

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

JOHN W. STEWART,
PLAINTIFF,

V

DOCKET #04-0105

BANCHERO CEMENT COMPANY, INCORPORATED,
CITIZENS INSURANCE COMPANY OF THE MIDWEST,
DEFENDANT.

APPEAL FROM MAGISTRATE COPE.

DONALD SHIFFMAN AND DARYL ROYAL FOR PLAINTIFF,
JUDITH FLEMING VARGA FOR DEFENDANT.

OPINION

PRZYBYLO, COMMISSIONER

Defendant appeals the decision of Magistrate Susan B. Cope, mailed March 4, 2004, granting plaintiff an award for his back injury. Defendant contends that the magistrate erred as a matter of law because she failed to include any analysis of plaintiff's wage-earning capacity under the *Sington v Daimler Chrysler*, 467 Mich 144 (2002), decision. We affirm the magistrate's fact findings because we find no error in her selection of more persuasive evidence. However, we agree that the magistrate's analysis was incomplete and remand for a more complete analysis of the disability issue using the *Sington* requirements.

The magistrate summarized plaintiff's educational and vocational history accurately. She found that plaintiff completed high school and one college course. She stated that plaintiff served in the Navy and after his discharge, he earned a merchant marine card. In or around 1980, plaintiff started his career in the concrete business.

The magistrate included an accurate description of plaintiff's concrete finishing position with defendant. The magistrate concluded that the concrete finishing job required significant physical labor. The job included bending, shoveling, raking, pulling, and lifting up to 100 pounds. Plaintiff also operated a heavy "buffer" to create the finished look to large concrete surfaces.

The magistrate acknowledged the uncertainty concerning the mechanism that caused the injury to plaintiff's back. She summarized plaintiff's testimony. She wrote that plaintiff attempted to remove a form used to pour concrete when he experienced a sharp pain in his back on

December 13, 2001. Plaintiff never returned to work. After three months, plaintiff's doctor sent him for an MRI which confirmed that plaintiff suffered a herniated disc. The herniated disc was caused by either years of heavy labor or the December 13, 2001, incident according to the magistrate's reading of the medical proofs.

The magistrate then concluded that plaintiff satisfied the definition of disability under MCL 418.301(4). The magistrate found that the medical testimony established plaintiff's inability to perform concrete finishing work. She then concluded that plaintiff was "disabled from such work in view of the medical testimony presented here."

Defendant argues that the magistrate's analysis does not satisfy the *Sington* requirements. More specifically, defendant asserts that the magistrate did not address plaintiff's prior training, education, or job experiences. (Defendant's brief, pgs. 10-11). In addition, defendant argues that the magistrate erred because videotape evidence showed plaintiff performing many concrete finishing jobs after his last day of work. According to defendant this evidence also raised an issue concerning plaintiff's credibility. Defendant also mentions several other findings that necessitate both a credibility assessment and a wage-earning capacity assessment.

The Michigan Supreme Court overruled *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997), redefining disability in their recently decided case of *Sington v Daimler Chrysler Corp*, 467 Mich 144 (2002). *Sington* has redefined disability as follows:

Accordingly, the plain language of MCL 418.301(4) indicates that a person suffers a disability if an injury covered under the WDCA results in a reduction of that person's maximum reasonable wage-earning ability in work suitable to that person's qualifications and training.

So understood, a condition that rendered an employee unable to perform a job paying the maximum salary, given the employee's qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training would not constitute a disability.

* * *

If the employee is no longer able to perform any of the jobs that pay the maximum wages, given the employee's training and qualifications, a disability has been established under §301(4).

* * *

[R]ather than concluding that any employee who is unable to perform a single job because of a work-related injury has a 'disability' under §301(4).

[R]ather than concluding that any employee who is unable to perform a single job because of a work-related injury has a 'disability' §301(4), a worker's compensation

magistrate or the WCAC should consider whether the injury has actually resulted in a loss of wage-earning capacity in work suitable to the employee's training and qualifications in the ordinary job market.

In sum, we conclude, . . . that 'disability' as defined in MCL 418.301(4) cannot plausibly be read as describing an employee who is unable to perform one particular job because of a work-related injury, but who suffers no reduction in wage-earning capacity.

* * *

The plain meaning of the definition of 'disability' in §301(4) as a 'limitation of an employee's wage-earning capacity in work suitable to his qualifications and training' precludes regarding a person as disabled when an inability to perform one particular job does not, in fact, reduce that person's wage-earning capacity in other, equally well-paying work suitable to his qualifications and training. Section 301(4) specifically directs the reader to a consideration of whether there is a limitation in wage-earning capacity, not of whether a person is merely limited in performing one (or more) particular jobs.

As the Supreme Court explained in *Sington*, it is entirely possible to suffer a work-related injury, however not suffer a compensable disability. The two are not interchangeable. As part of establishing a compensable disability, the plaintiff must establish that a work-related injury precludes him from performing all jobs within his or her qualifications and training. *Carpenter v Snack Time Services, Inc*, 2003 ACO #103.

In *Ketham v Lear Seating*, 2003 ACO #205, the Commission required a claimant to prove a work-related medical impairment, qualifications and training, and finally, a limitation in maximum wage-earning capacity. To prove medical impairment under *Ketham*, a claimant must offer evidence of a physical or mental incapacitation from a work-place event. To prove qualifications and training, a claimant must offer evidence of past jobs in addition to any other skills that could transfer to the job market. Additionally, plaintiff must prove the earning capacity of those jobs; how much the jobs pay. Finally, according to the Commission, a claimant must show that the medical impairment prevents the claimant from obtaining or performing all of the highest paying jobs suitable to the claimant's qualifications and training. *Riley v Bay Logistics*, 2004 ACO #27.

The Commission, seeking to expand its pronouncements in *Ketham* and to harmonize several other opinions, issued an en banc decision, *Peacock v General Motors Corp*, 2003 ACO #274. In that decision, the Commission expanded its definition of qualifications and training. The Commission also highlighted the importance of the phrase, "suitable to" as it further explained qualifications and training. The Commission wrote:

Because *Sington* does not define "qualifications and training," we will. In a simple form, qualifications and training represent a plaintiff's resume. One aspect involves formal education. Another includes work experience. Still another includes special training such as the use of certain computers or computer programs. A different facet considers skills such as

flight attending, lifeguarding or being trained in CPR. Finally, the term encompasses any licensure to perform a specific job or task.

Likewise, *Sington* does not define the word "suitable," but one footnote explains the statutory term. *Sington's* footnote 9 . . . reads as follows:

We recognize that pre-1987 Michigan case law once drew a distinction with regard to wage earning capacity between "skilled" and "unskilled" workers. A skilled worker was considered to have an impairment of earning capacity, and thus would be entitled to compensation, if a work-related injury rendered the employee unable to continue earning the same level of wages in his particular skilled employment, even if the same wages could be earned at another type of employment. See, e.g., *Kaarto v Calumet & Hecla, Inc*, 367 Mich 128, 131; 116 NW2d 225 (1962); *Geis v Packard Motor Car Co*, 214 Mich 646,648- 649; 183 NW 916 (1921). Similarly, an unskilled or "common" laborer had to show a limitation in wage earning capacity in the entire field of "unskilled" labor. See *Leitz v Labadie Ice Co*, 229 Mich 381; 201 NW 485 (1924); *Kling v National Candy Co*, 212 Mich 159; 180 NW 431 (1920). This dichotomy between skilled and unskilled labor led to some anomalous results. In *Geis*, the plaintiff was held to have a compensable disability because of an injury that precluded him from performing the skilled employment he was performing at the time of his injury even though he worked for higher wages in somewhat related employment See *Kaarto, supra* at 131 (discussing *Geis*). Conversely, in *Leitz*, the plaintiff was held entitled to continuation of a disability award on the basis of being disabled from common labor even though he was earning higher wages as a bookkeeper and accountant.

However, when the present definition of disability was adopted in 1987, the Legislature replaced its prior reference to a limitation in wage earning capacity in "the employee's general field of employment" with "work suitable to his or her qualifications and training." This means that the inquiry is now focused on an employee's qualifications and training, not merely the general field of employment in which the employee happened to work at the time of a work-related injury. Thus, the prior common-law skilled/unskilled dichotomy has no significance under the current statutory language. Because there is no textual basis in the statute for the selection and application of either historical definition of "wage earning capacity," we examine the plain meaning of the words found in the statute.

Thus, the term "suitable" does not limit the field of jobs. It does not necessitate prior experience or require adequate prestige according to a skill level. Rather, the list of suitable jobs encompasses those jobs that afford a plaintiff an opportunity for consideration to be hired because he possesses the minimum experience, education, and skill. (*Peacock v General Motors Corp*, 2003 ACO #274, pgs. 19-20.)

Thus, under *Sington*, *Ketham*, and *Peacock*, plaintiff must first produce evidence that establishes her qualifications and training. After establishing her qualifications and training, plaintiff must then demonstrate that no job suitable to her qualifications and training represents wage-earning capacity equal to or greater than her pre-injury wage. This requires plaintiff to provide some evidence that demonstrates the wage-earning capacity for any job suitable to the established qualifications and training. In *Riley*, *supra*, the Commission demanded the plaintiff answer the question, “[h]as plaintiff established universe of jobs for which he is qualified and trained, and how much do they pay?”

Sington, *Peacock*, and MCL 418.301(4), require plaintiff to prove that the work-place injury caused any loss of wage-earning capacity. The statute plainly states that only limitations in wage-earning capacity “resulting from a personal injury or work-related disease,” constitute disability. Enforcing that provision, the *Sington* court forbade evaluation of other causes of wage-earning capacity limitation. With greater explanation, the *Peacock*, *supra*, decision showed the historical consistency of the causation element.

Interpreting *Sington*, the Appellate Commission warned that a claimant must first prove a work-related cause for any condition. In *Hague v Northwest Airlines, Inc*, 2002 ACO #237, the Commission reversed an award of benefits because the medical testimony failed to establish a work-related link to Ms. Hague’s pain complaints. Ms. Hague claimed that an electrical shock caused numerous problems. However, the Commission held that her treating doctors’ vague statements were not actually a diagnosis.

In *Peacock v General Motors Corp*, 2003 ACO #274, the Commission again explained causation, but differentiated the causation of injury from the causation of a limitation in wage-earning capacity. The Commission held that MCL 418.301(4) contains a causation requirement. The Commission then established that under *Sington*, *supra*, and Section 301(4), a magistrate must find a causal link between any limitation in wage-earning capacity and the work-place injury.

The *Sington* court demonstrated one aspect of the causation element. Mr. Sington suffered an injury to his left shoulder in a work-related incident. However, he also suffered a right shoulder injury that was not related to his job. Even more tragically, plaintiff suffered a stroke. The stroke was not caused by his job. Evaluating Mr. Sington’s disability, the court stated that the only wage-earning capacity limitations applicable were those related to the left shoulder because they were work-related; limitations from the other injuries were irrelevant.

Following that pronouncement, the Commission further explored the causation element from a historical perspective. We wrote:

Sington also does not address the statutory requirement that any limitation in wage earning capacity must result from the workplace injury. However, *Sington* adopts the *Pulley* decision, and that decision mirrors Section 301(4) [of] the statute perfectly. In *Pulley*, the

Court discussed the causal relation between injury and a limitation in wage earning capacity by writing the following:

When he filed an application for additional benefits, he became the moving party and his was the burden of proving that his inability to obtain employment was the result of his injury and disability.

The *Pulley* Court cited *Hood v Wyandotte Oil & Fat Co*, 272 Mich 190 (1935), for this proposition. In *Hood*, the Court expounded slightly when it stated:

The claimant's search for work was fruitless. The inference is permissible that it was his own physical defects which made the quest a vain one. Failure to find work is, indeed, no ground for compensation if the failure has its origin in general business conditions, the slackness of the demand for labor (*Cardiff Corp. v. Hall, supra*, pp. 1018, 1020; *Clark v. Gas Light & Coke Co.*, 7 W.C.C. 119 [21 T.L.R. 184]; *Sullivan's Case*, 218 Mass. 141 [105 N.E. 463, L.R.A. 1916A, 378]). There is some basis for a finding that this was the claimant's plight. He was an unskilled or common laborer. He coupled his request for employment with notice that the labor must be light.

In both *Pulley* and *Hood* the injured plaintiffs sought work but were not hired. Mr. Hood offered proof that employers rejected him for work because of his physical limitations caused by his workplace injury. Mr. Pulley offered no such proof. Predictably, Mr. Hood was awarded benefits, and Mr. Pulley was denied benefits. Both results would be appropriate under the current statutory scheme. (*Peacock v General Motors Corp*, 2003 ACO #274, pgs. 19-22.)

Peacock demonstrates another area where non-work-related causes result in wage-earning capacity limitations; namely economic causes. Thus, as the courts in *Hood* and *Pulley* illustrated, poor economic conditions that cause limitations in wage-earning capacity fail to demonstrate disability. They simply reflect the economic reality of hard times. In those instances, plaintiffs must prove that employers reject them because of their injuries and not because the employers do not have work. However, *Peacock* cautions that a magistrate may simply infer that the injury causes the inability to obtain employment based on the particular facts of a case.

Sington also requires a claimant to explore the job market and to make an effort to obtain employment. The court recognized the importance of Justice Weaver's comments in an earlier case, *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201 (1995). In that case Justice Weaver reasoned that job pursuit constituted a specific and necessary determination before concluding a claimant satisfies the definition of disability in MCL 418.301(4). The Supreme Court's order included a mandate to discuss, "Rea's efforts after the injury and through the hearing on this remand to obtain employment, and with what result, particularizing to the extent reasonably possible." *Sington* at 161.

Following the Supreme Court's pronouncement, the Commission also examined the impact of whether a claimant pursued job opportunities following an injury. In *Stanton v Great Lakes Employment*, 2002 ACO #251, the Commission cautioned against the prior practice of many claimants. Specifically, the Commission addressed the danger of not looking for work when a claimant cannot physically perform the job that produced the work-place injury. After *Stanton*, the court reiterated the importance of an injured worker's failure to look for work in *Fuller v Wal Mart Stores, Inc*, 2004 ACO #115.

We have also recognized that we must refrain from exceeding our statutory limitations when reviewing a magistrate's decision under *Sington*. In *Isaac v Masco Corp*, 2004 ACO #81, we explained:

The magistrate's credibility determination is entitled to deference because the hearing officer has the opportunity to view and judge witnesses. Moreover, the magistrate is not obligated to deal with the credibility issue like a light switch, turning it either on or off.

The magistrate's choice of which medical expert opinion or opinions to adopt is within his or her discretion and we defer to that choice, if it is reasonable. The magistrate need not adopt expert opinions in their entirety but may give differing weight to different portions of testimony. And, although a magistrate may give preference to a treating expert's opinion, she need not do so. (Footnotes omitted).

Applying these cases to the instant matter necessitates our affirmance of the magistrate's findings, but they also necessitate a remand for additional analysis under *Sington* and our interpretations of that case. Under the *Isaac* standard, the magistrate appropriately found that plaintiff suffered an injury that prevented him from concrete finishing work. The magistrate considered the videotape evidence and concluded that it did not alter her belief that plaintiff's work caused an injury that prevented him from performing concrete finishing. She explained that the video showed only a portion of plaintiff's job duties. She further explained that she accepted plaintiff's testimony that he performed the video jobs with great pain and an excessive amount of medication. She also supported her credibility finding with medical testimony from the defendant's doctor admitting that the excessive medication could allow plaintiff to perform the work. We cannot disturb this well reasoned and well supported finding.

However, the magistrate failed to include critical analysis required under *Sington*. The magistrate failed to address whether plaintiff's other job experiences and training constitute occupations within plaintiff's qualifications and training. Likewise, the magistrate failed to consider whether plaintiff could perform any job with an earning capacity equal to his earning capacity as a concrete finisher. This analysis must be included before making any final determination concerning any limitation in plaintiff's earning capacity resulted from his work injury.

Therefore, we affirm the magistrate's credibility and injury findings, but remand for a supplemental analysis of plaintiff's qualifications and training, wage-earning capacity in jobs suitable to his qualifications and training, and whether plaintiff suffers a limitation in his wage-

earning capacity in all work suitable to his qualifications and training. In so doing, the magistrate should follow the *Sington*, *Peacock*, and *Riley* decisions. We retain jurisdiction.

Gregory A. Przybylo

Commissioner

KENT, COMMISSIONER, CONCURRING IN PART:

I concur in part with Commissioner Przybylo, but write separately to express my disagreement with his position that plaintiff bears the burden of an economic downturn. I believe that if a job becomes unavailable, even for economic reasons, then it is not one which may be considered under the rule as set forth in *Sington v Chrysler Corp*, 467 Mich 144 (2002), and outlined in *Riley v Bay Logistics*, 2004 ACO #27 and *Wegienka v Monsanto Chemical Co*, 2004 ACO #324.

James J. Kent

Commissioner

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

JOHN W. STEWART,
PLAINTIFF,

V

DOCKET #04-0105

BANCHERO CEMENT COMPANY, INCORPORATED,
CITIZENS INSURANCE COMPANY OF THE MIDWEST,
DEFENDANT.

GLASER, CHAIRPERSON, DISSENTING:

I am unable to concur with either of my colleagues.

If we are to accept the magistrate's findings of fact, and I believe we should, then further analysis pursuant to the Supreme Court's order in *Sington v Chrysler Corp*, 467 Mich 144 (2002) is unwarranted.

The magistrate did perform an analysis, reciting plaintiff's education and training. The magistrate found that plaintiff is unable to perform the only work he has engaged in over the twenty years prior to his injury. He can no longer perform the work as a cement finisher.

The only work plaintiff performed prior to cement work was with the Navy and Merchant Marines. That work was performed over twenty years prior to plaintiff's found date of injury. The Merchant Marine card, which may have allowed plaintiff to perform some lighter work, required passing four different tests. He obtained the card in 1979 or 1980. (Trial transcript p. 15) Plaintiff's card has since then expired. He has not renewed it. (Trial transcript p. 17) As such, it is irrelevant to the analysis.

I would affirm the magistrate.

Martha M. Glaser

Chairperson

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

JOHN W. STEWART,
PLAINTIFF,

V

DOCKET #04-0105

BANCHERO CEMENT COMPANY, INCORPORATED,
CITIZENS INSURANCE COMPANY OF THE MIDWEST,
DEFENDANT.

This cause came before the Appellate Commission on defendant's appeal from Magistrate Susan B. Cope's decision, mailed March 4, 2004, granting benefits. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed in part and remanded in part. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed in part and remanded in part in accordance with the attached opinion. We retain jurisdiction. Transcript/brief filing requirements shall be issued by letter from the Commission to counsel as soon as the magistrate's supplemental opinion is filed with the Commission.

Gregory A. Przybylo

James J. Kent

Commissioners