2013 ACO # 1

S T A T E O F M I C H I G A N
MICHIGAN COMPENSATION APPELLATE COMMISSION

RICHARD L. BARCLAY,
PLAINTIFF,

V DOCKET #08-0161

GENERAL MOTORS CORPORATION,
SELF INSURED,
DEFENDANT.

AFTER REMAND TO MAGISTRATE MASON.

MICHAEL P. DOUD FOR PLAINTIFF,
CARSON J. TUCKER FOR DEFENDANT.

OPINION

PRZYBYLO, COMMISSIONER

This matter returns to the Appellate Commission following a second remand to the Board of Magistrates that required additional analysis of the disability and wage loss issues. The remand further instructed that the parties had the opportunity to present additional proofs. They declined. Therefore, Magistrate Mason issued a supplemental opinion, mailed June 4, 2012, that utilized the existing record. Addressing the June 4, 2012, supplemental opinion, defendant argues that the decision failed to follow the remand directive. We agree.

LAW

When assessing a magistrate's disability or wage loss determinations, we examine several recent changes in the law. Interpreting the definition of disability from MCL 418.301(4), the Michigan Supreme Court reversed prior decisions in *Sington v Chrysler Corporation*, 467 Mich 144 (2002). Responding to *Sington*, the Appellate Commission issued numerous decisions explaining its understanding of plaintiff's burden to prove disability and wage loss. However, in *Stokes v DaimlerChrysler Corporation*, 2006 ACO #24, the Appellate Commission issued an en banc decision reversing its position on plaintiff's burden of proof and altering its view of wage loss. The Michigan Supreme Court stayed the Appellate Commission's opinion until the resolution of the appellate process. Then, the Court of Appeals issued its 2-1 decision in *Stokes*, 272 Mich App 571 (2006). That decision again altered the parties' obligations and introduced the concept of plaintiff proving a prima facie case. Then, the Supreme Court reversed. *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

The multiple changes in legal standards concerning disability created an impossible situation for litigants. They could not make an informed decision about the evidence to introduce at the hearing. Under *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997), the decisions were simple. Plaintiff introduced proof that he could not perform any single job and proof that his injury caused his wage loss. Then, defendant introduced proofs that plaintiff could perform other jobs. *Sington* changed that, but did not create a clear mandate about what proofs would satisfy the new standard. Since *Sington*, the parties have been subject to a constantly changing mandate. In short, we keep moving the target. In some cases, the standard changed three times between plaintiff's filing and the actual hearing. In fact, the Supreme Court addressed the inconsistent application of the *Sington* standard in its *Stokes* decision. These constant changes prevent a fair process and require a remand in almost every case.

In *Stokes*, the Supreme Court then reversed the Court of Appeals and provided clear guidelines for future cases. In so doing, the decision specifically states that certain Appellate Commission decisions accurately reflect the *Sington* standard, but criticized the abandonment of the standard when analyzing cases. The Supreme Court *Stokes* decision also mandates discovery, including vocational rehabilitation expert interviews with plaintiff. Finally, the decision outlines plaintiff's obligations when proving disability. It states:

> First, the injured claimant must disclose his qualifications and training. This includes education, skills, experience, and training, whether or not they are relevant to the job the claimant was performing at the time of the injury. It is the obligation of the finder of fact to ascertain whether such qualifications and training have been fully disclosed.
>
> Second, the claimant must then prove what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. *Sington*, *supra* at 157. The statute does not demand a transferable-skills analysis and we do not require one here, but the claimant must provide some reasonable means to assess employment opportunities to which his qualifications and training might translate. This examination is limited to jobs within the maximum salary range. There may be jobs at an appropriate wage that the claimant is qualified and trained to perform, even if he has never been employed at those particular jobs in the past. *Id*. at 160. The claimant is not required to hire an expert or present a formal report. For example, the claimant's analysis may simply consist of a statement of his educational attainments, and skills acquired throughout his life, work experience, and training; the job listings for which the claimant could realistically apply given his qualifications and training; and the results of any efforts to secure employment. The claimant could also consult with a job-placement agency or career counselor to consider the full range of available employment options. Again, there are no absolute requirements, and a claimant may choose whatever method he sees fit to prove an entitlement to workers' compensation benefits. A

claimant sustains his burden of proof by showing that there are no reasonable employment options available for avoiding a decline in wages.

We are cognizant of the difficulty of placing on the claimant the burden of defining the universe of jobs for which he is qualified and trained, because the claimant has an obvious interest in defining that universe narrowly. Nonetheless, this is required by the statute. Moreover, because the employer always has the opportunity to rebut the claimant's proofs, the claimant would undertake significant risk by failing to reasonably consider the proper array of alternative available jobs because the burden of proving disability always remains with the claimant. The finder of fact, after hearing from both parties, must evaluate whether the claimant has sustained his burden.

Third, the claimant must show that his work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages. *Id*. at 158.

Fourth, if the claimant is capable of performing any of the jobs identified, the claimant must show that he cannot obtain any of these jobs. The claimant must make a good-faith attempt to procure post-injury employment if there are jobs at the same salary or higher that he is qualified and trained to perform and the claimant's work-related injury does not preclude performance.

Upon the completion of these four steps, the claimant establishes a prima facie case of disability. The following steps represent how each of the parties may then challenge the evidence presented by the other.

Fifth, once the claimant has made a prima facie case of disability, the burden of production shifts to the employer to come forward with evidence to refute the claimant's showing. At the outset, the employer obviously is in the best position to know what jobs are available within that company and has a financial incentive to rehabilitate and re-employ the claimant.

Sixth, in satisfying its burden of production, the employer has a right to discovery under the reasoning of *Boggetta* if discovery is necessary for the employer to sustain its burden and present a meaningful defense. Pursuant to MCL 418.851 and MCL 418.853, the magistrate has the authority to require discovery when necessary to make a proper determination of the case. The magistrate cannot ordinarily make a proper determination of a case without becoming fully informed of all the relevant facts. If discovery is necessary for the employer to sustain its burden of production and to present a meaningful defense, then the magistrate abuses his discretion in denying the employer's request for discovery. For example, the employer may choose to hire a vocational expert to challenge the claimant's proofs. That expert must be permitted to interview the claimant and present the employer's own analysis or assessment. The employer may be able to demonstrate that there are actual

> jobs that fit within the claimant's qualifications, training, and physical restrictions for which the claimant did not apply or refused employment.
>
> Finally, the claimant, on whom the burden of persuasion always rests, may then come forward with additional evidence to challenge the employer's evidence. [*Stokes* at 281-284, footnote omitted.]

The Supreme Court in *Stokes v Chrysler LLC*, 481 Mich 266 (2008), reiterated that plaintiff must prove wage loss. While the Workers' Disability Compensation Act clearly defines wage loss in MCL 418.471, the courts have interpreted wage loss differently. In *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997), the Court required plaintiff to prove that he suffered an actual loss of wages after a work injury and that the work injury caused the subsequent wage loss. While the *Sington* Court overruled the *Haske* interpretation of disability, it upheld the need for plaintiff to prove wage loss. Further, the Court in *Sington* failed to offer any different interpretation of the wage loss requirement. In *Stokes* the Court of Appeals did not address wage loss other than expressly vacating the Appellate Commission majority view of wage loss. Finally, the Supreme Court *Stokes* decision mandates that plaintiff prove wage loss, but did not expound further. After *Stokes*, the Court of Appeals verified the viability of the *Haske* wage loss interpretation in *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1 (2008). Thus, we must apply the two-part *Haske* requirement. We explored the intricacies of the wage loss issues in *Epson v Event Staffing, Inc*, 2009 ACO #152. In that case, we recapitulated the law and firmly reiterated the requirement to follow both *Haske* and *Romero*. We issued the opinion as an en banc decision to eliminate any previous confusion emanating from our prior opinions.

However, several former Appellate Commission members refused to follow the majority opinion in *Epson*. Those members continued to insist that the Act contained no requirement that a plaintiff prove wage loss. The members included those statements in the majority opinion in *Harder v Castle Bluff Apartments*, 2010 ACO #77. In response, the Michigan Supreme Court issued an order that specifically rejected that opinion. In fact the Court issued several additional orders specifying the requirement to prove wage loss and to calculate benefit rates that provide credit for wages that injured workers are able to earn in accordance with MCL 418.361(1).

Respecting the Court's directive, we must include some guidance that will allow the parties to address this interpretation of wage loss as it pertains to benefit calculation. In addition to the Court's notation of § 361(1), benefit calculation actually begins with the provisions in MCL 418.371. Section 371 precisely sets the maximum benefit rate. According to that section the benefit rate must not exceed the difference between the average weekly wage at the time of the injury and the wage earning capacity after the injury in the same or other employments. This precise language has evaded interpretation since its inception more than thirty years ago. However, when coupled with the Court's current interpretation of wage earning capacity and the directive from *Harder*, we understand that the benefit cap calculation includes the wage earning capacity from all jobs suitable to plaintiff's qualifications and training beyond the jobs that pay the maximum.

With that understanding, we look to *Stokes* for guidance as we attempt to establish a method for determining the wage earning capacity in all employments that are suitable to plaintiff's qualifications and training. Following the *Stokes* multi-step process allows each party to present evidence that meets the approval of the Court. This, presumably, would also reduce remands because the Court has endorsed this method for establishing post-injury wage earning capacity. Therefore, we endorse the *Stokes* process to determine wage earning capacity to calculate wage loss.

When an injured employee retains a wage earning capacity, but has not actually worked in the job, MCL 418.371(5) directs that the average weekly wage for that job is determined by the usual wage for similar services. Again the *Stokes* proofs normally would provide that information.

Finally, MCL 418.361(1) contains the actual calculation formula, as informed by MCL 418.313. Section 361(1) requires computation of 80% of the after tax average weekly wage for both the injury job and the jobs that the claimant retains an earning capacity. However, the director of the Agency, according to § 313, must publish tables annually that conclusively establish those numbers based on average weekly wages. Using the numbers from the table, the benefit rate equals the number for the injury job less the number for the post-injury jobs where plaintiff retains an earning capacity.

APPLICATION

We find the various magistrates' decisions lack the essential findings required to determine plaintiff's eligibility for benefits as well as the correct benefit rate. The current legal standards clearly require very specific findings based on the record evidence. The first of these findings defines the universe of jobs suitable to plaintiff's qualifications and training at the time of his injury. This finding consists of a list of jobs. To date, no magistrate has constructed the list. This list provides the foundation for other findings. Importantly, this list will never change, and as such, serves as a foundation for future disagreements about disability and wage loss.

From the list of jobs suitable to plaintiff's qualifications and training, the current standard requires a finding of those jobs that plaintiff's work-related mental or physical impairment allows him to continue performing. Because the impairment may fluctuate, the analysis must address those fluctuations. For example, plaintiff's treating physician may severely restrict activities during recuperation periods, but alter those restrictions after convalescence. These fluctuations change the list of jobs plaintiff can perform. Again, this step is not a part of any analysis to date.

The next step further concentrates the job list to those jobs that are: 1) suitable to plaintiff's qualifications and training; 2) within plaintiff's work related restrictions; and additionally 3) available to plaintiff. This step routinely involves vocational job surveys and plaintiff directed job searches. This step is glaringly missing from the analyses. To adequately address this step, a magistrate must consider fluctuations in the evidence for the entire time of claimed disability. For example, a vocational expert may perform a job market survey that only examines the job market during a specific week. Or, as in this case, plaintiff may exhibit varying degrees of tenacity when

looking for work. Again those fluctuations alter the list of jobs that are available. Only when plaintiff proves that no suitable, restriction-compliant jobs are available can the magistrate order full benefits.

Finally, if the only available jobs pay less than the maximum, the magistrate must then follow the *Harder* standard and compute a partial rate of wage loss benefits.

CONCLUSION

Therefore, we remand for completion of the disability and wage loss analysis. The magistrate shall not allow any additional proofs. We do not retain jurisdiction. Because we do not retain jurisdiction, the magistrate must issue a new order that identifies the appropriate benefit rate.

Commissioners Goolsby and Owczarski concur.

Gregory A. Przybylo	Commissioner
Garry Goolsby	Commissioner
Lester A. Owczarski	Commissioner

STATE OF MICHIGAN
MICHIGAN COMPENSATION APPELLATE COMMISSION

RICHARD L. BARCLAY,
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GENERAL MOTORS CORPORATION,
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DEFENDANT.

This matter returns to the Appellate Commission after second remand on a claim for review filed by defendant from Magistrate Rosemary Wolock's order, mailed May 20, 2008, granting an open award of benefits. The Commission, by 2009 ACO #30, remanded this matter to the magistrate for a supplemental opinion. Magistrate Wolock issued an opinion on remand, mailed January 31, 2011. The Commission, by 2012 ACO #3, remanded this matter for the second time to the magistrate for a supplemental opinion. Magistrate Michael J. Mason issued an opinion on second remand, mailed June 4, 2012. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be remanded. Therefore,

IT IS ORDERED that the magistrate's order is again remanded for the completion of the disability and wage loss analysis. The magistrate shall not allow any additional proofs. We do not retain jurisdiction. Because we do not retain jurisdiction the magistrate must issue a new order that identifies the appropriate benefit rate.

Gregory A. Przybylo Commissioner

Garry Goolsby Commissioner

Lester A. Owczarski Commissioner