

STATE OF MICHIGAN  
WORKERS' COMPENSATION APPELLATE COMMISSION

PATRICIA E. NOWAK,  
PLAINTIFF,

V

DOCKET #04-0208

CITY OF EAST LANSING, AND  
ACCIDENT FUND INSURANCE COMPANY OF AMERICA,  
DEFENDANTS.

APPEAL FROM MAGISTRATE SMITH.

DEBORAH A. DEPREZ FOR PLAINTIFF,  
MARK W. JAKUBIAK AND DEBORAH A. STRAIN FOR DEFENDANTS.

OPINION

KENT, COMMISSIONER

Defendants appeal the open award from the decision of Magistrate L'Mell Smith.<sup>1</sup> They argue the evidence did not support her finding that plaintiff suffered a knee injury, and that the Magistrate failed to follow *Sington v Chrysler Corporation*, 467 Mich 144 (2002) when making her disability determination.

By way of background, we repeat portions of the Magistrate's summary of basic facts elicited at trial:

Plaintiff . . . graduated from high school and Michigan State University with a double major in psychology and criminal justice. She also has an emergency medical technician certification from Lansing Community College. She then obtained two Master's degrees, one in criminal justice and the other in social work. She also attended the police academy at Lansing Community College.

She was hired as a police officer by East Lansing after passing a pre-employment physical in June 1980 and was only the second female police officer at that time. When she started she had no restrictions nor did she have any prior problems with her left knee. She was a routine patrol officer for four or five years and in 1986 was assigned to the Tri-County Metro Narcotic Squad. During that

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<sup>1</sup> The magistrate mailed her opinion to the parties on May 24, 2004.

time she was involved in a raid and received gunshot wounds in the head and buttock/thigh area. She did not injure her left knee at that time. However, the injuries she did receive kept her off work for about a year before she returned to full duty but she still experienced sciatic pain from time to time.

She continued to work for several years in the Detective Bureau investigating assaults but then returned to road patrol. In September 1998 she was promoted to the rank of Sergeant. She did not recall any prior problems with her left knee at that time except occasional pain in her kneecap.

On May 5, 1999 plaintiff was participating in a training exercise to brush up on her police skills. She was kneeling on the ground and practicing handcuffing on a co-worker when she experienced acute pain in her left knee.<sup>2</sup>

The magistrate went on to discuss the medical evidence presented at trial, finding that even though it was an unusual injury mechanism, plaintiff did suffer a tear of the posterior cruciate ligament, which restricted her from general patrol duty:

There is very little dispute from a medical standpoint that plaintiff suffered from a tear of the posterior cruciate ligament. There is also little dispute that this is a very unusual injury. Dr. Wessinger describes that ligament as a very strong and “as thick as your small finger” and indicated that it takes a severe trauma to tear that ligament. Dr. Wojtys did not disagree. He did, however relate the injury to the training episode.

Yes. I mean she related to the most significant knee injury that she’s had was the training episode back in May of 1999. In fact, after I arthroscoped her knee, I specifically went back and asked her about previous injuries. You know, did you get hurt when you were a teenager. Do you ever remember getting hurt in sports. Something that might hint that there was an earlier injury that was may be under diagnosed, or misdiagnosed. And she said, no, the only significant injury I’ve had to that knee was the one on the training episode. (EMW, p. 21, ll. 15 – 24.)<sup>1</sup>

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<sup>1</sup> The information contained in parentheses following a called [sic] refers to the initial of the doctor who was quoted and the location of the quote in the deposition.

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<sup>2</sup> Magistrate’s opinion, pp 2-3.

It is clear that the defendant's position in this case is that the training episode could not possibly have torn plaintiff's posterior cruciate ligament because it was not a major trauma. However, Dr. Wojtys indicated that if someone tore their ligament they would certainly know it and plaintiff did testify that she experienced excruciating pain at the time, hopped to her car and went directly to the doctor. Therefore, an assessment of plaintiff's credibility is necessary. I found plaintiff to be one of the most credible witnesses who has ever appeared before me. When she was asked about automobile accidents she might have been involved in she told of one in which she struck a child, information that she did not need to share. I found her to be straightforward, candid and open. It was clear she was trying to hide nothing. In short, I believed her.

Therefore, I find that plaintiff did tear her posterior cruciate ligament in the course of a training episode which occurred on May 5, 1999. I further find that the injury required several surgeries which caused plaintiff to miss 517 hours of work and cost her some out of pocket expenses for which she should have been compensated through worker's compensation. Accordingly, defendant is ordered to do so. I also find that the injury has required plaintiff to work with restrictions which defendant has honored to its credit. However, should restricted work be unavailable, her benefits must be resumed until such time as Dr. Wojtys releases her from those restrictions. Of course, defendant may take credit for wages and any worker's compensation benefits previously paid.<sup>3</sup>

Defendants argue such a finding was not properly made. Their argument, when boiled to its essence, amounts to no more. In support, defendants urge us to re-weigh the testimony of the various medical experts, and reach a different conclusion than that of the Magistrate. We have stated on numerous occasions that is not our function. As the Michigan Supreme Court pointed out in *Mudel v Great Atlantic & Pacific Tea Company*, 462 Mich 691 (2000), we do not have the power to disregard the weight given testimony by the magistrate in his or her fact finding. Our function on appeal is to review a magistrate's fact findings in a qualitative and quantitative fashion to discern if they are supported by competent, material, and substantial evidence, as required by MCL 418.861(a)(3). Only if after that quantitative and qualitative review we determine the fact-finding is not supported by the requisite evidence may we substitute our finding for that of the magistrate.

Nor did *Mudel* do anything to alter our long standing position that we will not displace the magistrate's choice between conflicting evidence or medical opinions, when there is a reasonable basis for such choice, as there is in the instant case. It is well within the magistrate's discretion to accept the medical testimony she finds most persuasive, as long as there is a reasonable basis for her findings and support on the record.

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<sup>3</sup> *Id.*, pp 4-6.

To the extent she found plaintiff continues to suffer a physical limitation which prevents her from currently working as a patrol officer, there is the requisite support on the record.

However, as noted in defendants' second issue on appeal, that finding does not meet the requirements of *Sington*:

Magistrate Smith's ruling that Plaintiff sustained a work-related disability is erroneous. Plaintiff did not suffer any loss of wage earning capacity since she continues to work full time for the City of East Lansing, in charge of Parking Enforcement Unit (T 33). She has received her full salary from the City of East Lansing from May, 1999 through the trial (T 34).

Under *Sington v Chrysler Corporation*, 467 Mich 144 (2002) disability is established by determining whether there are regular jobs in the marketplace at the maximum wages within the employee's qualifications and training that she can perform. Additionally, the Magistrate must make a finding concerning the employee's qualifications and training.<sup>4</sup>

Plaintiff's response seems to argue implementation of a *Haske* test, which of course was explicitly overruled by the Supreme Court in *Sington*:

Ever since the injury that occurred on May 4, 1999, the Plaintiff has been under knee restrictions. She has been limited in her ability to run as a result of which she can no longer be an unrestricted patrol officer for the City of East Lansing, a job that she loved. Although the City of East Lansing has, to its credit, continued to honor the restrictions places upon the Plaintiff, the fact of the matter is that the evidence demonstrates that she continues to lose time from work either for visits to Dr. Wojtys or for physical therapy related to the injury to her knee. Since the injury sustained by the Plaintiff continues to limit her abilities to perform the full range of police work she had previously been able to perform, under *Sington v Chrysler Corporation*, 467 Mich (2002), she continues to be disabled. The Magistrate correctly found that, in the event the City of East Lansing chose to withdraw its favored work, the Plaintiff should be placed on worker's compensation since her restrictions would be the reason why she could not perform unrestricted police work. In this regard, the fact of the matter is that the only reason the Plaintiff is working at all is because the City has been willing to abide by her work injury related restrictions. Under these circumstances, it is quite clear that the Plaintiff has physical limitations that effect [sic] her ability to perform work as a police officer and she is therefore disabled.<sup>5</sup>

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<sup>4</sup> Defendants' brief on appeal, p 20.

<sup>5</sup> Plaintiff's brief on appeal, pp 22-23.

The case of Charles Sington himself is illustrative here. Charles Sington, like this plaintiff, suffered a work injury, which prevented him from performing the job he was doing when he was injured. Charles Sington, like this plaintiff, returned to work at Chrysler after his work injury, working at a different job than the one he was performing when he was injured.

In the first go-around, utilizing the *Haske* any-one-job standard, the Court of Appeals held Charles Sington had established a disability. However, after the *Sington* court expressly overruled that decision along with the *Haske* test, the matter was sent back to the fact finder for redetermination. Applying the Supreme Court's instructions, the magistrate found Charles Sington able to perform some 13 other jobs at the Chrysler plant which paid as much or more than the one his work injury prevented him from performing, and hence, had failed to establish the requisite 301(4) threshold compensable disability.

The Supreme Court has rejected the theory plaintiff appears to propose that simply because she was not able to perform the same job she performed at the time of her injury, her favored work status amounted to an ex post facto disability finding. As we noted in our second *Sington* remand opinion, the Supreme Court now requires much more to establish the initial threshold disability required by Section 301(4):

This flowed from what appeared to be the fundamental factual question on the Supreme Court's mind regarding the facts in the actual *Sington* case, i.e., just what kind of work did plaintiff actually do at Chrysler post-injury but pre-stroke? In various parts of their opinion, the Supreme Court made it clear they wanted the fact finder to determine whether that work constituted a regular job which he could perform despite the residual "de minimis" effect of a work injury, or was it truly make work which would not have continued for other non-injured employees accommodating this absent plaintiff.<sup>6</sup>

In keeping with that mandate from the Court, we noted in our remand opinion, the progression of testimony at the original trial,<sup>7</sup> leading up to the penultimate question in Mr. Sington's case. Were his job duties at Chrysler characteristic of a real job in the real world or simply make work, which a large and unique employer could offer its injured workers to keep them on the payroll?

On remand, Magistrate Wierzbicki performed a flawless *Sington* analysis, noting that Charles Sington's residual physical restrictions did not in fact prevent him from performing numerous job classifications he was qualified for at the Chrysler plant where he worked:<sup>8</sup>

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<sup>6</sup> See *Sington*, pgs 24, 25, and 26, including footnote 12.

<sup>7</sup> See 2002 ACO #92, pages 11-13.

<sup>8</sup> See 2004 ACO #220, pp 4-5.

The Appellate Commission affirmed this magistrate's decision, the Court of Appeals reversed, and the Supreme Court remanded the case for further findings. *Sington*, id.

In its decision, the Supreme Court stated, "In order to establish that he had a 'disability' because of the left shoulder injury, plaintiff had to show that that injury resulted in a limitation in his wage earning capacity in work suitable to his qualifications and training . . . An inquiry must be made regarding whether the 'regular job' was suitable to plaintiff's qualifications and training at the time of the injury. Also, if plaintiff's injuries only enabled him to perform that 'regular job' because of accommodations provided by defendant, his wage earning capacity might be less than his actual wages." *Sington*, supra, at 165-166.

The Court further stated that ". . . a work-related injury that has a de minimis effect on the employee's related duties might not amount to a disability. This is because many employers might disregard such minor limitations in hiring applicants generally, meaning that such minor conditions would not effect [sic] an employee's ability to perform his top paying job and would therefore not limit his wage earning capacity. A useful perspective for the WCAC in considering this case on remand might be considering whether plaintiff's injuries would prevent him from competing in the marketplace with other workers for the 'regular job.' The WCAC might also consider whether defendant would have continued plaintiff in the 'regular job' at the same rate of pay if he was injured in a non-work-related incident. If plaintiff would have been hired or retained despite his injury, this would indicate that plaintiff did not suffer a disability because the pertinent injury did not impair his wage earning capacity. Conversely, if defendant would not have hired or would not have accommodated plaintiff's injury except for it being work related, that would be indicative of a limitation in wage earning capacity." *Sington*, supra, at 166, footnote 12.

The Appellate Commission stated that its charge was to determine the Plaintiff's pre-injury and post-injury qualifications and training, the Plaintiff's highest demonstrated level of earnings within his pre-injury qualifications and training, and the economic impact of his work-related injury. The Commission has directed this magistrate to make certain factual determinations, namely: 1) what jobs were suitable for the Plaintiff, given his qualifications and training; 2) what was the Plaintiff's highest rate of pay; 3) were the suitable jobs for Plaintiff reasonably available from the time of his injury until his last day of work in subsequent employment; and 4) what is Plaintiff's actual wage loss assuming there is a threshold disability finding. If there is a threshold disability finding, this must be determined by limiting the injury to the jobs that are suitable to Plaintiff's qualifications and training and that would pay him his maximum earning rate.

After a thorough and accurate summary of the witness testimony at the subsequent hearing, the magistrate determined that there existed 17 job classifications that plaintiff was qualified to perform at Chrysler, and that plaintiff remained capable of performing 13 of them. More importantly, the fact finder determined that all of these 13 positions were regular or real jobs and not make work or special jobs for injured workers, for which defendant would hire other workers to do in plaintiff's absence.

Later in Charles Sington's case, we noted the fact that while sometimes potential jobs exist with other employers, subsequent performance of a real job with the same employer can in fact be determinative:

The magistrate considered plaintiff's qualifications and training, and held that in view of his limited cognitive and educational skills, the universe of such jobs that paid the maximum wage was "limited" to the bevy of classification/jobs he could perform at Chrysler. He directly confronted the issue of whether the post-injury work plaintiff was performing until his stroke was make work or a real job, and, as noted above, gave a detailed analysis of the testimony at trial.

His conclusions/findings took into account the direct observations by the Michigan Supreme Court in this case that a "useful perspective" could include whether "plaintiff would have been hired or continued" in his jobs despite his injury. Magistrate Wierzbicki, having heard the live testimony of both plaintiff's and defendant's witness, determined as noted above that defendant would have hired and placed a new worker with similar physical limitations (PQX vs. PQ) in at least 13 regular full-time classified positions. Further, the magistrate found plaintiff able to continue in such full-time-classified positions despite a *de-minimis* physical limitation. Finally, while it remains true a giant manufacturer has the flexibility in moving employees from one job to the next that a small "mom and pop" operation might not have, given the facts as found by the magistrate, these were real jobs in which plaintiff could have been replaced with new unrestricted workers.

In his oft quoted treatise, Professor Ed Welch commented on the potential proof problems confronting a plaintiff, such as Mr. Sington, who has a history of successfully performing viable subsequent employment. In a portion of his comments which is directly on point to the issue now confronting us, Professor Welch articulated in singular, direct terms this basic yet sometimes overlooked principle:<sup>7</sup>

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<sup>7</sup> Welch, *Workers' Compensation in Michigan: Law and Practice* (4<sup>th</sup> ed). Section 8.2(e), p 8-22 (04 supplement).

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Successfully performing subsequent work may demonstrate that there is no loss from the workers' maximum capacity. If it does, he or she does not meet the definition and is not entitled to benefits.

Thus, the magistrate was legally correct in holding such a job would be a regular (or real) job for which there continued to be a substantial job market (in the real world).

Returning to the case at bar, the record as it stands suggests plaintiff may have been engaged in such a regular job for which there may be a substantial job market:

Q. Okay. And it's the time after that that you're seeking through this?

A. Correct.

Q. Okay. At the present time, you're working full-time?

A. Yes, I am.

Q. And that is doing what?

A. I am in charge of the Parking Enforcement Unit.

Q. Okay, and what does that job entail?

A. They're civilian employees that I'm over. There's ten or eleven full-time, they work code enforcement, parking enforcement, and I supervise them, as well as manage their activities and statistical documentation.<sup>9</sup>

We have on several occasions made clear the requisite steps in making a disability determination under the *Sington* provisos. It appears no such findings or analysis was made here. It is essential, under the economic focus mandated by *Sington* that the magistrate determines whether the position as head of the parking enforcement unit was within plaintiff's qualifications and training, and was in fact a regular job for which there was a substantial job market, such as contemplated in *Sington*. If so, the magistrate should determine whether that job paid the maximum. If that is the case, plaintiff does not meet the definition of disability.

If necessary, the magistrate should also consider the other jobs reasonably available to plaintiff given her qualifications and training which she could still perform. For guidance, in addition to the *Sington* remand opinion, the Magistrate should consider our oft quoted opinions

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<sup>9</sup> Trial transcript, p 33.

in *Riley v Bay Logistics*, 2004 ACO #27 and *Wegienka v Monsanto Chemical Co*, 2004 ACO #324.

Commissioner Glaser and Chairperson Reamon concur.

James J. Kent

Martha M. Glaser

William G. Reamon, Jr.

Commissioners

Chairperson

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DOCKET #04-0208

CITY OF EAST LANSING, AND  
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DEFENDANTS.

This cause came before the Appellate Commission on defendants' appeal from Magistrate L'Mell Smith's decision, mailed May 24, 2004, granting an open award for plaintiff's knee injury. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be remanded for further findings. Therefore,

IT IS ORDERED that the magistrate's decision is remanded for further findings in accordance with the attached opinion. Transcript and/or brief filing requirements shall be issued by letter from the Commission to counsel when the magistrate's supplemental opinion is mailed. We retain jurisdiction.

James J. Kent

Martha M. Glaser

Commissioners

William G. Reamon, Jr.

Chairperson