STATE OF MICHIGAN

COURT OF APPEALS

RONALD L. TATAR, Plaintiff-Appellant,	UNPUBLISHED November 26, 2013
v	No. 310833 WCAC
RYDER INTEGRATED LOGISTICS, INC., Defendant-Appellee.	LC No. 2010-000119

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the order of the Workers' Compensation Appellate Commission overturning his award of wage-loss benefits and medical expenses. We affirm.

Plaintiff is employed by defendant as a truck driver. His responsibilities include loading, unloading, and transporting racks to an automobile manufacturer. On January 8, 2009, plaintiff filed a worker's compensation claim, alleging that on September 30, 2008, while unloading a trailer, he injured his lower back and that his work activities caused and aggravated back and leg pathology. He also alleged that performing various work-related activities caused and aggravated back and leg pathology as of November 26, 2008. Plaintiff was laid off from his employment on that day and resumed full pre-injury employment with defendant on May 25, 2009. Defendant disputed plaintiff's claim on the grounds that plaintiff was not disabled, or that plaintiff's injury or disability was not work related. Plaintiff received no unemployment benefits, short-term disability payments, or wage-loss benefits during the disputed period.

The magistrate held a hearing in January 2010. Several months after the hearing, the magistrate issued an opinion awarding plaintiff wage-loss benefits for the closed period between the date of his injury (September 30, 2008) and the date of his return to work (May 25, 2009). The magistrate also awarded plaintiff all reasonable and necessary medical expenses incurred during that period. In support of these awards, the magistrate concluded that plaintiff had established that his injury was work related and medically distinguishable from any pre-existing problem and that plaintiff's physical restrictions would have prevented him from performing "the entire universe" of jobs for which he was qualified, educated, and trained to perform.

Defendant appealed to the Workers' Compensation Appellate Commission (WCAC), which held that under the Michigan Supreme Court's opinion in *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008), plaintiff was required to establish what jobs, if any, were

available to him at his pre-injury salary range at the time of the injury and that he was unable to perform or obtain any of those jobs. The WCAC determined that because plaintiff failed to do so, he failed to carry his burden of persuasion under *Stokes* and thus reversed the magistrate's award. This appeal followed.

On appeal, plaintiff argues that the WCAC erred as a matter of law in reversing the magistrate's decision where the evidence presented at trial substantiated that plaintiff met his burden of proof in demonstrating that he was temporarily and totally disabled for a closed period of time and that he was thus entitled to benefits pursuant to the standards set forth in *Stokes*, 481 Mich 266, and *Sington v Chrysler Corporation*, 467 Mich 144; 648 NW2d 624 (2002). Plaintiff further contends that the strict manner in which the WCAC applied *Stokes* to his case is misplaced because plaintiff suffered a closed period disability, unlike the claimants in *Stokes* and its progeny who suffered from ongoing, open ended disabilities and urges that *Stokes* does not apply in like manner to closed period disability claims. We disagree.

This Court's review of a decision of the WCAC is limited. Absent fraud, the Commission's findings of fact are conclusive on appeal if there is any competent evidence in the record to support them, 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). *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709; 732; 614 NW2d 607 (2000). We review de novo questions of law in final orders of the WCAC. See *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000).

An employee seeking worker's compensation benefits must establish both a disability and a wage loss. *George v WCAC Burlington Coat Factory Warehouse of Southfield*, 250 Mich App 83, 86; 645 NW2d 722 (2002). "Disability" for purposes of such benefits means "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." MCL 418.301(4)(a). In *Sington v Chrysler Corp*, 467 Mich 144, 155; 648 NW2d 624 (2002), our Supreme Court sought to clarify the statutory definition of disability, ruling that "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." Instead, only when the employee is no longer able to perform any of the jobs, suitable to the employee's training and qualifications in the ordinary job market, that pay the maximum wages, is a disability established under § 301(4). *Id.* at 157-158.

More recently, in *Stokes*, 481 Mich at 297-298, our Supreme Court noted the inconsistent application of *Sington* and delineated the following practical proofs necessary to establish a prima facie disability under the *Sington* standard:

> . . . to establish a disability, the claimant must prove a work-related injury *and* that such injury caused a reduction of his maximum wage-earning capacity in work suitable to the claimant's qualifications and training. To establish the latter element, the claimant must follow these steps:
>
> (1) The claimant must disclose all of his qualifications and training;

(2) the claimant must consider other jobs that pay his maximum pre-injury wage to which the claimant's qualifications and training translate;

(3) the claimant must show that the work-related injury prevents him from performing any of the jobs identified as within his qualifications and training; and

(4) if the claimant is capable of performing some or all of those jobs, the claimant must show that he cannot obtain any of those jobs.

If the claimant establishes all these factors, then he has made a prima facie showing of disability satisfying MCL 418.301(4), and the burden of producing competing evidence then shifts to the employer.

The WCAC in this matter held that plaintiff failed to establish a disability because he failed to provide evidence that he was unable to obtain alternative employment at his maximum pre-injury wage, citing *Stokes*. As pointed out by plaintiff, *Stokes*, as well as the case *Stokes* sought to clarify, *Sington*, concerned employees seeking open-period disability benefits. This case, on the other hand, deals with an award of closed-period disability benefits--an award given for the specific period of time between an injury and a return to work. The first pertinent issue in this matter, then, is whether the cited *Stokes* analysis applies equally to close-period disability benefits matters, as was held by defendant, or whether, as argued by plaintiff, *Stokes* should distinguish between open-period disability benefits and closed-period disability benefits and should not be read to require a temporarily and totally disabled employee to seek alternative work opportunities until he has reached either stabilization of the condition or maximum medical improvement and is able to return to work or alternative employment. According to plaintiff, that *Stokes* addressed an employee with an open-ended claim who appeared to have reached his maximum medical improvement yet still continued to have some form of physical limitation was critical to its analysis.

The Supreme Court made no distinction between closed and open period benefits in *Stokes*. Moreover, the Supreme Court has implicitly indicated that the *Stokes* analysis applies with equal force to closed-period benefits matters. See, e.g., *Diot v Department of Corrections, Brooks Regional Correctional Facility*, 482 Mich 997; 756 NW2d 81 (2008)(directing the Board of Magistrates to conduct a new hearing "regarding the plaintiff's entitlement to worker's compensation benefits for the closed period from July 17, 2002 to March 25, 2003, consistent with this Court's decisions in *Stokes v Chrysler, LLC*, 481 Mich 266; 750 NW2d 129 (2008), and *Robertson v DaimlerCyrysler Corp*., 465 Mich 732; 641 NW2d 567 (2002)"). Thus, the Supreme Court was aware of the distinction between such benefit periods and nevertheless specifically directed a hearing for closed period benefits such as plaintiffs in conformity with a *Stokes* analysis. Plaintiff's argument that a different result should be reached by this Court is therefore without merit.

Moreover, in December 2011 the Legislature amended MCL 418.301 (PA 266, effective December 19, 20110) to add subsection (5) as follows:

> To establish an initial showing of disability, an employee shall do all of the following:
>
> (a) Disclose his or her qualifications and training, including education, skills, and experience, whether or not they are relevant to the job the employee was performing at the time of the injury.
>
> (b) Provide evidence as to the jobs, if any, he or she is qualified and trained to perform within the same salary range as his or her maximum wage earning capacity at the time of the injury.
>
> (c) Demonstrate that the work-related injury prevents the employee from performing jobs identified as within his or her qualifications and training that pay maximum wages.
>
> (d) If the employee is capable of performing any of the jobs identified in subdivision (c), show that he or she cannot obtain any of those jobs. The evidence shall include a showing of a good-faith attempt to procure post-injury employment if there are jobs at the employee's maximum wage earning capacity at the time of the injury.

The above are substantially similar to those requirements set forth in *Stokes* and serve as the Legislature's tacit approval and adoption of those specific standards as well as the analysis that accompanied them. Had the Legislature intended to create a lesser or different burden for those seeking closed-period benefits, it could have done so. In sum, the WCAC correctly applied *Stokes* to this case and plaintiff has failed to provide any authority suggesting otherwise.

We next turn to plaintiff's assertion that the WCAC erred as a matter of law in reversing the magistrate's decision. Consistent with the first requirement with *Stokes*, 481 Mich at 297-298, plaintiff did disclose all of his qualifications and training. However, there is no indication that plaintiff provided any proof as to what jobs, if any, were within his same maximum pre-injury wage as required by factor two under *Stokes*, 481 Mich at 297-298, and the magistrate made no inquiry. Plaintiff also indicated that the majority of his skills and pre-injury employment involved heavy labor. However, he also related a work history and skill level consistent with cooking at a restaurant, performing locksmith services, and along with performing locksmith services, running his own locksmith business. Plaintiff provided no evidence that his work-related injury rendered him unable to perform any of these types of work that are consistent with his qualifications and training as required by factor three under *Stokes*, 481 Mich at 297-298, and the magistrate made no inquiry. Finally, as indicated by the WCAC, had plaintiff shown that there was at least one job he was capable of performing, he would have to show that he was unable to obtain such a job. However, the magistrate would never have even gotten to this factor, plaintiff having not met his burden as to factors two and three. *Stokes* is clear: "If the claimant establishes all these factors, then he has made a prima facie showing of disability satisfying MCL 418.301(4), and the burden of producing competing evidence then shifts to the employer." *Id*. at 298. Plaintiff failed to carry his burden and the WCAC did not err in reversing the magistrate's decision.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan