

STATE OF MICHIGAN
COURT OF APPEALS

GWENDOLIN MILLER,
Plaintiff-Appellee,

UNPUBLISHED
April 1, 2008

v

No. 278235
WCAC
LC No. 04-000336

GRAND HAVEN STAMPED PRODUCTS
COMPANY and NATIONAL UNION FIRE
INSURANCE COMPANY,

Defendants-Appellants,

and

FIDELITY & GUARANTY INSURANCE
COMPANY,

Defendant.

Before: Kelly, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

This matter returns to us on remand from our Supreme Court for consideration as on leave granted. Defendant employer and its insurer appeal a decision of the Worker's Compensation Appellate Commission ("WCAC") that affirmed an order of the magistrate granting plaintiff an open award of differential wage loss benefits for a work-related right knee injury. On remand, we are directed by the Supreme Court to determine "whether the plaintiff is disabled, and if so, whether she is entitled to an award of differential weekly wage loss benefits." *Miller v Grand Haven Stamped Products, Co*, 478 Mich 865; 731 NW2d 725 (2007). The WCAC answered both questions affirmatively. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant employer manufactures component parts for the automobile industry. Plaintiff assembles those component parts. Plaintiff tore the medial meniscus in her right knee in April 1995 while in the course of her employment. At the time of her injury, plaintiff worked between 55 and 60 hours a week inclusive of overtime. She subsequently underwent arthroscopic surgery to repair the tear. Plaintiff returned to work following surgery, but experienced continuing discomfort in her right knee while standing, leading her surgeon to impose a sit/stand option for her work activities. Plaintiff thereafter performed the "accelerator job" with a stool to effectuate

her medical restriction. She worked overtime on this job, as well as on “stand up jobs.” The accelerator job was eliminated, however, at some point in 2003 when it was moved to a plant in either Canada or Japan. Plaintiff did some work in the office at a reduced rate of pay, with defendant employer paying her partial worker’s compensation benefits to make up the difference. Defendant employer discontinued the payment of differential benefits after an independent medical examiner determined that plaintiff suffered from degenerative joint disease in both knees that was unrelated to the April 1995 work incident and merely a condition of aging accelerated by plaintiff’s obesity. Defendant employer also reassigned plaintiff to perform the only sit-down work available in the plant, “the Toyota hood hinge” job, which is a regular union-qualified assembly job. Plaintiff commenced these proceedings to secure the reinstatement of her differential wage loss benefits.

The magistrate determined that plaintiff’s right knee injury gave rise to a work-related disability and that defendants were obligated to compensate plaintiff at a rate of \$375.26 a week employing the following rationale:

The hood hinge job Ms. Miller is currently performing is a regular job in the plant. It can be performed sitting or standing. The Defendant does not have to make special accommodations for Ms. Miller to keep her on the hood hinge job. It is, however, the only job in the plant that fits within Ms. Miller’s work-related physical restrictions. While working on sit-down jobs only, during the years following the injury, Ms. Miller became disqualified from performing any other job in the plant. The Defendant claims, under [*Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002)], since Ms. Miller can perform a regular job without accommodation, she is not disabled. Ms. Miller is not disabled from performing the hood hinge job. However, just because there is one job at the plant that Ms. Miller can perform, without accommodations, does not mean she is no longer disabled. Disability is defined by wage loss. Ms. Miller’s pre-injury average weekly wage was \$653.14. Because of her injury she no longer able to earn that wage or compete for all the jobs in the plant. She is no longer physically able to earn her maximum wages of \$15.00 to \$17.00 an hour, the wages she earned in the 1980s and early 1990s, when she was able to stand for an entire shift. I find that Ms. Miller has established, under *Sington*, that she is disabled.

The WCAC affirmed the magistrate’s determination, explaining:

Due to her work-related injury, plaintiff is unable to perform the work that provided her maximum earnings. Plaintiff’s current work, while regular employment because it is work performed by two other workers in addition to plaintiff, involves a sit-stand option and also has the attributes of “reasonable employment” because it “is within the employee’s capacity to perform that poses no clear and proximate threat to that employee’s health and safety, and that is within a reasonable distance from that employee’s residence.” MCL 418.301(9). Plaintiff is unable to perform the vast majority of production jobs that defendant employer has and they are not available to plaintiff.

While defendants have argued that the employer no longer has the high-paying piece work jobs that plaintiff had when she earned her maximum earnings,

this is nonetheless important to a person such as plaintiff because due to her work-related injury, she is unable to look to other employers for these high paying jobs. This we believe demonstrates without question that plaintiff's maximum wage earning capacity was destroyed by her injury with defendant employer.

Our review of the WCAC's decision is solely limited to ensuring the integrity of the administrative process. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000).

Findings of fact made or adopted by the WCAC are conclusive on appeal, absent fraud, if there is any competent supporting evidence in the record, but a decision of the WCAC is subject to reversal if the WCAC operated within the wrong legal framework or if its decision was based on erroneous legal reasoning. [*Schmaltz v Troy Metal Concepts, Inc*, 469 Mich 467, 471; 673 NW2d 95 (2003).]

This Court continues to exercise de novo review of questions of law involved in any final order of the WCAC. *Mudel, supra* at 697 n 3.

The magistrate and the WCAC erroneously determined that plaintiff suffered a compensable disability as defined in *Sington v Chrysler Corp*, 467 Mich 144, 155-158; 648 NW2d 624 (2002).

The term "disability" is defined for purposes of the Worker's Disability Compensation Act, MCL 418.101 *et seq.*, in subsection 301(4). The first sentence of that subsection states that a "disability" is "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease." MCL 418.301(4). The second sentence of subsection 301(4) provides that "[t]he establishment of disability does not create a presumption of wage loss." MCL 418.301(4).

In *Sington, supra* at 156, in discussing the import of the first sentence, our Supreme Court opined that it "is not enough for the claimant claiming partial disability to show an inability to return to the same or similar work." According to the Court, "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." *Id.* at 155. The Court emphasized that "disability," as defined in section 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." *Id.* at 158.

The Court further opined that only where the employee is no longer able to perform *any* of the jobs that pay the maximum wages, given the employee's training and qualifications, is a disability established under subsection 301(4). *Sington, supra* at 157. "[T]he language of § 301(4) requires a determination of overall, or in other words, maximum, wage earning capacity in all jobs suitable to an injured employee's qualifications and training." *Id.* at 159. Applying the definition of "disability" to the facts before it, the Court ruled that "[i]n 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." *Id.* at 165. Finally, the Court instructed that the magistrates and the WCAC may have

to consider a number of factors when determining whether an employee is disabled, including, but not limited to, “the particular work that an employee is both trained and qualified to perform, whether there continues to be a substantial job market for such work, and the wages typically earned for such employment in comparison to the employee’s wage at the time of the work-related injury.” *Id.* at 157.

In addressing the import of the second sentence of subsection 301(4), that “[t]he establishment of disability does not create a presumption of wage loss”, MCL 418.301(4), the Court offered the following illustration:

For example, an employee might suffer a serious work-related injury on the last day before the employee was scheduled to retire with a firm intention to never work again. In such a circumstance, the employee would have suffered a disability, i.e., a reduction in wage earning capacity, but no wage loss because, even if the injury had not occurred, the employee would not have earned any further wages. [*Sington, supra* at 160-161.]

The WCAC’s conclusion that plaintiff is disabled under the standards announced in *Sington* is the product of erroneously applied legal reasoning and is unsupported by the factual record. Under *Sington*, an employee’s limitation in his or her wage earning capacity in work suitable to his or her qualifications and training must be attributable to a work-related injury. *Sington, supra* at 165. One of the factual matters to consider when making a disability determination is whether there continues to be a substantial job market for the work for which the employee is both trained and qualified. *Id.* at 157. Here, the record establishes that the piecework job that plaintiff held in the 1980s, at which she earned \$15 to \$17 an hour, has not existed since the 1980s. There is no evidence in the record that there is any market, let alone a substantial job market, for such work at present. Accordingly, the piecework job has no relevance for purposes of establishing plaintiff’s maximum wage earning capacity. Furthermore, although the evidence demonstrated a link between plaintiff’s injury and her loss of the opportunity to work in other cells within defendant’s plant, there was no showing that plaintiff would earn a greater hourly wage if she worked in any other cell. Moreover, although plaintiff demonstrated that she had lost significant earning capacity, as reflected by her loss of overtime work, the evidence demonstrates that this loss of earning capacity is not attributable to her injury, but to the changing fortunes and efficiencies of the automotive industry and the terms of her union contract. Finally, plaintiff now earns approximately \$2 more an hour in her current position, which establishes that her current position realizes her maximum wage earning capacity. Under these circumstances, plaintiff’s work-related injury has had no adverse impact on her maximum wage earning capacity. Plaintiff is not disabled under *Sington*.

In light of the above conclusion, we decline to address defendants’ remaining issue on appeal.

Reversed.

/s/ Kirsten Frank Kelly

/s/ Michael J. Talbot

/s/ Bill Schuette