STATE OF MICHIGAN

COURT OF APPEALS

ANNIE SWINTON, Plaintiff-Appellee,	UNPUBLISHED October 7, 2008
v	No. 280135 WCAC
MICHIGAN STATE UNIVERSITY, Defendant-Appellant.	LC No. 06-000103

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

Defendant Michigan State University (MSU) appeals by leave granted the decision of the Worker's Compensation Appellate Commission (the Commission), which affirmed a magistrate's order granting plaintiff Annie Swinton a closed award of benefits for a work-related psychological condition. Because we conclude that the Commission misapplied the applicable law to the facts of this case, we reverse the Commission's decision to affirm and remand for further proceedings. This appeal has been decided without oral argument under MCR 7.214(E).

Swinton alleged in the underlying proceedings that she suffered a continuing injury beginning on June 19, 2003, arising from repeated harassment by her supervisor in the course of her employment with MSU that caused, aggravated, or accelerated emotional sequelae. The magistrate found that Swinton had shown by a preponderance of the evidence that she suffered a work-related psychiatric condition that was significantly contributed to by actual events of her employment. The magistrate also found that Swinton had established that she was disabled under *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), and granted her a closed award of benefits for the period extending from June 20, 2003 to July 13, 2004. The Commission then affirmed the magistrate's award.

Our review of the Commission's decision is 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 [Commission] are conclusive on appeal, absent fraud, if there is any competent supporting evidence in the record, but a decision of the [Commission] is subject to reversal if the [Commission] 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 Commission. *Mudel*, *supra* at 697 n 3.

MSU first argues that the Commission misapplied the test stated in *Robertson v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002).

MCL 418.301(2) provides in pertinent part that "[m]ental disabilities … shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof." To establish the existence of a compensable mental disability and to satisfy the second sentence of § 301(2),

> a claimant must demonstrate: (a) that there has been an actual employment event leading to his disability, that is, that the event in question occurred in connection with employment and actually took place; and (b) that the claimant's perception of such actual employment event was not unfounded, that is, that such perception or apprehension was grounded in fact or reality, not in the delusion or the imagination of an impaired mind. [*Robertson, supra* at 752-753.]

This test is objective. *Id*. at 754. To determine "whether actual events occurred and whether a claimant's perceptions were 'founded,' the factfinder must assess the factual circumstances in terms of how a reasonable person would have viewed them." *Id*. at 754-755.

> Thus, in applying the proper statutory test, the factfinder must first determine whether actual events of employment indeed occurred. Then, in analyzing whether a claimant's perception of the actual events of employment had a basis in fact or reality, i.e., the claimant's perception was "founded", the factfinder must apply an objective review by examining all the facts and circumstances surrounding the actual employment events in question to determine whether the claimant's perception of such events was reasonably grounded in fact or reality. [*Id.* at 755.]

MSU does not dispute that the actual events of employment occurred, that is, that Swinton's supervisor denied her permission to attend a conference and withdrew her authority to hire student assistants. Rather, MSU asserts the Commission failed to determine whether Swinton's perception of the actual events was, under an objective standard, reasonably grounded in reality.

The Commission essentially adopted the magistrate's findings with regard to the reasonableness of Swinton's perceptions. But the magistrate misapplied the *Robertson* test. The question was not whether Swinton accurately perceived the actual happening of the events, as the magistrate concluded, but whether Swinton's perception of her supervisor's actions as racist, vindictive, and motivated by animus toward her was reasonably grounded in fact. See, e.g., *Wolf v General Motors Corp*, 262 Mich App 1, 7; 683 NW2d 714 (2004) ("The second prong of the *Robertson* test requires an objective review of all the facts surrounding the employment events to determine whether plaintiff's perception of the coworker's behavior as 'humiliating,' and the production standards as 'stressful', was reasonably grounded in fact."). The magistrate made no objective review of the facts surrounding the employment events to determine whether Swinton's perception of her supervisor's actions was reasonably grounded in fact. Indeed, the magistrate expressly declined to make a ruling regarding whether the actions could be viewed as motivated by racial animus. Hence, the decision of the magistrate is the product of a flawed application of

Robertson. Likewise, the Commission, by adopting the flawed findings and reasoning of the magistrate and by failing to engage in a qualitative and quantitative review of MSU's challenge, misapplied *Robertson*.

MSU also correctly observes that any disability Swinton may have experienced ended as of November 24, 2003. Swinton's psychologist released Swinton to return to work as of that date, with the restrictions that MSU not return her to the same work setting or to the supervision of her former supervisor. MSU refused to allow her to return to work until its doctor determined that Swinton was not a danger to other employees or her former supervisor, which has not happened. Swinton indicated that she would return to work if MSU would honor her restrictions. As our Supreme Court emphasized in *Sington, supra* at 158, "disability," as defined in MCL 418.301, "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." The testimony in this case demonstrates that Swinton possessed the capacity to earn her maximum wages as of November 24, 2003, the date her psychiatrist permitted her return to work. The Commission's conclusion to the contrary is not supported by the "any evidence" standard. Hence, any disability award made on remand should be closed as of November 24, 2003.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher