STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER M. SCHARNITZKE, Plaintiff-Appellant,	UNPUBLISHED October 18, 2012
v	No. 304515 WCAC
COCA-COLA ENTERPRISES, Defendant-Appellee.	LC No. 10-000061

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by leave granted[1] from an order of the Workers Compensation Appellate Commission (WCAC), modifying in part and affirming in part a magistrate's order granting plaintiff a closed award of benefits pursuant to the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.* Plaintiff also challenges the WCAC's order dismissing his cross appeal of the magistrate's order denying benefits for an earlier time period. We affirm the WCAC's modification of the magistrate's award, but reverse the order dismissing plaintiff's cross appeal and remand for further proceedings regarding the cross appeal.

I. PLAINTIFF'S CROSS-APPEAL

Plaintiff filed petitions seeking benefits and claimed injuries to his left shoulder on July 30, 2007, and March 4, 2008. Following a hearing on April 8, 2010, the magistrate found that the evidence did not establish that the condition that caused plaintiff to be removed from work from July 30, 2007, to February 11, 2008, was work-related. However, the magistrate determined that a work-related injury occurred on March 4, 2008. With respect to the disability analysis, the magistrate determined that plaintiff was disabled from March 4, 2008, to July 6, 2009, the period during which he "was completely removed from work in anticipation of surgery as well as for a period of recovery following that surgery."

[1] *Scharnitzke v Coca-Cola Enterprises*, unpublished order of the Court of Appeals, entered March 1, 2012 (Docket No. 304515).

The magistrate mailed her opinion on May 13, 2010. Defendant filed a claim for review with the WCAC on May 24, 2010, and its brief on July 6, 2010. Plaintiff timely filed his appellee brief on July 15, 2010. On July 26, 2010, plaintiff filed a document labeled as a cross appeal and a brief in support of the cross appeal. He did not file a particular form indicating that he sought to file a "cross claim for review." In the cross appeal, plaintiff challenged the magistrate's denial of benefits for the period July 30, 2007, to February 11, 2008.

On August 10, 2010, the WCAC mailed an order dismissing plaintiff's "cross claim for review." That order states, in part:

> Plaintiff's brief, received July 26, 2010, is also labeled cross appeal of plaintiff-cross-appellant Christopher Scharnitzke and brief in support, but no cross appeal was timely filed. A brief is not sufficient assertion of a cross appeal and a form was not filed. There is no delayed cross appeal. R 418.4(3); Rule 4(3). It is not timely filed and, therefore, it is dismissed. See, generally, *Jefferson v Trinity Health Michigan*, 2009 ACO #52 at 2, n3. Therefore,
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> IT IS ORDERED that plaintiff's cross claim for review is dismissed for want of jurisdiction. Defendant's claim for review pends.

Plaintiff moved for reconsideration of the August 10, 2010, order and to file a delayed cross appeal. Plaintiff submitted the requisite form by facsimile to the WCAC on August 12, 2010. In an opinion and order mailed December 21, 2010, the WCAC denied plaintiff's motions.

Although plaintiff timely filed a cross-appeal brief, the WCAC dismissed the cross appeal because plaintiff failed to submit the correct form for filing a cross appeal within the time limit for filing the cross appeal. This Court reviews for an abuse of discretion the WCAC's decision to dismiss an appeal for violation of procedural rules. *Laudenslager v Pendell Printing, Inc*, 215 Mich App 167, 171; 544 NW2d 721 (1996). See also *Kurtz v Faygo Beverages, Inc*, 466 Mich 186, 192; 644 NW2d 710 (2002). "The doctrine of substantial compliance applies to briefing and other procedural deadlines in worker's compensation cases." *Laudenslager*, 215 Mich App at 171. In determining whether a party has substantially complied with a procedural deadline, a court should consider the length of the delay, and other relevant factors, such as the reason for the delay and the existence of any resulting prejudice. *Id.*[2]

[2] In a document labeled, Supplemental Authority, defendant cites *Stand Up for Democracy v Secretary of State*, ___ Mich ___; ___ NW2d ___ (Docket No. 145387, issued August 3, 2012), in support of its contention that substantial compliance cannot be considered. In that decision, the Supreme Court discussed the doctrine of substantial compliance in the context of a pre-election challenge to mandatory petition requirements. *Id.*, slip op at 9-16 (M.B. KELLY, J.). The justices who concluded that the doctrine did not apply in that context did not repudiate the doctrine in other contexts. *Id.*, slip op at 13-15 (M. B. KELLY, J.), 4 (YOUNG, C.J., concurring in part and dissenting in part). We do not view *Stand Up for Democracy* as implicitly overruling

Mich Admin Code, R 418.4, provides:

> (1) A cross appeal shall be received by the commission not later than 30 days after the cross appellant has received a copy of the appellant's brief. The cross appellant shall provide all other parties with copies of the cross appeal. There shall be a rebuttable presumption that "receipt of appellant's brief" occurred 5 days after the date of service/mailing indicated in the proof of service filed by the appellant with the commission.
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> (3) There shall not be delayed cross appeals. An extension of time to file a reply brief does not extend the time to file a cross appeal.
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> (5) A cross appeal shall be filed on the claim for review form specifically identifying that the party cross appeals the magistrate's decision.

The statutory basis for this Administrative Rule is MCL 418.861a(6), which provides that

> [n]ot more than 30 days after receiving a copy of the transcript and brief of the appealing party, an opposing party shall file its reply brief with the commission and provide a copy to the appealing party. In addition to filing its reply brief within the 30 days, the opposing party may file a cross appeal and brief in support thereof . . . .

Defendant's appellant's brief was mailed on July 1, 2010. Thus, the brief was presumptively received by plaintiff on July 6, 2010. Because "[t]he day of the act, event, or default after which the designated period of time begins to run is not included," MCR 1.108(1), the 30-day period expired on August 5, 2010. Plaintiff timely submitted the brief supporting his cross appeal within this period, but did not file the requisite claim for review form with it. The WCAC determined that, without the form, plaintiff did not file a cross appeal within the 30-day period, and therefore dismissed his cross appeal "for want of jurisdiction."

Plaintiff filed the proper form by facsimile on August 12, 2010. Therefore, plaintiff filed his claim for review within one week after the expiration of the 30-day deadline. The proffered reason for the delay was an oversight concerning the requirement of a form. There was no prejudice to defendant. Plaintiff filed the defective cross appeal and accompanying brief before the deadline. The WCAC recognized that the filing was an attempted cross appeal because it entered an order dismissing "plaintiff's cross claim for review" even though the cross claim for review form had not been filed. Defendant has not even asserted that it was prejudiced by the

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Dries v Chrysler Corp, 402 Mich 78; 259 NW2d 61 (1977), and every other application of the doctrine in contexts that are entirely distinct from pre-election challenges to petition requirements.

delay; in its answer to plaintiff's motion for reconsideration, defendant merely requested time to file an answer to the arguments raised by plaintiff in his cross-appellant's brief.

In *Laudenslager*, 215 Mich App at 171-173, this Court concluded that the WCAC abused its discretion because the "harsh sanction of dismissal [was] wholly disproportionate to the relatively small procedural infraction involved" in the case, i.e., a brief received one day after the deadline. Here, plaintiff filed the cross-appellant's brief within the 30-day period and supplied the requisite form within a week after the deadline. The deficiency amounted to the tardy filing of a cover sheet. As in *Laudenslager*, dismissal of the cross appeal was wholly disproportionate to the infraction and was an abuse of discretion. Accordingly, we reverse the WCAC's dismissal of plaintiff's cross appeal and remand for plenary consideration of plaintiff's cross appeal.

II. THE WCAC'S MODIFICATION OF THE MAGISTRATE'S AWARD

Plaintiff also challenges the WCAC's determination that he failed to establish a prima facie case of disability for the period from January 5 to July 6, 2009.

In reviewing a decision of the WCAC, this Court looks first to the decision of the WCAC, not to the magistrate's decision. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709; 614 NW2d 607 (2000). This Court's review of the WCAC's findings of fact is "deferential to the skill and experience of the WCAC in this highly technical area of the law." *Mudel*, 462 Mich at 703. The WCAC's factual decisions are treated as conclusive "[a]s long as there exists in the record any evidence supporting the WCAC's decision, and as long as the WCAC did not misapprehend its administrative appellate role (e.g., engage in de novo review; apply the wrong rule of law)[.]" *Id.*

A claimant under the WDCA must prove disability and entitlement to benefits by a preponderance of the evidence. MCL 418.851. Disability is defined in MCL 418.301(4)(a), in relevant part, as "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease."

In *Sington v Chrysler Corp*, 467 Mich 144, 158; 648 NW2d 624 (2002), the Court explained that disability was not shown by a mere limitation in performance of one or more particular jobs. The Court explained:

> [T]he plain language of MCL 418.301(4) indicates that a person suffers a disability if an injury that is covered under the WDCA results in a reduction of that person's maximum reasonable wage earning ability in work suitable to that person's qualification and training.
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> So understood, a condition that rendered an employee unable to perform a job paying the maximum salary, given the employee's qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training would not constitute a disability. [*Id.* at 155.]

The Court instructed that a magistrate or the WCAC:

> should consider whether the injury has actually resulted in a loss of wage earning capacity in work suitable to the employee's training and qualifications in the ordinary job market. . . . "[D]isability" as defined in MCL 418.301(4) 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 loss of wage earning capacity. [*Id.* at 158.]

In *Stokes v Chrysler LLC*, 481 Mich 266, 289-290; 750 NW2d 129 (2008), the Court set forth "a practical application of the *Sington* standard" that did not impose any "new requirements," but attempted "to afford guidance in the application of *Sington* so that future claimants and employers will have the benefit of a consistent and workable standard in assessing their rights and obligations under the law." The Court stated that a prima facie showing of disability required several steps:

> 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. . . .
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> 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. . . .
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> 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.
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> 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.
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> Upon the completion of these four steps, the claimant establishes a prima facie case of disability. [*Id.* at 281-283 (citations omitted).][3]

In *Stokes*, the Court determined that the claimant "did not meet his burden of proving a disability under the WDCA because he only presented evidence of an inability to perform his prior job." *Id.* at 287.

[3] The Legislature largely incorporated the standard set forth in *Stokes* when it amended the WDCA in 2011 PA 266, effective December 19, 2011.

The WCAC has held that a claimant need not satisfy the *Stokes* steps if the evidence establishes that the claimant is disabled from any and all employment. In *Robertson v DaimlerChrysler Corp*, 2011 Mich ACO 72, the WCAC stated:

> Although *Stokes v Chrysler LLC*, 481 Mich 266, 283 (2008) does generally require a determination of the "universe" of jobs that fall within one's qualifications and training, we are also informed by the Supreme Court's pronouncements that there is no precise requirement to proving disability under MCL 418.301(4), and that a "claimant sustains his burden of proof by showing that there are no reasonable employment options available for avoiding a decline in wages." *Id.* As we have observed in *Raguckas v State of Michigan*, 2009 ACO #82, medical testimony to the effect that a claimant is disabled from any and all employment satisfies the *Stokes* requirements. When the testimony was to the effect that plaintiff is "quite disabled from return to any and all employment," we observed that "work that cannot be performed cannot establish a wage earning capacity. This testimony establishes that there is no work plaintiff is able to perform and establishes her total disability." *Id.* at 12.
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> In the present case, the WCAC recognized this point, stating:
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> We have observed that one's total incapacity for employment can obviate the need to perform the multi-step *Stokes* analysis. *See Raguckas v State of Michigan, Department of Corrections*, 2009 ACO # 82. *Raguckas* involved proof of disability that was so severe that plaintiff could not return to any employment. Commissioner Ries pertinently observed that "work that cannot be performed cannot establish a wage earning capacity. This testimony establishes that there is no work plaintiff is able to perform and establishes her total disability." *Raguckas* at 12.

The WCAC determined in part that plaintiff failed to satisfy the second requirement of *Stokes* because he did not present proof regarding what jobs, if any, he was qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. However, the WCAC found that plaintiff was not required to satisfy the *Stokes* requirements from March 4, 2008 (the date of his injury) until January 5, 2009, when Dr. Milia (plaintiff's treating physician) released him to return to work with restrictions. The WCAC stated, "[w]e conclude that plaintiff acted reasonably as it relates to the medical investigation, leading to the need for surgery and the need for convalescence and physical therapy so that he was not capable of obtaining maximum wage employment until January 5, 2009." The WCAC concluded that at that point, plaintiff was required to establish disability "within the usual *Stokes* paradigm."

Plaintiff essentially argues that the WCAC was wrong in its assessment of his condition from January 5 to July 6, 2009. He contends that the WCAC ignored evidence and committed legal error. Contrary to plaintiff's characterization, his disagreement with the WCAC's analysis amounts to a factual dispute, i.e., when plaintiff's condition was sufficiently improved that his non-compliance with *Stokes* was no longer excused. Plaintiff points to medical evidence that he was still restricted in his work and from lifting and commercial truck driving. However, that

evidence indicates that plaintiff was continuing in therapy to rehabilitate his shoulder; the evidence does not show the level of incapacity for any and all work that the WCAC has used to excuse compliance with the *Stokes* requirements. Although plaintiff sought to return to work with defendant subject to restrictions in January and February of 2009, he did not present evidence of other jobs within his salary range for which he is qualified and trained to perform. *Stokes*, 481 Mich at 282-283. We conclude that plaintiff failed to sustain his burden of proof related to this *Stokes* requirement by failing to show that "there are no reasonable employment options available for avoiding a decline in wages." *Id.* at 282.

Plaintiff further argues that, regardless of his ability to work in January and February of 2009, that he was taken off work and put back into physical therapy by his physician on March 9, 2009 until July 6, 2009, and that the WCAC erred in not considering his physician's records during this time period and in excusing him from satisfying the *Stokes* requirements because he was disabled from returning to any and all employment. We disagree. It appears that plaintiff did not provide the WCAC with all of the records he now cites on appeal, as required by MCL 418.861a(8). This Court's review is generally limited to the record of the administrative tribunal and we will not allow enlargement of the record on appeal. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

Further, the records of plaintiff's treating physician do not support plaintiff's contention that he was fully disabled on March 9, 2009 until July 6, 2009. For example, on March 9, 2009, plaintiff's physician did indeed take plaintiff "off work" but stated "[f]rom my perspective, he can do most things at work except for repetitive overhead use. According to the patient that is not available so I am going to keep him off work until I see him back in 1 month." Further records from the same physician note that plaintiff's "strength is nearly symmetric" and that the need for additional strengthening was related to the requirement of repetitive overhead lifting at his former job. These notes simply do not indicate that plaintiff was disabled from returning to any and all employment and therefore not required to comply with the multi-part requirements of *Stokes*; in fact they support the inference that plaintiff may have been able to work a comparable job at an appropriate wage that did not involve repetitive overhead lifting. "A claimant must do more than demonstrate that his work-related injury prevents him from performing a previous job." *Stokes*, 481 Mich at 281, citing *Sington*, 467 Mich at 155.

The WCAC's evaluation that plaintiff was not so incapacitated that his disability was established in spite of noncompliance with *Stokes* is supported by the evidence. We will not interfere with that determination. Plaintiff's inability to perform his prior job does not meet his burden of proving a disability. *Stokes*, 481 Mich at 287. Accordingly, we affirm the WCAC's determination that plaintiff failed to establish a prima facie case of disability for the period from January 5 to July 6, 2009.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra