

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

LYDIA SALDANA,
PLAINTIFF,

V

DOCKET #03-0444

DECKERVILLE WIRE, INCORPORATED AND
FRANKENMUTH MUTUAL INSURANCE COMPANY,
DEFENDANTS.

APPEAL FROM MAGISTRATE SLOSS.

JOHN S. PATERSON FOR PLAINTIFF,
DANIAL J. HEBERT FOR DEFENDANTS.

OPINION

REAMON, CHAIRPERSON

Plaintiff appeals the decision of Magistrate Andrew G. Sloss, mailed October 17, 2003, which denied her claim for alleged upper extremity conditions. Plaintiff claims on appeal that the magistrate erred in exceeding his authority to commence trial and to enter an order sua sponte denying benefits to plaintiff. Defendant denies reversible error.

A very brief hearing was held in this matter by Magistrate Sloss on October 7, 2003. Neither plaintiff nor her counsel was present. Defense counsel was present and participated in the short hearing. In the hearing transcript, the magistrate summarized the procedural history of this claim up to and including the trial date of October 7, 2003.

MAGISTRATE SLOSS: Okay. This is the day set for trial in this matter. It is Tuesday, October 7th, 2003. Mr. Paterson, the attorney of record for Ms. Saldana has not appeared. Rather than just simply dismissing it, I am taking testimony and issuing a decision. Kind of an unusual procedure, but this case was initially filed in April of 98, went two years. No work was done on the file and the case was dismissed. It was refiled in April of 2000. Again went, at that point a year with no work being done on the file and was withdrawn. It was then refiled on June of 2001, counsel didn't appear for the first trial. It was dismissed. It was refiled again in December of 2001. Parties were warned to prepare the case, get it ready for trial. It went two years to April 2nd of 2003. I'm not sure whether at that time it was withdrawn again or whether it was dismissed, but again no work was done on the file. He was warned that if he refiled the case, he should have it ready to go on the first trial date. It's now the first trial date on the Petition filed in April of 2003 and we are going to proceed with trial. Plaintiff not

being here, presenting no evidence, Mr. Hebert, is there any evidence you'd like to present?¹

Defense counsel submitted the depositions of Sanjeev Prakash, M.D. and Michael Sperl, M.D., and also the attached videotape. With no appearance by plaintiff or her counsel there was no evidence submitted on her behalf. Proofs were then closed. The magistrate subsequently issued his opinion, which due to its brevity, we reprint below, beginning with the magistrate's "Analysis and Conclusion" portion of the opinion:

ANALYSIS AND CONCLUSION

Plaintiff alleges an injury date of November 1, 1996. In order to establish a work-related disability, Plaintiff must demonstrate that she has a limitation of her maximum wage-earning capacity in work suitable to her 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).

Neither Plaintiff nor her counsel appeared at trial in this matter. The current petition is the fifth filing of Plaintiff's claim, the previous petitions either having been dismissed for lack of progress, or having been withdrawn by Plaintiff's counsel on threat of dismissal for lack of progress. The last time this matter was withdrawn, Plaintiff's counsel was warned that any refiled petition in this matter would be tried on the first trial date. Defendant has suffered prejudice from Plaintiff's failure to prepare her claim in that many of its witnesses are no longer employed by the company, and are unavailable. In light of the procedural history of this claim, justice requires a final decision on the merits at this time, rather than a simple dismissal.

Plaintiff bears the burden of proving her case, and has submitted no evidence. Plaintiff has therefore failed to establish that she sustained a work-related injury or disability as defined by the act.

¹ Transcript from the October 7, 2003 hearing at pp 4-5.

There being no work-related injury, the Form 104C Petition of Blue Cross Blue Shield of Michigan is denied.

ORDER

IT IS HEREBY ORDERED that Plaintiff's petition for benefits be DENIED.

IT IS ALSO HEREBY ORDERED that the Form 104C Petition of Blue Cross Blue Shield of Michigan be DENIED.²

Plaintiff argues on appeal that by following this admittedly "unusual procedure", the magistrate erred in failing to obtain competent, material or substantial evidence supporting his determinations of fact. By commencing trial and "sua sponte" denying benefits in the absence of plaintiff or her counsel, it is argued that the magistrate arbitrarily exceeded his authority. While reference is made in her brief on the Commission's statutory authority under Sec. 861a(14), no reference to the magistrate's statutory authority appears. Plaintiff does point out that there is no statute of limitations contained within the Act. Plaintiff did not assert lack of notice of the hearing as a defense to not appearing for the scheduled trial.

Defendant argues that plaintiff provides no explanation or excuse for her absence as well as her counsel's absence on the date of trial. Also pointed out was the absence of any claim by plaintiff that proper and sufficient notice of the hearing was not given. Defendant further contends that plaintiff failed to preserve any issue for appeal, factual or legal. Specifically, her claim that the magistrate went beyond his statutory authority in trying the claim in the absence of plaintiff and her counsel makes no reference to the statute the magistrate purportedly violated. By so doing, defendant posits that plaintiff improperly left it to the Commission to provide authority for the arguments she made which should result in waiver of the issue in question per the application of *Mitcham v Detroit*, 355 Mich 182, 203 (1959). Finally, defendant argues that the decision to proceed to trial without plaintiff and her counsel was within the magistrate's discretion.

We concur with defendant's position in this matter, particularly insofar as the area of the magistrate's discretion is concerned. The Commission has previously noted that it is a matter of the magistrate's discretion whether to proceed in the absence of a party or its attorney:

"Although plaintiff frames the issue as one of due process, we do not discern such an issue. In this case, plaintiff does not argue that she and her attorney were not notified of the date of the continued hearing. Rather, they did not appear for the hearing. The decision to proceed in the absence of a party or attorney who has notice of the hearing date is a discretionary one with the magistrate or trial judge. As a result, it is incumbent upon plaintiff to establish that the magistrate abused her discretion in proceeding without her or her attorney."³

² Magistrate Sloss' opinion at pp 2-3.

³ *Norman v Henry Ford Health System*, 1998 ACO #350.

Such a rule recognizes the authority the magistrates must be given to run a trial docket efficiently and with good order:

“We must determine on appeal whether the magistrate abused her discretion in closing the hearing in the absence of defense counsel’s presence. In light of our reluctance to micro-manage the affairs of the magistrates, and our cognizance of the importance of docket control and case management in the effective execution of a magistrate’s role, we conclude that the magistrate in this case did not abuse her discretion in closing the hearing when she did. Attorneys have an obligation to appear at the time scheduled by the magistrate and to adhere to the rulings made by a magistrate in the conduct of a hearing.”⁴

Somewhat analogous to the issue presented is the situation where a party is not ready to proceed to trial and requests an adjournment. We recently issued a decision on that point which is instructive as to the rather broad latitude given the magistrate’s discretion insofar as running a docket is concerned.

Defendant’s brief sets forth in accurate fashion a statement of the law applicable to the proper approach to be taken by a magistrate in dealing with motions to adjourn trial:

A magistrate’s decision on a motion for adjournment is reviewed under the abuse of discretion standard. *O’Connor v Renosol Corp*, 2001 ACO 250, 14 MIWCLR 1491 (2001). An abuse of discretion is found when the decision is so “palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995), quoting from *Spalding v Spalding*, 355 Mich 382; 94 NW2d 810 (1959).⁵

Former Bureau Director Edward M. Welch has noted that different magistrates take individualized approaches to requests for adjournments:

It also often happens that the parties are not prepared for trial and request an adjournment. Sometimes, of course, there are legitimate reasons for not being prepared, and some magistrates are more lenient than others. The parties have an obligation, however, to be prepared to proceed to trial on the day scheduled. For examples of cases in which the court of appeals or the commission has upheld a magistrate’s right to dismiss a case for lack of prosecution, see *Safeco Ins Co v Mindell*,

⁴ *French v Mich Dept of Corrections*, 1996 ACO #16.

⁵ Defendant’s brief, pp 7-8.

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This cause came before the Appellate Commission on plaintiff's appeal from Magistrate Andrew G. Sloss' decision, mailed October 17, 2003, denying plaintiff 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.

William G. Reamon, Jr.

Chairperson

Martha M. Glaser

James J. Kent

Commissioners