RECENT CASES

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SUPREME COURT

As of this writing, the Supreme Court still has pending before it *Stokes v Chrysler LLC, f/k/a DaimlerChrysler Corp* (SC Docket No. 132648). The case was orally argued on October 4, 2007. The point orally argued in *Stokes* was the parties' burdens of proof in *Sington* disability cases. Recall that the Court of Appeals had largely dismantled the Workers' Compensation Appellate Commission's *en banc* decision in *Stokes*, but the Court of Appeals affirmed the result in the case – an open award of benefits at the maximum rate. *Stokes v DaimlerChrysler Corp*, 272 Mich App 571; 727 NW2d 637 (2006). For the time being, the Court of Appeals' *Stokes* decision is the controlling rule of law.

Another case that had been orally argued before the Supreme Court and remains pending as of this writing is *Gee v Arthur B. Myr Industries, Inc* (SC Docket No. 133762). *Gee* was argued in January 2008. It is a factually complex case involving *res judicata* in an attendant care context.

More specifically, Mr. Gee had litigated a total and permanent disability claim in 2001. At the conclusion of the hearing, he requested attendant care benefits for his family providers. The Magistrate failed to address the nursing or attendant care portion of the claim. On appeal, the Workers' Compensation Appellate Commission denied the attendant care claim on the basis that plaintiff had failed to introduce any evidence on the reasonable value of services performed. That appeal became final.

Plaintiff then filed a new application again requesting attendant care services. The defendant moved for dismissal on the basis of *res judicata*. The Magistrate denied the motion to dismiss. And, the Magistrate went on to determine plaintiff was entitled to 56 hours of attendant care services each week. Defendant appealed to the Appellate Commission and Court of Appeals without success. The Supreme Court's oral argument related to whether the defendant is entitled to relief on the basis of *res judicata*.

Most recently, the Supreme Court has granted an oral argument on an application for leave to appeal in *Brackett v Focus Hope* (SC Docket No. 135375). The oral argument is scheduled for May 7, 2008.

The issue in the case is whether plaintiff's claim is barred by the intentional and wilful misconduct provision, MCL 418.305. The facts are that plaintiff at the time of hire was advised that she had to attend Focus Hope's annual Martin Luther King Day celebrations. After hire, plaintiff decided not to attend the celebration. Her supervisors confronted her about her decision and she claimed a psychiatric injury as a result. The question for oral argument is whether her psychiatric injury is by reason of her own intentional and wilful misconduct.

Finally, two other cases pending before the Supreme Court bear noting if for no other reason than the length of time they have been pending before the Supreme Court. One is *Bessinger v Our Lady of Good Counsel* (SC Docket No. 128870). The other is *Diot v Department of Corrections* (SC Docket No. 130702).

Bessinger presents the question of whether the claimant is entitled to only partial disability benefits after he ceased working at a post-injury lesser paying job. The Supreme Court had remanded the case while retaining jurisdiction on January 31, 2006. The Workers'

Compensation Appellate Commission issued its opinion on remand on October 25, 2006. The case then automatically returned to the Supreme Court where it still pends.

In *Diot*, the employer applied for leave to appeal on March 14, 2006, over two years ago. That application still pends, which is highly unusual. Mr. Diot was granted an open award of benefits upon being found disabled as a result of an inability to return to work at one place of employment for his employer, although he acknowledged the ability to do that type of work elsewhere.

It is conceivable that *Bessinger* and *Diot* are either being held in abeyance while the Supreme Court continues to consider *Stokes*. Or, perhaps they are being considered in conjunction with *Stokes*. We will of course keep everyone apprised of the developments.

COURT OF APPEALS

The Court of Appeals has recently released seven workers' compensation decisions, all unpublished.

Applying *Sington*

In *Miller v Grand Haven Stamped Products Co* (CA Docket No. 278235, rel'd April 1, 2008), the Court of Appeals reversed the Workers' Compensation Appellate Commission's and Magistrate's open award of benefits on the basis that they had misapplied *Sington*.

The plaintiff in this case works for an automobile components manufacturer. She suffered a work-related right knee injury. At the time of her injury, she was working up to 60 hours a week. Following arthroscopic surgery, she returned to work with restrictions requiring a sit/stand option. Post-injury, she performed different jobs within these restrictions, some of where ended when they were outsourced to other countries and some of which paid less than she earned at the

time of injury. After her benefits were terminated, plaintiff filed her application seeking a reinstatement of partial disability benefits.

The Magistrate and Appellate Commission found that plaintiff was disabled under *Sington* and granted her an open award of benefits.

The Court of Appeals reversed saying "[p]laintiff is not disabled under *Sington*." After reviewing *Sington*'s discussion of both the first and second sentences of MCL 418.301(4), the Court of Appeals in discussing the definition of disability in the first sentence says plaintiff did not prove "disability" because:

> One of the factual matters to consider when making a disability determination is whether there continues to be a substantial job market for the work for which the employee is both trained at qualified. [*Sington*, *supra*] at 157. Here, the record establishes that the piecework job that plaintiff held in the 1980s, at which she earned $15 to $17 an hour, has not existed since the 1980s. There is no evidence in the record that there is any market, let alone a substantial job market, for such work at present. Accordingly, the piecework job has no relevance for purposes of establishing plaintiff's maximum wage earning capacity. Furthermore, although the evidence demonstrated a link between plaintiff's injury and her loss of the opportunity to work in other cells within defendant's plant, there was no showing that plaintiff would earn a greater hourly wage if she worked in any other cell.

With respect to the second sentence of § 301(4) and its obligation to link wage loss to a disability, the Court of Appeals added:

> Moreover, although plaintiff demonstrated that she had lost significant earning capacity, as reflected by her loss of overtime work, the evidence demonstrates that this loss of earning capacity is not attributable to her injury, but to the changing fortunes and efficiencies of the automotive industry and the terms of her union contract.

The Court of Appeals then added that, given pay raises, plaintiff now "realizes her maximum wage earning capacity" and her work injury "has had no adverse impact on her maximum wage earning capacity."

Applying *Rakestraw*

In *Bousquette v Meeder Dimension & Lumber Co* (CA Docket No. 274373, rel'd April 8, 2008), the Workers' Compensation Appellate Commission had reversed the Magistrate's open award of benefits on the basis that the Magistrate erred in failing to apply *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003). Plaintiff appealed. The Court of Appeals affirmed the Appellate Commission.

Plaintiff suffered a pre-existing back condition as a result of an L4-5 fusion. He claimed that a specific event at work, lifting bags, compensably aggravated that condition. His co-workers confirmed at trial that plaintiff had experienced pain attributable to the lifting at work. The Magistrate found compensable aggravation, but had not explicitly chosen between the competing medical opinions. On appeal, the Appellate Commission reversed on the basis "the magistrate legally erred in failing to apply *Rakestraw's* 'medically distinguishable' standard." The Appellate Commission said the testimony of plantiff's co-workers that he injured his back while lifting bags was binding but was insufficient to establish that plaintiff had suffered an injury medically distinguishable from his pre-existing disc abnormalities.

In affirming the Appellate Commission, the Court of Appeals said the co-workers' testimony did not shed light on the medical question presented. The Court of Appeals said that the medical record "contains testimony both in support of and against the conclusion that plaintiff suffered a work injury, as distinguished from an exacerbation of symptoms consistent with the progression of his pre-existing back condition." The Court of Appeals then held that the Appellate

Commission could legitimately choose to accept one doctor's testimony to the effect that lifting the bags at work "may have resulted in exacerbation of plaintiff's back pain, [but] did not result in any new condition."

<u>Losing Reasonable Employment Where The Employee Is At Fault</u>

In *Johnson v General Motors Corp* (CA Docket No. 275909, rel'd January 29, 2008), the Court of Appeals addressed the "reasonable employment" (f/k/a favored work) provisions of MCL 418.301(5)-(9).

Plaintiff suffered a work-related knee condition and then returned to work with restrictions. She claimed a new injury while working at such "reasonable employment" and filed a petition on that basis. Plaintiff had a confrontation at the trial on that petition with a representative of the defendant. Defendant said plaintiff "'attacked'" the represenative at the Agency and, as a result, plaintiff's employment was terminated. Defendant then filed its own petition claiming that, since plaintiff lost her post-injury reasonable employment as a result of her own fault, she was no longer entitled to benefits under MCL 418.301(5)(d). This provision says: "If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job through no fault of the employee, the employee shall receive compensation under this act pursuant to the following: …."

The Workers' Compensation Appellate Commisison found this provision inapplicable and ruled plaintiff was entitled to ongoing benefits. The Appellate Commission said nothing within the reasonable employment provisions exactly fit this case and, therefore, its provisions were not the criteria by which to judge whether plaintiff was entitled to benefits.

The Court of Appeals disagreed. The Court of Appeals said that "the WCAC's decision, which advocates an interpretation of MCL 418.301 requiring looking outside the statute to

determine plaintiff's entitlement to benefits, is improper." The Court of Appeals vacated the Appellate Commission's order and remanded for a determination of "whether a termination of employment, through the fault of the employee here, results in the permanent forfeiture of benefits pursuant to MCL 418.301(5)(d)."

Majority Decision Of The WCAC

In *Smith v Exemplar Manufacturing Co* (CA Docket No. 272749, rel'd January 31, 2008), the Court of Appeals addressed the question of whether a splintered Workers' Compensation Appellate Commission decision constituted a "true majority" opinion.

The Appellate Commission had issued a decision that consisted of three different opinions: a lead opinion, a concurring opinion, and a dissenting opinion. The employer argued that this was improper because the Act and case law require a true majority opinion under MCL 418.274(8) ["The decision reached by a majority of the assigned 3 members of a panel shall be the final decision of the commission."] and *Aquilina v General Motors Corp*, 403 Mich 206; 267 NW2d 923 (1978).

The Court of Appeals disagreed with defendant saying there was a "true majority" because the only purpose of the concurring opinion was to address the dissenting Commissioner's points and "in all other respects" the concurring Commissioner agreed with the lead opinion.

***Bailey* And Retroactivity**

In *Pieser v Sara Lee Bakery and Second Injury Fund (Vocationally Handicapped Provision)* (CA Docket Nos. 275608 and 277884, rel'd March 20, 2008), the Court of Appeals addressed whether the employer was entitled to reimbursement as a result of a change in the law precipitated by the Supreme Court's decision in *Bailey v Oakwood Hospital & Medical Center*, 472 Mich 685; 698 NW2d 374 (2005). Recall that *Bailey* held that the Second Injury Fund is obliged to

reimburse employers under the vocationally handicapped provision even if the employer failed to provide notice to the Fund within the time limits described in MCL 418.925(1).

After release of *Bailey*, the employer and its carrier sought reimbursement in *Pieser* on an old claim. The Workers' Compensation Appellate Commission agreed with defendant and gave *Bailey* retroactive effect ordering the Fund to reimburse the employer for all benefits paid after the date of *Bailey*'s release on June 29, 2005.

The Court of Appeals reversed the Appellate Commission. The Court of Appeals said it saw no reason to stray from "the 'usual' rule of limited retroactivity. Therefore, because this case was no longer pending at the time *Bailey* was released, that case is inapplicable to the instant matter and the fund is correct in its assertions that the WCAC erred in granting defendants any reimbursement at all."

WCAC's Administrative Role

Two of the unpublished decisions from the Court of Appeals address the Workers' Compensation Appellate Commission's authority in reversing Magistrate's decisions.

In *Krastes v Haseley Construction Co, Inc* (CA Docket No. 276545, rel'd April 10, 2008), the Court of Appeals reversed the Appellate Commission and reinstated the Magistrate's order granting the defendant's petition to stop.

Ms. Krastes had originally been granted an open award after which the employer filed a petition to stop. The employer's petition was based on a medical examination by Dr. Drouillard and on the videotapes of plaintiff taken by a private investigator. On the basis of that evidence, the Magistrate concluded plaintiff was no longer disabled and granted the petition to stop. On appeal, the Appellate Commission reversed. The Appellate Commission said Dr. Drouillard had not examined plaintiff at the time she was originally found to be disabled and, as a consequence,

had no understanding of how her condition may have changed since then. And, the Appellate Commission said the Magistrate misinterpreted the private investigator's videotapes.

In response to the employer's appeal, the Court of Appeals reversed the Appellate Commission saying it "overstepped its authority." The Court of Appeals said that, although the Appellate Commission "carefully reviewed the record, it afforded little or no … deference to the magistrate's decision and did not conduct the limited review provided by" statute. The Court of Appeals characterized the Appellate Commission's discussion of Dr. Drouillard's testimony as "entirely specious." And, the Court of Appeals found the Appellate Commission merely "chose to substitute its interpretation of the videotape evidence for the magistrate's interpretation." The Court of Appeals therefore concluded the Appellate Commission "misapprehended or grossly misapplied its standard of review when it reversed the magistrate's order stopping disability benefits."

A different result ensued in *Stone v R.W. Lapine, Inc* (CA Docket No. 275684, rel'd April 3, 2008).

Here, the Magistrate granted plaintiff a closed award and, on plaintiff's appeal, the Workers' Compensation Appellate Commission reversed and granted him on open award.

On appeal to the Court of Appeals, the defendant argued, amongst other things, that the Appellate Commission had misapprehended its administrative appellate role, particularly by disagreeing with the Magistrate's application of the "'special circumstances'" provision of the average weekly wage provision, MCL 418.371(6).

The Court of Appeals disagreed with defendant and affirmed the Appellate Commission. The Court of Appeals said the Appellate Commission "preserved the integrity of the administrative process by vacating the magistrate's personal medical opinions and crafting an opinion based on the evidence in the record." The Court of Appeals agreed with the

Commission that the Magistrate should have applied subsection (3) of the average weekly wage provision because plaintiff had worked less than 39 weeks and the "'special circumstances'" provision of subsection (6) did not apply.

WORKERS' COMPENSATION APPELLATE COMMISSION

Medical Benefits Under A Prior Open Award

The Workers' Compensation Appellate Commission has addressed the defendant's obligation to pay medical benefits under a prior open award of benefits, as well as related procedural issues. In *Kerrigan v Suds Mobile Cleaning Systems*, 2007 ACO #187, the Magistrate had previously entered an open award of benefits that included an obligation to pay reasonable and necessary ongoing medical benefits "including, but not limited to, treatment recommended by" a particular doctor. After that award had become final, the employer filed an application to, amongst other things, challenge whether plaintiff's ongoing medical treatment was reasonable and necessary. To prove its point, the employer scheduled two medical depositions. Those medical depositions were quashed by the Magistrate, however, on the basis that the employer was refusing to authorize medical treatment as required by the terms of the prior open award. The employer challenged that quashing of depositions before the Appellate Commission. An oral argument was held.

Oddly, before the Appellate Commission resolved the case, the propriety of the Magistrate's ruling quashing the depositions became moot because the employer agreed to pay the medical bills in question, but the defendant pursued the appeal nonetheless. The Appellate Commission said, "Having now fulfilled their obligation to provide ongoing medical, defendants will now receive the relief they sought here at the Commission," namely: the ability to take the depositions quashed by the Magistrate. However, the Appellate Commission then proceeded to

address the procedural question presented. The Appellate Commission majority said the Magistrate did not err in quashing the depositions due to the defendant's failure to provide ongoing medical treatment. The concurring Commissioner, Commissioner Grit, agreed with the majority and said "[b]ecause of the importance of the issues raised, I believe we should address these cases." Commissioner Grit then explained:

> The defendants are looking for a ruling that says they need not pay for medical benefits under an open award whenever they dispute the work-related nature, reasonableness or necessity of the medical treatment. The defendants believe that if they decide the medical treatment is not compensable, they can refuse payment, even under an open award, until a magistrate rules otherwise. The defendants are wrong.
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> The defendants ask us if they have to pay for medical treatment that might be grossly inappropriate, unrelated to the work injury, unnecessary and/or unreasonable. The answer is yes. The reason the answer is yes is because there is an order (in this case final) requiring the defendants to do so. That order remains effective until or unless a different order is entered. And until a different order is entered, the defendants may have to pay bills that they should not have to pay. The logic behind that reasoning is provided by the Supreme Court in *Garcia*.

See also, *Schultz v Pontiac Osteopathic Hospital*, 2007 ACO #82, which contains a historical review of MCL 418.315(1) in the context of a prior open award granting unspecified ongoing medical benefits.

<u>Applying The Court Of Appeals' *Stokes* Decision</u>

In *Welch v Means Industrial, Inc*, 2007 ACO #121, the Workers' Compensation Appellate Commission addressed application of the *Sington* definition of disability under the current state of the law, *i.e.*, under the Court of Appeals' decision in *Stokes v DaimlerChrysler Corp*, 272 Mich App 571; 727 NW2d 637 (2006). In remanding the case to the Magistrate for additional

analysis, the Appellate Commission explained "how a plaintiff proves a prima facie case on disability." Commissioner Grit, with Commissioners Ries and Will concurring, said:

> While not repudiating the numerous factors suggested by the *Sington* Court, the Court of Appeals decision in *Stokes v DaimlerChrysler*, 272 Mich App 571 (2006), offers up a straightforward discussion of how a plaintiff proves a prima facie case on disability:
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> > . . . as a practical matter, an employee's proofs will generally consist of the equivalent of the employee's resume, i.e., a listing and description of the jobs the employee held up until the time of the injury, the pay for those jobs, and a description of the employee's training and education; and testimony that the employee cannot perform any of the jobs within his qualifications and training paying the maximum wage . . . By producing such evidence, in addition to evidence of a work-related injury causing the disability, an employee makes a prima facie case of disability-a limitation in the employee's maximum wage earning capacity in all jobs suitable to the employee's qualifications and training. [*Hovey v Hancock Enterprises, Inc*, 2007 ACO #51, pp 4-6.]
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> We remand this matter to the magistrate for a complete analysis on the disability issues. His analysis should take into account the *Sington* decision and the Court of Appeals decision in *Stokes*. The magistrate should address whether the plaintiff's work injuries have resulted in a limitation in his maximum wage earning capacity in work suitable to his qualifications and training. The decision should include findings on the plaintiff's pre-injury qualifications and training, the exact extent of the plaintiff's work-caused physical limitations, what work is suitable to his qualifications and training and within Mr. Welch's work caused limitations, whether that work is reasonably available and whether the current pay for that type of work is equivalent to Mr. Welch's maximum wage earning capacity.