2019 ACO #**20**

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

CRAIG W. SCOTT,
PLAINTIFF,

V DOCKET #16-0016

OLIVIA'S TRANSPORT, LLC AND,
WAUSAU BUSINESS INSURANCE COMPANY;
TKMS, LTD AND UNITED STATES FIRE INSURANCE COMPANY;
TKMS, LTD AND TRAVELERS INDEMNITY COMPANY OF CONNECTICUT;
TKMS, LTD AND LIBERTY MUTUAL FIRE INSURANCE COMPANY,
DEFENDANTS.

APPEAL FROM MAGISTRATE OGNISANTI.

TIMOTHY S. BURNS FOR PLAINTIFF,
JAMES M. SCHOENER FOR DEFENDANT OLIVIA'S TRANSPORT, LLC AND WAUSAU BUSINESS INSURANCE COMPANY;
RAYMOND A. BOOMS FOR DEFENDANT TKMS, LTD AND UNITED STATES FIRE INSURANCE COMPANY;
CARSON J. TUCKER FOR DEFENDANT TKMS, LTD AND TRAVELERS INDEMNITY COMPANY OF CONNECTICUT;
JOHN D. RESEIGH FOR DEFENDANT TKMS, LTD AND LIBERTY MUTUAL FIRE INSURANCE COMPANY.

AMENDED OPINION
AMENDED AS TO ACO # ONLY

WEISE, COMMISSIONER

This matter comes to the Michigan Compensation Appellate Commission (Commission) on appeal by plaintiff and defendant TKMS Ltd and Travelers Indemnity Company of Connecticut (TKMS) following an Opinion on Remand from Magistrate E. Louis Ognisanti. For the reasons set forth below, we partially affirm and partially reverse.

BACKGROUND

This case has a significant procedural history. Plaintiff filed his application against defendants on June 4, 2010 alleging back injuries on dates in January 2002, March 2005, October 2007 and November 2007 against defendant TKMS and March 2010 against defendant Olivia's Transport, LLC (Olivia's). The matter went to trial on September 10 and October 5, 2012. The magistrate issued a decision mailed November 26, 2012 awarding benefits against defendant TKMS only.

On December 18, 2012, defendant TKMS filed a Claim for Review with the Commission. The Commission subsequently remanded the case back to the magistrate for further analysis under *Stokes v Chrysler LLC,* 481 Mich 266; 750 NW2d 129 (2008) without retaining jurisdiction. See 2014 Mich ACO #31. Defendant TKMS immediately filed for a Writ of Superintending Control with the Court of Appeals alleging that the Commission failed to address its first issue on appeal. (Also its first issue on the current appeal.) That complaint was denied and TKMS appealed that denial to the Michigan Supreme Court where its application was denied.

Meanwhile, our remand to Magistrate Ognisanti was scheduled for re-hearing on October 1, 2015. The parties agreed that the remand issues would be addressed through the filing of briefs. The record closed on December 16, 2015 and the magistrate issued his ruling in an order mailed February 1, 2016. Both parties appealed.

STANDARD OF REVIEW

The Michigan Worker's Disability Compensation Act requires this Commission to perform two essential functions when reviewing a magistrate's decision under two different standards. First, we examine the magistrate's fact findings under the competent, material, and substantial evidence standard. MCL 418.861a(3). 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). The former Workers' Compensation Appellate Commission expounded on these statutory mandates in *Isaac v Masco Corporation*, 2004 Mich ACO #81:

> 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 fact-finding review, magistrate statements and applications of the law are reviewed under a de novo standard. The Commission's review of statements of law are only limited to the extent that upon appeal, a party must articulate which statements and applications of law are submitted for review. MCL 418.861a(11).

PLAINTIFF-APPELLANT'S ISSUES ON APPEAL

1. Whether the Magistrate committed legal error by finding Plaintiff has established a residual wage earning capacity by utilizing wages that he earned doing jobs that he is disabled from performing and that would clearly not constitute reasonable employment and ignoring findings made by this Honorable Commission in a decision mailed July 28, 2014?

* * *

2. Whether the Magistrate finding that the Plaintiff failed to "provide sufficient evidence of a good-faith attempt to seek employment" was not supported by competent material substantial evidence?

* * *

3. Whether the Magistrate committed legal error when he determined Plaintiff suffered a work-related disability that caused him to suffer a reduction in his maximum wage earning capacity but failed to determine what, if any, residual wage earning capacity he had during periods of time when he was allegedly not seeking employment?

DEFENDANT-APPELLANT'S ISSUES ON APPEAL

I. Whether Plaintiff's voluntary choice to quit work for TKMS and go to work for an employer closer to his home, for better benefits and additional incentives broke the causal chain required to be proved by the workers' compensation claimant between the work-related disability and the subsequent claim of loss of wages?

II. Whether the Magistrate failed to apply the one-year back rule to Plaintiff's claim?

III. Whether Plaintiff is entitled to any post -2007 benefits?

DISCUSSION

We will analyze together both parties' initial issue on appeal as such an analysis is mostly dispositive of the whole dispute. As a sidebar, we note that defendants' initial issue on appeal has been preserved at every stage of these proceedings but has never been addressed until the latest order from the Board of Magistrates. In order to fully comprehend the dispositive nature of these issues, it is necessary to examine plaintiff's pertinent work history. The record demonstrates that the plaintiff worked at defendant TKMS from mid-2000 through October 2007. He then left that job and went to DHT until October 2008. He then performed a short period in mid-2008 at D &

D Welding before moving to Rumble Trucking in approximately November of 2008. The plaintiff was unsure of his end date at Rumble Trucking but states that he started at defendant Olivia's in March or April 2009, where he stayed until his last day of employment on March 24, 2010.

At issue are plaintiff's umbrage with the magistrate finding that the plaintiff had established a new wage earning capacity and defendants' assertion that plaintiff left his job voluntarily for a better job and not due to the effects of his work-related injury. We quote the pertinent verbiage from the magistrate's opinion after remand.

> Defendant first argues that Plaintiff has failed to present a prima facie case for disability and wage loss because "Plaintiff voluntarily quit his job with Defendant TKMS because he found a job closer to his home, with better benefits, and additional incentives." (See, Defendant's post remand brief, page 8). However, the record contains more than just the foregoing statement which was part of Defendant's Exhibit D. Plaintiff credibly testified on both direct and cross-examination that he left Defendant TKMS because he could no longer perform his job duties there and because Defendant TKMS would not honor his restrictions. I find Plaintiff's testimony to be of greater weight and more persuasive. Contrary to Defendant's assertion in its brief regarding the reason for Plaintiff's departure from Defendant TKMS (See, Defendant's post remand brief, pages 9 and 10), there is no testimony from Plaintiff indicating his admission that he left Defendant TKMS for a reason other than the work related injury. (Footnote omitted.)

We are cognizant of the standard of review and the circumstances under which we should defer to the magistrate's credibility determinations. However, we are equally cognizant of the qualifier that we must only defer to them if they are reasonable. Our review of the record uncovers the fact that these findings and conclusions are not reasonable in light of the testimony and evidence contained therein.

Specifically, we note the findings from the magistrate's 2012 opinion and order that correctly found that plaintiff's subsequent jobs following his employment at TKMS were substantially similar.

> In the instant case, I find that the preponderance of the evidence supports the conclusion that Plaintiff has established a new wage earning capacity based upon his employment from and after July, 2007. He testified that his job at all of these employments were substantially the same as when he was injured, i.e., as a diesel truck mechanic and/or a working supervisor. I believe Plaintiff's work for more than 100 weeks represents "an ability to earn wages in the real world" (See, Williams v Spartan Engineered Products, 1990 ACO# 669).
>
> The Evidence in the instant case more than shows that Plaintiff is someone who has continually sought and obtained work after his injuries, both in 2002 and 2005. On various occasions, he changed jobs due to a combination of physical

problems and closure of the businesses for which he was working. Indeed, his last employment with Defendant Olivia's Transport was lost either because Plaintiff could no (sic) physically continue working or because the business closed. In either event I find that Plaintiff's job loss was "through no fault of the employee" (Section 3015(d)).

Then, we note the following from the magistrate's summary of the evidence from the opinion and order mailed November 26, 2012:

> Cross-examination by Attorney Reseigh disclosed the following testimony.
>
> Plaintiff admitted that his job duties at DHT were **substantially the same as** the duties that he performed at TKMS. He confirmed that his work at D&D Welding required him to lift 30 to 40 pounds on a regular basis. He was not fired from TKMS and admitted that no physician indicated that he couldn't continue working at TKMS. (Emphasis added.)

Then, in his findings in the February 1, 2016 Opinion on Remand, the magistrate inexplicably changes course and announces the following:

> Under the 4th step of *Stokes*, supra, Plaintiff must show that he cannot obtain any job within his qualifications and training which pay his maximum wage earning capacity. The evidence presented herein established that while Plaintiff was employed subsequent to his departure from Defendant TKMS in October, 2007, his employment was, for the most part, **different than** his employment with Defendant TKMS. I have described his subsequent job duties above. More significantly, he was earning considerably less at those subsequent jobs. (See my discussion under step 3 above). I believe this evidence is sufficient proof that Plaintiff was prevented from earning his maximum wages subsequent to 2007. I find therefore that Plaintiff has satisfied the 4th step of the *Stokes* test. (Emphasis added.)

We cannot reconcile these disparate findings with respect to work subsequent to plaintiff's employment with TKMS. What is even more puzzling about the magistrate's credibility determination finding the plaintiff credible is the fact that plaintiff's testimony on the above issue was contradictory and irreconcilable. For example, during cross examination, the following exchange took place:

Q. And but you lived a long way from there, correct?

A. From TK, yes.

Q. How far?

A. An hour and 20 minute drive, possibly, hour and ten minutes, maybe.

Q. How about two hours?

A. From TKMS?

Q. Yeah.

A. To my house?

Q. Yeah.

A. Rush hour, two hours. Real early morning, hour and ten minutes, hour and fifteen minutes.

Q. And that's part of the reason you left TKMS, to take a job that was closer to your house?

A. The reason I left TKMS is they weren't honoring my restrictions.

Q. I'm going to show you this form that says involuntary/voluntary separation. Show it to your attorney first. Can you read what it says about reason for separation?

A. Mm-hmm.

Q. Is that a yes?

A. Yes.

Q. What does it say?

A. "New job closer to home, better benefits, company truck and gas."

Q. PPO insurance also, and some better benefits, PPO insurance, company truck with gas, again.

A. Yes.

Q. And so which employer was that that you went to?

A. That was - -

MAGISTRATE OGNISANTI: I'm sorry, the form - - read again what it says. You're not marking or offering it, so I've got to write it down, so tell me what it - - what it says.

MR. NOWINSKI: It says, "Reason for separation: new job closer to home, better benefits, PPO insurance - -

MAGISTRATE OGNISANTI: Just a second. New job closer to home, what was the next thing?

MR. NOWINSKI: Better benefits.

MAGISTRATE OGNISANTI: Better benefits.

MR. NOWINSKI: PPO insurance.

MAGISTRATE OGNISANTI: PPO insurance.

MR. NOWINSKI: Company truck with gas.

MAGISTRATE OGNISANTI: Okay.

BY MR. NOWINSKI:

Q. And was that the DHT?

A. Correct.

Attorney Nowinski's cross-examination was then followed by further cross-exam by Attorney Reseigh who elicited the following from plaintiff:

BY MR. RESEIGH:

Q. Mr. Scott, you indicated - - you've been asked a number of times about your job description with these various employers, and as I understand it, your job at TKMS as a diesel mechanic required you to bend, twist, lift, and all those other things, correct?

A. Correct.

Q. And when you were asked by Mr. Nowinski about your job duties at, for instance, DHT, you indicated that you would still have been lifting (inaudible); is that correct?

A. Correct.

Q. You told Mr. Nowinski that in terms of lifting, after you left - - left TKMS, that you would sometimes lift up to, I believe you said 90 pounds, on a regular basis?

A. Yeah.

Q. When you were doing tires?

A. Yeah, tires, and you know, that such.

Q. And when you were working at the welding - - D and D Welding. You would regularly lift 30 to 40 pounds; is that correct?

A. Yeah, correct.

Q. Now, you left TKMS because you decided to do so, correct?

A. Correct.

Q. You were not fired, were you?

A. No, I was not fired.

Q. You didn't have any doctor tell you that you could not continue to work at TKMS, did you?

A. I didn't go see a doctor. I was - - I was, you know, on restrictions, so, no. I mean, a doctor technically, yeah, did tell me not to do any lifting and that, but, no, a doctor didn't tell me I could not work there.

Q. All right. And your next job was at DHT, and you told us that you redid the tool room, parts room?

A. Parts room.

Q. And after that you were back out on the floor doing essentially what you were doing at TKMS - -

A. Wrenching and then, you know, a working supervisor parts and wrench when I had to wrench.

Q. And when you left TKMS, that's essentially what you were doing?

A. Yeah, correct.

Faced with the magistrate's conflicting findings and analyses and plaintiff's conflicting testimony, we are forced to either remand the case once again or make our own findings of fact in deciding which conclusion to embrace, if any. On this record, we are comfortable in making our own factual determinations under the authority granted us by *Mudel v Great Atlantic & Pacific Tea Company*, 462 Mich 691; 614 NW2d 607 (2000) and holding that the magistrate's noted determinations were not reasonable.

To that end, our review of the record demonstrates to us that there is substantial evidence to show that plaintiff left his job with TKMS voluntarily for a "better" job at DHT. His testimony that he left TKMS because they weren't honoring his restrictions lacks credibility to the extent that the record shows that he never really worked within his restrictions at any of his subsequent employment following TKMS and that, with the exception of the brief employment at D & D Welding, all of his subsequent employment was substantially similar to or the same as what he did at TKMS; diesel mechanic/working supervisor.

In fact, it is plaintiff's work ethic and unwillingness to work within his restrictions that resulted in him deciding on March 24, 2010 that he couldn't do the job anymore. The record is replete with his testimony that he always pitched in where needed and did what had to be done to get his mission accomplished, the result being that he pushed his back beyond its capabilities until he came to the realization that his diesel mechanic days were over.

The import of all of this is that plaintiff failed in his burden of proof to establish a connection between the wage loss from his highest paying employer, TKMS, and his disability as required by MCL 418.301(4)(c). But our analysis doesn't end here.

The record is clear that plaintiff's treating physician, Dr. Mark Adams had plaintiff on certain work restrictions. The record is also clear that plaintiff worked within those restrictions when he could, but for the most part, he was non-compliant with his restrictions as noted above. This situation continued until his symptoms were aggravated to the point that he "couldn't take it anymore" and decided to quit on March 24, 2010. Given these findings, we find that the plaintiff's subsequent employment from TKMS was "reasonable employment," thus subjecting the plaintiff to the possibility of establishing a new wage earning capacity.

We find it important to note at this point that we are also bound by the law of the case doctrine as we have spoken on these matters in our opinion remanding the case to the magistrate. (2014 Mich ACO 31). In that opinion, we held:

> Finally, we reverse the magistrate's reasonable employment findings because this record contains no proof that plaintiff was disabled in 2007. In fact, the magistrate's findings prove just the opposite. The magistrate states that plaintiff's jobs since 2007 "were essentially the same as when he was injured, i.e., as a diesel truck mechanic and/or a working supervisor." [Magistrate's opinion at

> 42.] If plaintiff could work as a diesel mechanic, and did work as a diesel mechanic, he needed to prove that his injury prevented him from earning the maximum starting in 2007. No proofs cover that period of time.

Based on the above and the magistrate's reasoning in his 2012 opinion, the magistrate was correct in applying the mandates of MCL 418.301(5), which is the current MCL 418.301(9), in finding that the plaintiff established a new wage earning capacity. The record shows that the plaintiff did indeed work for more than 100 weeks and less than 250 weeks after returning to work following a period of disability and then subsequently losing that job through no fault of his own.

With the exception of the above reversal, the balance of the magistrate's opinion is supported by competent, material, and substantial evidence and is affirmed.

Chair Wyatt and Commissioner Goolsby concur.

Kevin L. Weise	Commissioner
George H. Wyatt III	Chair
Garry Goolsby	Commissioner

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DEFENDANTS.

This cause came before the Michigan Compensation Appellate Commission (Commission) on a claim for review filed by plaintiff and defendants TKMS, Ltd and Travelers Indemnity Company of Connecticut from Magistrate E. Louis Ognisanti's order, mailed February 1, 2016. The Commission has considered the record and counsel's briefs and believes that the magistrate's order should be partially affirmed and partially reversed. Therefore,

IT IS ORDERED that the magistrate's order is partially affirmed and partially reversed in accordance with the attached opinion.

This is a final order closing the appeal.

Kevin L. Weise Commissioner

George H. Wyatt III Chair

Garry Goolsby Commissioner