

STATE OF MICHIGAN
MICHIGAN COMPENSATION APPELLATE COMMISSION

YAVONCA SCOTT,
PLAINTIFF,

V

DOCKET #11-0105

CHRYSLER LLC,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE LOGAN.

DARYL C. ROYAL FOR PLAINTIFF,
CARSON J. TUCKER FOR DEFENDANT.

OPINION

PRZYBYLO, COMMISSIONER

Plaintiff appeals and defendant cross-appeals the decision of Magistrate Beatrice B. Logan, mailed July 27, 2011, denying plaintiff wage loss benefits because she failed to prove that her wage loss was connected to her work injury. On appeal, plaintiff argues that the magistrate misunderstood the current wage loss standard. Defendant suggests that the magistrate properly applied the wage loss standard. We affirm.

FACTS

Plaintiff suffered from carpal tunnel syndrome caused by her work with defendant. Her condition required restrictions from certain activities. Plaintiff needed surgery. Following her surgery, plaintiff returned to work. The work caused plaintiff pain. Plaintiff complained to plant medical. Plaintiff was offered a buyout. She accepted the buyout on June 1, 2007. Plaintiff has not looked for work thereafter.

MAGISTRATE'S FINDINGS

The magistrate considered the impact of plaintiff's restrictions and her decision to accept the buyout. She wrote the following:

In the instant case, plaintiff was actively working, albeit with restrictions which were not honored, but nevertheless she was working until she accepted the buyout. Her last visit to plant medical with complaints of her hand hurting due to the work she was performing was on May 14, 2007. Plaintiff continued to work the job despite the problems with her hands. Her last day worked was June 1, 2007.

Haske v Transport Leasing, Inc., Indiana, 455 Mich 628 (1997), requires plaintiff to prove that she suffered an actual loss of wages after a work injury and the work injury caused the subsequent wage loss. Plaintiff sustained a work-related injury to her upper extremities, but there was no evidence that she refused work or stopped working due to her injuries. She stopped working because she accepted the buyout. Plaintiff testified she took the offered buyout because she was tired of her restrictions not being honored and she would have continued working if offered work within her restrictions. Nevertheless, she took the buyout while she was actively working. [Magistrate's opinion at 14.]

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, at page 5, where we wrote the following:

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*, 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 no error in the magistrate's conclusion that plaintiff's wage loss was caused by her voluntary acceptance of the buyout. The magistrate made a choice between two reasonable alternatives; plaintiff stopped working because of her work injury or because she voluntarily left her employment pursuant to the buyout. In reaching that conclusion the magistrate relied heavily on the fact that plaintiff did not stop working before her departure. This constitutes a reasonable resolution of conflicting evidence. We further note that plaintiff has not looked for work since her departure. This also strongly supports the conclusion that the wage loss was not caused by the work injury.

CONCLUSION

Therefore, we affirm.

Commissioners Owczarski and Smith concur.

Gregory A. Przybylo Commissioner

Lester A. Owczarski Commissioner

L'Mell M. Smith Commissioner

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This cause came before the Appellate Commission on a claim for review filed by plaintiff and a cross appeal filed by defendant from Magistrate Beatrice B. Logan's order, mailed July 27, 2011, granting medical only. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be affirmed. Therefore,

IT IS ORDERED that the magistrate's order is affirmed.

Gregory A. Przybylo	Commissioner
Lester A. Owczarski	Commissioner
L'Mell M. Smith	Commissioner