

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE COMMISSION

BLAINE SULIMAN,
PLAINTIFF,

V

DOCKET #03-0168

ANN ARBOR CEILING & PARTITION AND
SAFECO INSURANCE COMPANY,
DEFENDANTS.

APPEAL FROM MAGISTRATE BRENNAN.

WILLIAM G. RAPPLEYE FOR PLAINTIFF,
JANE S. COLOMBO FOR DEFENDANTS.

OPINION

GLASER, COMMISSIONER

Defendant appeals the decision of Magistrate Mary C. Brennan, mailed on March 27, 2003, granting plaintiff a closed award on a finding of a work related injury of the left upper extremity, and penalty for nonpayment of benefits for that closed period. She also ordered defendant to provide vocational rehabilitation. We affirm in part and reverse in part the magistrate's decision.

This case was initiated by plaintiff filing an Application for Mediation or Hearing on October 25, 2001, alleging an injury to his left arm on September 24, 1998 and resultant disability. That Application was amended on May 6, 2002, submitting a request for vocational rehabilitation services with Beacon Rehabilitation.

Plaintiff was injured when the scaffolding he was climbing on began to roll and then collapsed. He fell on an extended left arm. He has undergone multiple surgeries to that arm at various prominent medical facilities such as St. Joseph, University of Michigan and Mayo Clinic.

At the time of his trial, plaintiff had no functional use of his left arm. His past work was that of a carpenter. Although work related disability was not stipulated to, there was no genuine dispute that plaintiff was, in fact, disabled as a result of his work injury. In fact he was being paid workers' compensation benefits on a voluntary basis at that time.

The magistrate noted that at the commencement of the hearing, the parties agreed that the issues in dispute were limited to plaintiff's claim for benefits owing from October 5, 2001 to January 21, 2002 and defendant's appeal of Mediator Burden's Vocational Rehabilitation Order which had been mailed August 26, 2002, ordering that Beacon Rehabilitation may conduct a full evaluation and assessment of plaintiff's potential for effective vocational rehabilitation.

The magistrate set forth facts related to the two specified issues:

In May 2001, plaintiff had an appointment with Dr. Derina and was met at the doctor's office by Patricia Johnson, his case manager retained by Safeco. Plaintiff testified that Ms. Johnson accompanied him into Dr. Derina's office and remained present during the examination. After they left Dr. Derina's office, plaintiff confronted Ms. Johnson about a remark she had allegedly written in her file regarding plaintiff's attempt to "con" Dr. Cooney. An argument ensued and Ms. Johnson told plaintiff she would find him another case manager. Plaintiff denied that he had threatened Ms. Johnson or raised his voice to her.

In October 2001, Ms. Sundermeyer contacted plaintiff and informed him that she was assigned as his new case manager and requested a meeting. Plaintiff contacted his attorney and, pursuant to his advice, plaintiff did not meet with Ms. Sundermeyer. Shortly thereafter, plaintiff's weekly benefits were terminated. His benefits were resumed in 2002, after the filing of the instant petition; however, defendants have refused to pay benefits for the period of 10/5/01 to 1/21/02.

In July 2001, plaintiff's attorney referred plaintiff to Mr. Smolarski at Beacon Rehabilitation. Mr. Smolarski never gave plaintiff a written report and I am unable to determine either the nature of the meeting or whether any evaluation was conducted. Defendants refused to pay for the meeting and thus plaintiff's attorney filed the amended petition. Mr. Burden's order does not address this evaluation but rather orders, "that Beacon Rehabilitation may conduct a full evaluation and assessment of Mr. Suliman's potential for effective VR. This assessment may be done immediately but it will address the residual effects of claimant's recent surgery and its impact on retraining/reemployment efforts." Plaintiff testified that he has personally paid the \$200 charge for the prior assessment and requests that he is reimbursed. He testified that this meeting was held only nine days after his last surgery and that he was still undergoing physical therapy at the time of the hearing. Plaintiff testified that he still remains in physical therapy and speculated that he will likely undergo more surgeries in the future. In spite of his ongoing medical treatment, plaintiff has been enrolled at Jackson Community College since August 2001 and has maintained a 3.7 GPA. Plaintiff testified that he is able to reconcile his education with his medical treatment because he can schedule his surgeries for school vacations.

She went on to conclude:

I find that plaintiff did sustain a work-related injury to his left arm on 9/24/98 and that as a result of that injury plaintiff continues to be unable to return to his work as a carpenter, or to perform any unrestricted, two-handed job. These findings are based upon the un rebutted testimony of plaintiff, whom I found to be a very credible witness.

* * *

Accordingly, I find that plaintiff's work-related injury to his left arm and wrist caused a disability from the date of his injury and continuing through the date of the hearing, and specifically including the period of 10/5/01 through 1/21/02.

Defendants contend that plaintiff is not entitled to benefits for the disputed period because of "claimants' non-cooperation with case manager". (The Notice of Dispute filed 10/11/01). However, the act does not allow for termination of benefits on this basis and I find that the termination was not only inappropriate, but also unjustified and devoid of any legal basis. Clearly, the act does not require the payment for disability benefits when the underlying claim is in dispute or when a disabled claimant has refused an offer of reasonable employment. It also provides that benefits may be terminated when the claimant refuses to co-operate with a vocational rehabilitation plan authorized by the director. Here, however, none of these bases are even claimed by defendants. Rather, defendants simply and without any statutory basis terminated benefits to a claimant whose disability was not disputed, because he allegedly did not co-operate with a medical case manager. The act does not impose this obligation on plaintiff nor does it permit defendants to stop benefits for lack of cooperation with an insurance carrier's case manager. Defendants' action terminating benefits is unsupported by the act and contrary to the spirit of the law.

* * *

I find that the termination of benefits is not supported by the act or the evidence presented at the hearing. Defendants are ordered to pay plaintiff benefits at the stipulated rate of \$553.00 per week from October 5, 2001 through and including January 21, 2002. Moreover, since the basis for the termination is not recognized by the act, I find that there was no statutorily recognized ongoing dispute and thus order defendants to pay a penalty of \$1,500.00 for its unjustified refusal to pay weekly benefits. MCL 418.801.

The second issue raised in this matter is defendants' appeal from the order of Mediator Burden. Defendants claim that the vocational rehabilitation plan is unreasonable on the basis that plaintiff is not a candidate for vocational rehabilitation and further that they did not agree to the selection of the vocational rehabilitation counselor. Once again, I find defendants' position to be without legal merit or evidentiary support. Defendants argue that plaintiff has not reached "maximum medical improvement" and thus is not a candidate for rehabilitation. Plaintiff acknowledged that he is still undergoing medical treatment and that he could even undergo additional surgery in the future. However, he also testified that he has been successfully attending Jackson Community College since August 2001, and is able to schedule his education to accommodate his medical treatment. Furthermore, defendants have not presented any evidence or statutory support for its contention that maximum medical improvement is a prerequisite before a rehabilitation program can be instituted, particularly where, as here, plaintiff is over four years post injury, will not be able to return to his prior employment, and is anxious to seek retraining. Moreover, Mediator Burden's order

specifically addresses defendants' concerns by requiring the assessment to "address the residual effects of claimant's recent surgery and its impact on retraining/reemployment efforts". Based upon the length of time post-injury, the nature of the injury, plaintiff's self-initiated educational efforts, and the lack of any contrary evidence, I find that plaintiff is a candidate for rehabilitation and Mediator Burden's order is reasonable and well supported.

I also reject defendants' claim that the order should be reversed because it did not agree to the selection of the rehabilitation counselor.

* * *

In this case, defendants do not suggest that Beacon Rehabilitation is not an approved facility nor do they provide any basis to suggest that it is an inappropriate facility. The sole fact that the plaintiff selected Beacon Rehabilitation is not a valid basis to overrule the mediator's order. Defendant's petition is denied.

Finally, at the hearing plaintiff requested that defendants reimburse him for the \$200.00 he paid to Beacon Rehabilitation. At the time plaintiff saw Mr. Smolarski at Beacon, there was no order from the bureau nor any determination by the director that such service was reasonable. Moreover, the record is unclear as to exactly what service was even rendered by Mr. Smolarski. Accordingly, I am denying plaintiff's request for reimbursement.

The magistrate's decision was mailed March 27, 2003 and defendant filed a timely appeal. On appeal defendant made several arguments, the first of which was as follows:

PLAINTIFF'S FAILURE TO COOPERATE WITH THE MEDICAL CASE MANAGER PRECLUDED EFFECTIVE MONITORING OF THE MEDICAL TREATMENT; THE MAGISTRATE'S FAILURE TO SUSPEND PLAINTIFF'S WAGE LOSS BENEFITS FOR THIS NON-COOPERATION VIOLATES THE SPIRIT AND NATURE OF THE WDCA AND CONDONES PLAINTIFF'S EGREGIOUS BEHAVIOR.

Defendant had terminated plaintiff's benefits when the latter failed to meet with a medical case manager, Kathleen Sundermeyer.¹ Benefits were reinstated when plaintiff and his attorney did meet with Ms. Sundermeyer. Defendant argues that plaintiff's actions in refusing to meet with this medical case manager are tantamount to a failure to cooperate with medical treatment given the nature and complexity of this matter.

We review the magistrate's finding of basic facts under the competent, material and substantial evidence standard. We review the magistrate's ultimate conclusions of law de novo. *Abbey v*

¹ At trial defendant argued that Ms. Sundermeyer was a vocational rehabilitation consultant. See trial transcript, p. 81.

Campbell, Wyant & Cannon Foundry, 194 Mich Application 341 (1992); *Ledesma v Federal Forge, Inc*, 1994 ACO #99; *Fagan v Dynamic Finishing LC*, 2000 ACO #480.

We agree with the magistrate that the Act does not allow for termination of benefits on the basis of “claimant’s non-cooperation with a case manager”.

Defendant cites Professor Larson’s treatise on whether refusal of treatment should be a bar to compensation. However, defendant cites no statutory basis or case law. Further, this case does not involve an allegation that plaintiff is refusing medical treatment, but rather, that he has refused to meet with defendant’s case manager.² Defendant alleges that the failure to meet with the medical manager “precluded effective monitoring of the medical treatment.” On this record we find no support for this allegation. As a result, the mere fact plaintiff refused to meet with the medical manager does not establish non-cooperation with medical treatment.

The magistrate’s determination that defendant had no basis for terminating plaintiff’s benefit from October 5, 2001 to January 21, 2002, is legally sound and we affirm it.

Defendant next argues:

PLAINTIFF’S MEDICAL CONDITION AT ALL TIMES PERTINENT TO THIS LITIGATION PRECLUDED EFFECTIVE VOCATIONAL REHABILITATION EVALUATION; ACCORDINGLY, THE MAGISTRATE ERRED AS A MATTER OF LAW IN AFFIRMING THE MEDIATOR IN ORDERING A VOCATIONAL REHABILITATION EVALUATION.

Defendant submitted that at all times relevant to the issue of vocational rehabilitation, plaintiff’s physical condition made rehabilitation evaluation impossible.

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. 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 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.

The magistrate found that, considering the length of time post-injury, the nature of the injury, plaintiff’s self-initiated education efforts, and the lack of any contrary evidence, the plaintiff is a candidate for vocational rehabilitation. She affirmed Mediator Burden’s order as it was reasonable and well supported. There is competent, material and substantial evidence on the whole record to support this conclusion and we are duty bound to affirm it.

² No evidence was presented that a case manager was of any benefit to plaintiff, other than self serving statements of Patricia Johnson, rejected by the magistrate. See Johnson deposition February 2, 2002.

Defendant's last argument is that the magistrate erred as a matter of law in awarding a penalty in this matter. On this issue we agree with defendant.

The magistrate noted that the issues in this case were limited by stipulation. Penalties were neither requested nor presented as an issue at the time the parties agreed to limit the issues to the closed period of benefits and the vocational rehabilitation order. It is well established that stipulations of fact are inviolable and binding on the parties unless abandoned or disaffirmed, and that a judge or hearing officer may not alter them. *Dana Corp v Employment Security Comm*, 371 Mich 107 (1963); *Nuriel v Young Women's Christian Ass'n of Metropolitan Detroit*, 186 Mich App 141 (1990).

Whether or not we agree with the magistrate that a penalty was warranted is moot. Based on the stipulation of the parties at the outset of the trial, we must reverse the penalty award.

Commissioners Will and Leslie concur.

Martha M. Glaser

Rodger G. Will

Richard B. Leslie

Commissioners

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This cause came before the Appellate Commission on defendants' appeal from Magistrate Mary C. Brennan's decision, mailed March 27, 2003, granting a closed award of benefits. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed in part and reversed in part. Therefore,

IT IS ORDERED that the magistrate's decision is reversed as to the penalty award. In all other respects, the magistrate's decision is affirmed.

Martha M. Glaser

Rodger G. Will

Richard B. Leslie

Commissioners