in a motel or hotel or as a receptionist. She also felt that there were immediate openings available in those jobs. After meeting with plaintiff Ms. Swartz did a second report and arrived at the same conclusion. Ms. Swartz testified that plaintiff had, in fact, been at her maximum wage earning capacity when working for defendant. She testified that there were jobs available at the Comfort Suites and Crowne Plaza in the Saginaw area but admitted that both jobs required some computer work for which the plaintiff was not trained. She

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<sup>1</sup> Magistrate’s opinion, pp 2-4.

also felt that plaintiff was qualified as a receptionist working for temporary agencies but could not identify specifically what jobs were available.<sup>2</sup>

Plaintiff having proven she cannot return to her previous maximum wage job, testified that she has not been able to work anywhere because of her hip and groin pain. She cannot lift much, sit for long, stand or walk back and forth. She does not feel she could return to any of her former employments.<sup>3</sup>

The magistrate found plaintiff to be a credible witness and concluded:

I first note that I found plaintiff to be a very credible witness. Even on cross-examination she listened carefully to the questions and provided thoughtful non-combative answers. I further find that the testimony of Drs. O'Brien and Schultz is supportive of plaintiff's claim. Although the diagnoses were not identical, they both identified soft tissue strain or sprain in the groin area. Both indicated that this was a very difficult condition to heal and both placed similar if not identical restrictions on plaintiff's activities. I find their testimony more persuasive than the non findings of Dr. Mandel whose curriculum vitae indicates that his area of expertise is back disorders. Finally, the hypothetical questions posed to Drs. O'Brien and Schultz were consistent with plaintiff's testimony regarding the fall she had at work and both doctors felt that her injury was associated with such a fall.

Therefore, I find that plaintiff has proven by a preponderance of the evidence that she has a work-related injury which prevents her from returning to her job with defendant without appropriate restrictions and entitles her to workers' compensation benefits. I am not satisfied that the testimony or reports from Cindy Swartz are sufficient to establish that plaintiff has a residual wage earning capacity of \$6.00 to \$7.00 per hour. Ms. Swartz testified that the hotel/motel jobs she identified for plaintiff required computer training which plaintiff did not have. She was unable to identify specific receptionist jobs available. Consequently, full benefits are ordered and defendant is also ordered to provide aqua therapy since it was recommended by Dr. Schultz and appears to have provided her with some relief in the past.

I identify the dates of injury as June 10, 1999, the date of the fall and May 26, 2000, her last date of work before going off on short term disability. The doctors testified that subsequent work as she was performing could aggravate the original injury and plaintiff testified that her condition got worse while she worked to the point that she had to stop. I am not satisfied that plaintiff has shown that her return to work in October 2000 when she worked for forty-five minutes had any substantial effect on her condition.<sup>4</sup>

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<sup>2</sup> *Id.*, p 6.

<sup>3</sup> Trial transcript, pp 50-54.

<sup>4</sup> Magistrate's opinion, pp 8-9.

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 believe that the magistrate is in the best position to assess lay testimony. Particularly, as the magistrate has the opportunity to view the witnesses and make determinations as to credibility.

Credible testimony from plaintiff that because of her disability, she is no longer able to perform any of the jobs for which she is qualified and trained, can establish a prima facie case of wage loss. If the magistrate finds that plaintiff has put in a prima facie case, having established the threshold wage loss, then the burden of persuasion shifts to the defendants, and it must be determined if defendants have brought forth sufficient proofs to show there did exist jobs (real jobs in the real world) within plaintiff's qualifications and training, and physical ability to perform, which were reasonably available to her.

Defendants argue first that the magistrate erred in finding that plaintiff was not qualified and trained for the desk clerk jobs and that the receptionist jobs were not available. They state that *de minimis* re-training prior to commencing new employment does not mean that the job at issue is not within the claimant's pre-injury qualifications and training. We believe, as does the magistrate, that a job which requires computer training for someone who has no such experience, is not within her qualifications and training pursuant to MCL 418.301(4) and *Sington v Chrysler Corp.*, 467 Mich 144 (2002), and is more than "de minimis" training or mere orientation to work tasks at a new job.

We disagree with defendants' statements that entry-level computer work is an undertaking "quickly learned and effectually performed by the laborer . . ." (Citing *Leitz v Labadie Ice Co*, 229 Mich 565 (1920).) Defendants' vocational expert cited the Dictionary of Occupational Titles as her reference. We note that the position of hotel clerk listed by Ms. Swartz as DOT #238.367-038, is actually found at DOT #238.362-010, and is listed as light work.<sup>5</sup> According to the DOT, this job takes at least 3 months to train and could take up to 6 months.

The magistrate found that the testimony of the vocational expert simply did not establish that there were real receptionist jobs which were reasonably available to her. The fact that Ms. Swartz was not able to identify even one employer with an actual position available is ample support that such jobs are not reasonably available. Mere referral to a temporary staffing company absent proof they have an actual job they will place her in is not sufficient evidence to sustain defendants' burden.

Defendants next argue that plaintiff's inguinal hernia ligament strain is not work-related and that the magistrate's finding of causal relationship is not supported by competent, material and substantial evidence on the whole record.

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. We do not perform a de novo review on questions of fact. Cognizant of our role, as set forth in *Holden v Ford Motor Co*, 439 Mich 257 (1992) and affirmed in *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000), however, we must perform a qualitative and quantitative analysis of the evidence, in order to ensure a full, thorough, and

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<sup>5</sup> According to the Selected Characteristics of Occupations Defined in the DOT, issued by the U.S. Dept. of Labor, "light work" is defined as lifting up to 20lbs with frequent lifting and/or carrying of objects. Light work requires a significant amount of standing/walking.

fair review. MCL 418.861a. We review findings of fact to determine whether there is competent, material and substantial evidence to support the finding. If so, then we must affirm. If not, then we cannot affirm.

Defendants here argue that the Commission is obligated to accept the testimony of their witness, Ms. Ricketts, because the magistrate did not specifically find her not to be credible. The problem here is that the magistrate did find plaintiff to be credible, and therefore, any testimony that contradicts plaintiff's version of the facts, must necessarily have been found less persuasive by the fact-finder. Plaintiff's testimony that she has been suffering from pain extending from her hip to her groin is not inconsistent with the medical records. She explained that she showed the doctor where the pain was and he then recorded it.

Plaintiff's June 10, 1999 injury is well documented. Both of her treating physicians relate the ongoing difficulties that she experiences to that initial injury. The magistrate reasonably rejected the testimony of defendants' medical expert, Dr. Mandel, first because his area of expertise is back disorders and this is not a back case. Also, the hypothetical questions presented to the treating physicians were consistent with plaintiff's testimony, which the magistrate found to be credible.

We believe that defendants are in essence requesting a reweighing of the evidence in a light more favorable to their position. That is not our function. We affirm.

Commissioners Kent and Will concur.

Martha M. Glaser

James J. Kent

Rodger G. Will

Commissioners

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This cause came before the Appellate Commission on defendants' appeal from Magistrate L'Mell Smith's decision, mailed on January 12, 2004, granting plaintiff an open award on a finding of a work related groin injury. 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