STATE OF MICHIGAN

COURT OF APPEALS

JERRILYN CAMP,

Plaintiff-Appellant,

v

SEARS, ROEBUCK & COMPANY and ALLSTATE INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
October 11. 1996

No. 181427
LC No. 92-0685

Before: Taylor, P.J., and Markey and N.O. Holowka,* JJ.

PER CURIAM.

Plaintiff appeals by leave granted the November 10, 1994, opinion and order of the Worker's Compensation Appellate Commission (commission), holding after remand from this Court that plaintiff is partially disabled, but not entitled to benefits because she remained capable of maintaining the same earnings after her injury. We affirm.

The facts of the case were summarized in the latest opinion of the commission. Plaintiff's qualifications and training encompassed a fairly wide variety of work, ranging from secretarial and clerical work to heavier warehouse work. Because of an injury sustained on July 5, 1990, while working in the warehouse, plaintiff is no longer able to fully perform the warehouse work. However, she remains fully able to perform computer and clerical work without restrictions. Plaintiff was not offered this work by defendant employer after her injury because of union layoff and seniority rules. The work plaintiff remains able to perform actually pays as much or more than the work she can no longer perform.

On the basis of these facts, the commission initially reversed the magistrate's award of benefits, finding that plaintiff was not disabled under MCL 418.301(4); MSA 17.237(301)(4). Plaintiff applied for leave to appeal, and this Court remanded for reconsideration in light of *Rea v Regency Olds Mazda Volvo*, 204 Mich App 516; 517 NW2d 251 (1994), remanded 450 Mich 1201 (1995). On remand, the commission found that under *Rea*, plaintiff was disabled because she could no longer perform her prior warehouse work. The commission found that plaintiff was only partially disabled because she

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*Circuit Court Judge, sitting on the Court of Appeals by assignment.

retained the capacity to perform clerical work within her qualifications and training. Applying its five part interpretation of *Sobotka v Chrysler Corp*, 447 Mich 1; 523 NW2d 454 (1994), initially set forth in *Braddock v Bellrose, Inc*, 1994 WCACO 525, the commission found that plaintiff was not entitled to benefits where her ability to earn met or exceeded her average weekly wage at the time of the injury.

A full review of the five-part *Braddock* test is not necessary to resolve this case. Plaintiff returned to work shortly after the commission issued its decision. The transcript reveals that plaintiff was consistently able to perform her prior clerical work. There was a churlish debate between counsel regarding whether plaintiff had to seek other work, or whether defendant had to offer the work to her. Clearly the work existed, and it was available to plaintiff. No unfavorable economic conditions contributed to plaintiff's inability to find work. *Sobotka, supra* at 27-28, 53. Both parties knew of the requirements that the union contract imposed on them. Where the contract required plaintiff to bid on job postings, as a practical matter plaintiff could not sit back and wait for defendant to offer her work. The commission could reasonably conclude that plaintiff was avoiding available work by not bidding for jobs, and consider that avoided work in determining plaintiff's residual wage-earning capacity. *McKissack v Comprehensive Health Services of Detroit*, 447 Mich 57, 71; 523 NW2d 444 (1994).

Given the facts of plaintiff's work situation, the commission did not improperly rely on jobs that were only theoretically available to determine plaintiff's residual earning capacity. Defendant had work available for plaintiff that was within her capacity to perform. Requiring a plaintiff to apply for such work is not an undue burden.

Affirmed.

/s/ Clifford W. Taylor
/s/ Jane E. Markey
/s/ Nick O. Holowka