

STATE OF MICHIGAN
MICHIGAN COMPENSATION APPELLATE COMMISSION

ROBERT A. COLE,
PLAINTIFF,

V

DOCKET #12-0137

CONSUMERS ENERGY COMPANY,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE SLATER.

FREDERICK W. BLEAKLY FOR PLAINTIFF,
MARTIN L. CRITHCELL FOR DEFENDANT.

OPINION

PRZYBYLO, COMMISSIONER

Defendant appeals the decision of Magistrate Chris D. Slater, mailed November 26, 2012, granting plaintiff benefits for his neck injury. Supporting its appeal, defendant alleges that the magistrate misapplied the disability standard. In addition, defendant argues that the magistrate failed to properly apply the benefit exclusion from MCL 418.361(1). Defendant also argues that the magistrate inappropriately applied the new statutory standard for reasonable employment instead of the standard applicable on the date of injury. We remand for additional proceedings and analysis.

FACTS

Plaintiff testified that in the four years prior to 2010, he embezzled funds from his union. Plaintiff discussed the matter with his union prior to February 2010 and offered to compensate the union for any wrongdoing. In fact, in early 2010, the union held a formal reading of the charges against plaintiff. Following the union investigation, a criminal investigation transpired. Eventually plaintiff pled guilty to three felony charges. Plaintiff was sentenced in December 2011.

After plaintiff began embezzling funds in 2006, he was injured at work. In October 2006, plaintiff suffered an injury to his cervical spine. After surgery, plaintiff returned to work without restrictions in May 2007. On February 28, 2010, plaintiff slipped and fell at work, causing

further injury to plaintiff's cervical spine. By June 2010, plaintiff's doctor restricted him from performing certain physical components necessary to execute job assignments.

LAW

The Worker's Disability Compensation Act requires the Appellate Commission to perform two essential functions when reviewing a magistrate's decision under two entirely different standards. First we examine the magistrate's fact findings under the substantial evidence standard. We must review the entire record. MCL 418.861a(4). The review must include both a qualitative and quantitative analysis of the evidence. MCL 418.861a(13). After our review of the record, we must determine whether a reasonable person would find the evidence adequate to support the magistrate's findings. MCL 418.861a(3). We expounded on these statutory mandates in *Isaac v Masco Corporation*, 2004 ACO #81, where we wrote the following at page 5:

The magistrate's credibility determination is entitled to deference because the hearing officer has the opportunity to view and judge witnesses. Moreover, the magistrate is not obligated to deal with the credibility issue like a light switch, turning it either on or off.

The magistrate's choice of which medical expert opinion or opinions to adopt is within his or her discretion and we defer to that choice, if it is reasonable. The magistrate need not adopt expert opinions in their entirety but may give differing weight to different portions of testimony. And, although a magistrate may give preference to a treating expert's opinion, she need not do so. [Footnotes omitted.]

In addition to our review of the magistrate's fact findings, we also examine the magistrate's statements and applications of the law. We do so under a de novo standard.

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 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 Worker's Disability Compensation Act clearly defines wage loss in MCL 418.371, 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, Incorporated*, 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 plaintiff 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.

In addition to wage loss, § 361(1) requires an additional inquiry when an injured worker is unable to perform or unable to obtain work because he commits a crime or is imprisoned. That section reads as follows:

Sec. 361(1) While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.

Interpreting that last sentence of § 361(1), the Supreme Court offered some guidance in the plurality opinion in *Sweatt v Department of Corrections*, 468 Mich 172 (2003). In that case, Sweatt suffered a knee injury that prevented him from performing his job as a corrections officer. While off work, Sweatt was convicted of a crime. The conviction disallowed his return to work as a corrections officer. The Court determined that Sweatt was entitled to a benefit rate proportionate to the loss of earning capacity due to the work injury. However, the Court further determined that § 361(1) reduced Sweatt's benefits for the lost wage earning capacity attributable to his commission of a crime. Finally, all the justices agreed that the employer bore the burden of proof when evaluating the last sentence of § 361(1).

APPLICATION

We agree with defendant's argument that the magistrate failed to properly evaluate the disability, wage loss and commission of a crime components of the Act. Plaintiff's testimony established that he began committing the crime of embezzlement sometime in early 2006. Plaintiff concealed the commission of the crime from his employer and union. Plaintiff continued committing the crime for four years. Instead of exploring the impact of the commission of the crime, the magistrate only considered the impact of the felony convictions in his analysis. This violates the last sentence of § 361 which clearly mandates exploration of the impact of the commission of the crime as well as any imprisonment.

In addition, the magistrate erred when he failed to recognize that, *Stokes*, *Harder* and the lead opinion in *Sweatt* all require an evaluation of wage earning capacity. Before plaintiff suffered his first injury in 2006, he committed his first crime. Therefore, to properly analyze plaintiff's wage earning capacity at the time of either injury, the analysis needed to include an evaluation of whether embezzling funds impacts wage earning capacity. In other words, the magistrate failed to contemplate whether the commission of the crime changed plaintiff's wage earning capacity before the injury occurred. As *Sweatt* informs, identifying loss of wage earning capacity concerns both the disability question in § 301(4) and the commission of a crime question in § 361(1).

The magistrate did not explain the impact of plaintiff's commission of a crime when he evaluated plaintiff's disability. Under the second step of *Stokes*, the magistrate simply concluded that plaintiff's maximum wage earning capacity was \$44.04 per hour at the time of his second injury. That earning capacity evidenced the wage plaintiff earned as a plant control operator. The magistrate did not even mention the impact of plaintiff's commission of a crime. This was error. The plaintiff's ability to conceal his crime does not eliminate the impact on plaintiff's wage earning capacity. The magistrate's analysis also fails to recognize that the commission of the crime's potential to impact employability ceased to be in any sense theoretical before plaintiff suffered an injury in late February 2010. By the time of that injury, the commission of the crime embezzlement was known to his union, and perhaps more generally.

Likewise, the third and fourth steps of *Stokes* mandate that the plaintiff prove his injury prevents him from obtaining or performing jobs at his maximum wage earning capacity. This inquiry exactly parallels the last sentence of § 361. Again, because plaintiff committed the crimes before his disabling injury, the magistrate must consider whether the commission of a crime prevented plaintiff from performing or obtaining the jobs at his maximum wage earning capacity. We find that the ability to conceal either the crime or the conviction does not relieve the plaintiff's burden of showing it did not adversely impact his wage earning capacity. Again, the magistrate's analysis failed to recognize that before plaintiff suffered any injury in 2010, he had admitted to committing a crime, eliminating the possibility that the crime's impact on employability was in any sense hypothetical or inchoate.

Should plaintiff carry his burden of proof and prove a work-related disability, defendant then can seek to prove plaintiff's disentitlement to benefits under the last sentence of § 361(1). Under § 361(1), it is the defendant that must prove the loss of wage earning capacity related to the commission of a crime.

CONCLUSION

Therefore, we remand to the magistrate for additional proceedings. The magistrate may allow additional proofs at his discretion. We do not retain jurisdiction.

Commissioners Wyatt and Halm concur.

Gregory A. Przybylo Commissioner

George H. Wyatt III Commissioner

Patricia L. Halm Commissioner

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This cause came before the Appellate Commission on a claim for review filed by defendant from Magistrate Chris D. Slater's order, mailed November 26, 2012, 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 remanded to the Board of Magistrates. Therefore,

IT IS ORDERED that the magistrate's order is remanded to the magistrate for additional proceedings and analysis consistent with the attached opinion. We do not retain jurisdiction.

Gregory A. Przybylo Commissioner

George H. Wyatt III Commissioner

Patricia L. Halm Commissioner