2008 ACO # 45

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

SERENA PLUMMER,
PLAINTIFF,

V DOCKET #07-0228

S & L ASSOCIATES, INCORPORATED,
UNINSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE GUYTON.

DAVID R. BERNDT FOR PLAINTIFF,
BENJAMIN J. WHITE FOR DEFENDANT.

OPINION

WILL, COMMISSIONER

The current claim was initiated by an Application for Mediation or Hearing filed by plaintiff on September 19, 2005. Plaintiff claimed three dates of injury wherein she received injuries to her back. Those dates were August 2, 2004, February 24, 2005 and August 18, 2005. On March 17, 2007 she amended her application to claim the last injury occurred on August 17, 2005 rather than August 18, 2005.

The claim went to trial on July 13 and July 25, 2007 in front of Magistrate Carol R. Guyton. Plaintiff testified on her own behalf and the defendant presented the testimony of its office manager and of its president.

Plaintiff presented the May 15, 2007 deposition of Garrett Martin, M.D., her treating internal medicine specialist. The defendant did not produce any medical testimony.

In addition to the deposition of Dr. Martin, plaintiff offered as exhibits medical records from Henry Ford Fairlane, an MRI report, the February 7, 2005 driving log, a picture of a client in a wheelchair and an affidavit from the client's mother. All of these proposed exhibits were received into the record except for the affidavit. The defendant's only proposed exhibit, which was received into evidence, was a driving log for various dates in August 2005.

In a decision mailed September 20, 2007, the magistrate gave plaintiff an open award. The magistrate devoted page three of her decision through the top of page seven thereof, summarizing the testimony offered. Neither party finds fault with this summary and our reading of the record disclosed that the magistrate's summary is excellent. Accordingly, pursuant to MCL 418.861a(10), we adopt the magistrate's summary as our own.

The magistrate completed her decision with her findings of facts and conclusions of law which she labeled as Findings. These findings included the following:

> To prove entitlement to workers' compensation, a claimant must establish each and every element of her case by a preponderance of the evidence. She must prove she sustained a personal injury that arose out of and in the course of her employment, Section 301(1) of the Act.
>
> Plaintiff has asserted that she sustained three back injuries while working as a driver for defendant. Defendant operates a service that transports clients to medical appointments. Plaintiff testified the first injury occurred on August 2, 2004 when she was on her way to pick up her first client. She was rear-ended while making a left-hand turn. She hit her head; hurt her shoulder, and the middle of her back. She reported the accident. She was off work a day or two. A police report was made. The second injury occurred on February 24, 2005 when she was lifting a wheelchair into the trunk of the car. Her back snapped, which caused disability for a week or two. She reported the injury to someone in the office. The third injury occurred on August 17, 2005, when she was again putting a client's wheelchair into the trunk. It was her second or third stop of the day. She was not sure if she completed the shift. She said she notified the dispatch person about her injury, but was advised there was no one to cover her shift. The next day, she called in sick and has not returned to work. When she spoke with defendant on August 18, 2005, she said her back was hurting and she was going to the ER.
>
> The main issue in this case is whether plaintiff sustained an injury at work and the extent of any associated disability. Defendant has asserted plaintiff would not have been required to lift a wheelchair, so her back problem was not caused by her employment. Based on the evidence presented, I find plaintiff has shown, by a preponderance of the evidence, that she sustained a work-related back injury on August 17, 2005.
>
> The medical history, as a whole, supports plaintiff's testimony. Plaintiff was seen at Henry Ford Fairlane on August 18, 2005 and August 23, 2005, Exhibit 2. On August 18, 2005, she reported right-sided back pain that had started the day before. There was no history of an injury. However, the timeline is consistent with her testimony. On the follow-up visit, August 23, 2005, she attributed the problem to lifting at work. She was kept off work and diagnosed with having an acute lumbar strain. She was not able to obtain further medical treatment until she obtained Medicaid benefits. She saw Dr. Garrett Martin on

September 16, 2005. Dr. Martin's notes indicate plaintiff was suffering from low back pain that she attributed to a work-related injury.

On direct examination, plaintiff did not identify which client had the wheelchair or how much the wheelchair weighed. On rebuttal, she testified there were several clients who used wheelchairs that she loaded into the trunk. She identified the following clients as using a wheelchair or walker: Shakira Jones, Karen Whitley, Ruth Lancaster, Rosemary, Cathy Owen, and Harry Thomas. She provided a current picture of Shakira Jones, in her wheelchair, Exhibit 5. It appears to be a heavy mechanical wheelchair that plaintiff said she had to fold down. When she first mentioned the wheelchair, I envisioned it was a push style/collapsible wheelchair. The kind used by Ms. Jones certainly belonged in a van instead of a car. However, I accept that on plaintiff's route she occasionally encountered clients with wheelchairs. Instead of calling a van to pick them up, she put the wheelchair in the trunk and transported the client to their destination.

Peter Semaan, the president of S & L Associates, and Ernestine Culpepper, an office manager, testified that only ambulatory clients are assigned to the cars. Clients with wheelchairs are placed in a van. The van is equipped with a mechanical lift. Plaintiff only drove a car. It was not clear from their testimony how the schedulers knew who needed a wheelchair and who did not. A client's need could change mid-stream. Based on plaintiff's consistent description of occasionally transporting clients with wheelchairs, I accept her testimony as fact. Plus, Mr. Semaan considered her a fairly trustworthy employee.

Plaintiff has continued to treat with Dr. Martin. An MRI performed October 9, 2005 shows she has a central disc herniation at L5-S1 with pressure on the subarachnoid space and pressure on the nerve roots. There is also a disc bulge with some degeneration at L4-5, Exhibit 3. An electroneuromyography, performed on or around October 18, 2006, was normal, Medical records attached to Exhibit 1. Dr. Martin related plaintiff's back problems to the lifting incident at work where she felt a pop in her back. Dr. Martin was informed that plaintiff's job involves a good deal of fairly heavy lifting, twisting, turning, bending, and stooping. (This is not an accurate description of plaintiff's job). He did not think plaintiff could perform that type of work. He did think plaintiff could drive a vehicle. She cannot sit all day in a vehicle. However, if accommodations were made where she could stop and rest and get out of the vehicle, he thought she could possibly do a driving job. She would not be able to lift people.

Upon reviewing the medical testimony presented, I find plaintiff is unable to do the driving job at defendant's. I am not convinced the job is as heavy as plaintiff described. Defendant says she did not have to lift wheelchairs. It appears her actual job involved mostly driving. She took it upon herself to transport clients with wheelchairs. However, she could call a van for them instead. Dr. Martin seems to think plaintiff could do a part-time driving job, with accommodations that would allow her to rest. Plaintiff's regular job could

conceivably be from 6 AM to 6 PM. It could involve many periods of rest or very few rest periods. As of the trial date, there was no firm or specific job offer for accommodated work, *Price v City of Westland,* 451 Mich 329 (1996). Thus, plaintiff is entitled to ongoing wage loss benefits.

To receive wage loss benefits, plaintiff must show a limitation in her earning capacity in work suitable to her qualifications and training resulting from the work-related injury, Section 301(4) of the Act. Plaintiff's work restrictions include no lifting over 15 pounds and no sitting for eight hours a day. Throughout plaintiff's employment, she held various unskilled jobs. She worked in a slaughter house where she cut up chickens on an assembly line, she worked in the kitchen at a nursing home, and she worked as a waitress at Big Boy's. She has also performed light industrial jobs, where she sorted and packed parts. Most of these jobs involved a lot of standing and some lifting. The job where plaintiff made her highest wage was a sit-down factory job. There was no indication this job would allow her to take periodic breaks. Plaintiff testified she is disabled from all these jobs. Dr. Martin's testimony supports that it would be difficult for plaintiff to do a job that involves standing or sitting all day. There is no indication that plaintiff has looked for post-injury employment. There is no indication that work is available within plaintiff's qualifications and training that would accommodate her work-related restrictions. Thus, plaintiff has demonstrated a limitation in her maximum earning capacity.

Plaintiff described two other work-related back injuries that appeared to be rather minor. The first occurred on August 2, 2004. She said she was involved in an auto accident. There was no compensable lost time from work and there was no indication plaintiff received any medical treatment. For the February 24, 2005 injury, plaintiff said she hurt her back lifting another wheelchair. She said she was off work a week or two. The driving logs seemed to indicate she worked on February 25, 2005. No medical was provided to substantiate treatment or disability. It is clear from Dr. Martin's testimony that he related her current back problems to the August 17, 2005 injury.

There is no indication that plaintiff promptly reported the August 17, 2005 injury directly to Mr. Semaan or Ms. Culpepper; however, the petition was filed on September 19, 2005, which provided defendant appropriate notice of a potential injury.

The Form B filed by University Neurologic Surgeons is dismissed. No proofs were offered about the work relationship of this treatment or whether it was reasonable and necessary. [Magistrate's opinion, pp 8-10.]

As indicated above the magistrate's decision was mailed on September 20, 2007. On October 10, 2007 defendant filed a claim for review. On December 5, 2007 defendant filed its brief on appeal raising a single issue:

ARGUMENT - RESPONDENT-APPELLANT IS NOT DISABLED FROM WORKING AS INDICATED BY HER DOCTOR AND BASED UPON HER TESTIMONY.

Defendant began its brief on appeal by incorporating the magistrate's factual findings as its statement of facts, believing that they closely indicate the testimony at trial. We believe that defendant's intent, in so arguing, was to accept the magistrate's summary of the evidence because the balance of defendant's brief reads as follows:

MAGISTRATE'S FINDINGS

The Magistrate found that the Plaintiff was entitled to workers compensation because she proved she sustained a personal injury that arouse out of her employment pursuant to 418.301(1) of the Act. The injury that was allegedly proven occurred on August 17, 2005 when the Plaintiff was lifting a wheelchair into the trunk of a car. She alleged that she injured her back previously doing essentially the same thing. After the August 17th incident Plaintiff never returned to work.

The magistrate indicated the main issue was whether Plaintiff injured her back at work and the extent of any associated disability. Defendant indicated Plaintiff was not required to lift wheelchairs, so her back problem was not caused by her lifting wheelchairs. On direct examination Plaintiff could not identify which client had the wheelchair or how much it weighed. On rebuttal she testified there were several clients who used wheelchairs that she loaded into the trunk. Instead of calling for a van to pick these clients up she put their hardware into the trunk.

S & L President Peter Semaan and Office Manager Ernestine Culpepper testified that only ambulatory passengers are assigned to cars. Clients with wheelchairs are placed in vans equipped with a mechanical lift. Plaintiff only drove a car.

Dr. Martin was given an erroneous description of Plaintiff's job which he did not think she could perform. He did think Plaintiff could drive a vehicle, but she could not sit all day. He indicated if accommodations could be made where Plaintiff could stop, rest and get out of the vehicle, he thought she could possibly do a driving job. However, she would not be able to lift people. Dr. Martin believed that Plaintiff could do a part-time driving job with accommodations that would allow her to rest.

The magistrate found Plaintiff's job to be mostly driving and she could call vans to pick-up wheelchair clients. The Magistrate further found that since there was no firm or specific job offer for accommodated work; Plaintiff is entitled to ongoing wage loss benefits. Furthermore, the Magistrate noted Plaintiff is not seeking employment due to unavailability of work within her qualifications and training that would accommodate her work-related restrictions. The Magistrate concluded Plaintiff demonstrated a limitation in her maximum earning capacity.

Defendant disagrees with the Magistrate's conclusions based upon Plaintiff's and Dr. Martin's testimony in light of the very nature of Plaintiff's driving job at S & L Associates, Inc.

ARGUMENT

PLAINTIFF-APPELLEE HAS WORKED AND CAN CONTINUE TO WORK FOR HER EMPLOYER DESPITE HER PHYSICAL INJURY.

The trial testimony speaks for itself; plaintiff can work a driving job that allows her to stand up not sit all day, to rest and to not lift based upon Dr. Martin's testimony. Her current job never required her to sit all day, to lift and she has every opportunity to stand or rest while she waits for clients to complete their business, between pickups, break and lunch time. Plaintiff in essence already works part time while receiving eight hours pay. *Price v City of Westland*, 451 Mich 329 (1996) is inapplicable to this case, since Plaintiff is already able to take advantage of any accommodations the employer has to make. In this case there are none.

RELIEF REQUESTED

The Defendant requests this honorable court reverse the Magistrate Opinion or remand for appropriate proceedings or entry of the appropriate judgment. [Defendant's brief pp 1-4.]

On December 27, 2007 plaintiff filed her brief on appeal. On the same date she filed a motion for sanctions without a supporting affidavit. Defendant did not respond to this motion.

We will deal with plaintiff's motion for sanctions before deciding the merits of this appeal. The first four paragraphs of plaintiff's motion set forth the history of this claim through December 5, 2007, when the defendant's brief was filed.

Plaintiff concluded this motion thusly:

5. The Defendant-Appellant's brief on appeal is grossly lacking the requirements of propriety or grossly disregarding the requirement of a fair presentation of the issues presented on appeal. In fact, the brief presented by the Defendant-Appellant does not even contain a reference to the applicable standard on appeal or any reference to any transcript involved in this proceeding.

6. Accordingly, this claim for review filed by the Defendant-Appellant was file[d] for the purposes of hindrance or delay and without any reasonable basis for a belief there was a meritorious issue to be determined on appeal.

> WHEREFORE, your Plaintiff-Appellee respectfully requests that this Honorable Tribunal find that the claim for review and supporting brief on appeal is vexatious pursuant to MCL 418.861b, thereby awarding the appellee costs.

Having read defendant's brief on appeal and the plaintiff's motion for sanctions, we deny sanctions because essentially the defendant, by implication, has argued that the magistrate's decision is unsupported by competent, material and substantial evidence. We also note that plaintiff has not made a request for specific sanctions in terms of a dollar amount.

In so determining we note that MCL 418.861b provides:

> The commission, upon its own motion, or the motion of any party, may dismiss a claim for review, assess costs, or take other disciplinary action when it has been determined that the claim or any of the proceedings with regard to the claim was vexatious by reason of either of the following:
>
> (a) That the claim was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was meritorious issue to be determined on appeal.
>
> (b) That any pleading, motion, argument, petition, brief, document, or appendix filed in the cause or any testimony presented in the cause was grossly lacking in the requirements of propriety or grossly disregarded the requirements of a fair presentation of the issues.

We are not convinced that defendant's appeal is vexatious under either (a) or (b) as set forth above.

Having ruled against plaintiff on her motion we return to the merits of this appeal and affirm the decision of the magistrate, believing that the magistrate has set forth in her decision a logical basis for her award. In this connection we believe that she has done an excellent job of setting forth all of the evidence that she found credible to establish a firm foundation for the open award she gave. The decision itself demonstrates the magistrate's understanding of the evidence presented and the applicable law.

On the other hand, in the defendant's brief we do see an honest attempt to describe a path that a magistrate could take to deny benefits if the magistrate did not find plaintiff to be credible. In this connection the magistrate found plaintiff sufficiently credible to grant her the open award. In so holding she noted that she did find some weakness in plaintiff's credibility. The magistrate is certainly free to finding a claimant sufficiently credible for an open award but at the same time give her a "verbal bouquet" by saying she is "not convinced the job is as heavy as plaintiff described." See *Isaac v Masco Corporation*, 2004 ACO #81.

We are concerned that defendant did not discuss the Commission's standard of review in terms of conclusions of law and findings of fact discussing the statutory language and court

decisions that are applicable in the appellate process. The defendant of course should have cited specific transcript portions where the defendant believes evidence contained therein supports its position.

Where the appealing party fails to carry out the above discussed tasks, that parties chances on appeal are diminished if not extinguished. As indicated above, we have denied sanctions in this case because we do not see a clear violation of Section 861(b) and plaintiff has made no specific request for monetary relief. One sanction listed in the statutory language is dismissal of the appeal and we are affirming the open award. In this connection, the motion for sanctions was filed on December 27, 2007 and this decision was drafted in January 2008.

The plaintiff filed an affidavit and motion to dismiss, received January 10, 2008. In her affidavit, the plaintiff indicated she had not received any weekly benefits since approximately December 7, 2007. The defendant filed a response to the motion, received January 15, 2008, acknowledging 70% benefits were not paid since December 7, 2007. Without an accompanying affidavit, defense counsel represents to us that the "problem was corrected" and that he was not aware of the problem until the motion was filed.

Admitting the defendant violated the order, but did not bother to tell defense counsel, is not sufficient to ward off a dismissal for failure to pay 70% benefits. If the defendant had filed an affidavit that it had fully complied, given the relatively short time frame it violated the order, we could deny the motion to dismiss. However, the defendant's response does not include an affidavit and we do not know what defense counsel means when he says the "problem was corrected." Does the defendant's answer mean all the past benefits have been paid, with interest, and that the defendant is current on its obligations? Or does he mean the defense attorney has explained the situation to his client and the defendant acknowledged it intends to comply with the order?

Because the defendant violated MCL 418.862 by failing to pay 70% benefits timely and because the answer to the motion to dismiss failed to include the appropriate affidavit, we agree it is appropriate to dismiss the defendant's appeal. MCL R 418.74.

Conclusion

The decision of the magistrate is affirmed. Her decision is supported by competent, material and substantial evidence on the whole record and contains no legal error. Plaintiff's motion for sanctions is denied. Plaintiff's motion to dismiss defendant's appeal is granted.

Commissioners Grit and Przybylo concur.

Rodger G. Will	Commissioner
Donna J. Grit	Commissioner
Gregory A. Przybylo	Commissioner

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

SERENA PLUMMER,
PLAINTIFF,

V DOCKET #07-0228

S & L ASSOCIATES, INCORPORATED,
UNINSURED,
DEFENDANT.

This cause came before the Appellate Commission on a claim for review filed by defendant from Magistrate Carol R. Guyton's order, mailed September 20, 2007, granting an open award of benefits. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be affirmed and that defendant's appeal should be dismissed. Therefore,

IT IS ORDERED that the magistrate's order is affirmed and defendant's appeal is dismissed.

IT IS FURTHER ORDERED that plaintiff's motion for sanctions is denied.

Rodger G. Will Commissioner

Donna J. Grit Commissioner

Gregory A. Przybylo Commissioner