

## RECENT CASES

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### SUPREME COURT

#### *Stokes v Chrysler LLC*

The Supreme Court has released its long-awaited decision in *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). *Stokes* explains in detail *how* to apply the definition of disability described in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002).

#### *Stokes Overview*

Before setting forth the Court's guidelines, the following points in the opinion are worth noting:

- The Court disapproved of the administrative “tendency to properly set forth the *Sington* standard, but then to apply the standard in a manner that effectively constitutes a reversion” to pre-*Sington* law. *Id.* at 278. The Court in *Stokes* said: “It is insufficient to merely articulate the *Sington* standard and then overlook necessary steps in its application.” *Id.* at 281.
- The Court said that the workers’ compensation claimant’s burden of proving disability includes the following: “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.” *Id.* at 283. And, the claimant is to disclose “the results of any efforts to secure employment.” *Id.* at 282.
- In defending the case, “the employer [is] entitled to discovery before the hearing to enable it to meet its burden of coming forward with evidence to rebut claimant’s claim of disability.” *Id.* at 282. The Court said: “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.” *Id.* at 284. The “discovery” can occur “throughout the entire process of examining the case,” as for example where the need arises for an interview in the midst of the workers’ compensation hearing. *Id.* at 295 n 6. The *Stokes* dissent objected to this saying: “Now,

every time an employer requests to have its expert interview a claimant, the magistrate must comply.” *Id.* at 315 (dissenting opinion of J. Cavanagh). “I observe that if compelled discovery in this case, it is difficult to imagine the case in which it would not be. *Id.* at 310 (dissenting opinion of J. Cavanagh).

- It is the claimant’s burden to prove that all jobs in the same “salary range” suitable to his/her qualifications and training cannot be performed as a result of the work injury or are not reasonable available. *Id.* at 282. The Court said suitable jobs are “those jobs that afford a plaintiff an opportunity for consideration to be hired because he possesses the minimum experience, education, and skill.” *Id.* at 277.

### Stokes Step-by-Step Guidelines

The Court then sets forth specific procedures to be followed in determining disability under *Sington*. The Court says: “We attempt only 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.” *Id.* at 290. The step-by-step process (with highlighting added for easier reference) is as follows:

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 not 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 [footnote omitted], 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.

This precise sequence is not rigid, but rather identifies the nature of the proofs that must precede the fact-finder's decision. Should it become evident in a particular case that a different sequence is more practical, the parties may present their evidence accordingly. However, the magistrate must ensure that all steps are completed in some fashion or another, that all the facts necessary to the determination of the case are presented, that each side has been accorded an adequate opportunity to respond to the other's proofs, and that the statutory burden of proof is respected. After that point, the magistrate can properly determine whether the claimant has satisfied his obligations under MCL 418.301(4).

We reiterate that MCL 418.851 places the burden of proof on the claimant to demonstrate his entitlement to compensation and benefits by a preponderance of the evidence. This burden of persuasion never shifts to the employer, although the burden of production of evidence may shift between the parties as the case progresses. **Because a claimant does not prove a "disability" under MCL 418.301(4) by merely demonstrating the inability to**

**perform any previous jobs, the burden remains on the claimant to demonstrate that there are no available jobs within his qualifications and training that he can perform. Only after the claimant has first sustained that statutory burden of proofs does the burden of production shift to the employer to show that there are jobs that the claimant can perform.** *Id.* at 281-285 (emphasis added).

The dissent notes Mr. Stokes worked 28 years essentially as a forklift driver for Chrysler and has a high school diploma and, therefore, “If compelled discovery is ‘necessary’ in this case, it will be ‘necessary’ in all cases.” The dissent also says:

**[A]s a practical matter**, the claimant will face even greater risk if he does not hire an expert. The majority clearly assumes that employers will have vocational experts at workers’ compensation proceedings to best support their positions. With the employer’s expert locked and loaded, the prudent claimant will have like reinforcement. The vocational proofs required virtually ensure that claimants will need experts.” *Id.* at 318-319 (dissenting opinion of J. Cavanagh) (emphasis added).

The majority opinion was authored by Justice Markman with Chief Justice Taylor, Justice Corrigan, and Justice Young concurring. The dissent quoted above is from the dissent of Justice Cavanagh, with whom Justice Kelly concurred. Justice Weaver joined in Justice Cavanagh’s dissent and wrote a separate dissent.

#### Application of the Guidelines to Mr. Stokes’ Case

In applying this template to Mr. Stokes’ case, the Court held that Mr. Stokes did not make a *prima facie* case of disability under the *Sington* standard. Mr. Stokes had worked for Chrysler for 28 years as a forklift driver while occasionally also doing dispatch work. He had a high school education and some college courses with no degree. His injury was a cervical injury that led to cervical laminectomy and fusion surgery after his last day of work. The Court found his proofs were “simply insufficient to establish a ‘disability’” because:

Under *Sington*, claimant was required to demonstrate that the injury to his cervical spine limited his maximum wage-earning capacity in work suitable to his qualifications and training. Claimant merely testified regarding his employment and educational background. Claimant presented no evidence that he had even considered the possibility that he was capable of performing any job other than driving a forklift. Likewise, the lower court, the magistrate, and the tribunal seemingly assumed that because claimant had driven a forklift for so many years, that was all he was able to do and that he had acquired no additional skills throughout his lift that might translate to other positions of employment. At a minimum, claimant was required by the WDCA to show that he had considered other types of employment within his qualifications and training that paid his maximum wages and that he was physically unable to perform any of those jobs or unable to obtain those jobs. There is no evidence in this case that claimant sought *any* post-injury employment or would have been willing to accept such employment within the limits of his qualifications, training, and restrictions. *Id.* at 286 (emphasis in original).

The Court said that “given the inconsistent application of the *Sington* standard in the past, we believe that it would be equitable to allow claimant an opportunity to present his proofs with the guidance provided by this opinion.” *Id.* at 270, 299. Therefore, the Court remanded the case to the Magistrate for that purpose.

#### **Intentional and Wilful Misconduct by the Employee**

The Supreme Court in *Brackett v Focus Hope, Inc.*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2008) (SC Docket No. 135375, entered July 30, 2008) held that the intentional and wilful misconduct provision of the Act, MCL 418.305, applied to bar benefits to the plaintiff. The Supreme Court held the type of “misconduct” contemplated by this provision is not limited to “moral turpitude”-type misconduct.

The facts of the case were that plaintiff, prior to her hire by defendant, was advised by the co-founder of Focus Hope that its employees are required to attend Focus Hope’s annual Martin Luther King Day celebration. Employees are asked before hire whether they will

abide by that requirement. Plaintiff was told of this requirement and agreed to these terms of employment.

Months after her hire, the Martin Luther King Day celebration was scheduled to take place that year in Dearborn. Plaintiff objected to that locale as inappropriate because of a past history of poor race relations in Dearborn, as well as her own past experiences there. For these reasons, plaintiff refused to attend the celebration. Plaintiff advised her immediate supervisor of her decision and he indicated she would be docked a day's pay.

A few days after the event, the co-founder who had hired plaintiff learned of her non-attendance. Plaintiff was called into a conference with her, confronted about her non-attendance, and told it reflected poorly on her commitment to Focus Hope. Plaintiff claimed a psychiatric and emotional problem as a result of these meetings regarding her non-attendance. She was not fired but never returned to work.

Defendants defended the claim arguing, amongst other things, plaintiff's non-attendance constituted "intentional and wilful misconduct" because she deliberately broke a mandatory employer rule. The Magistrate, Workers' Compensation Appellate Commission, and Court of Appeals had ruled plaintiff's favor. They primarily reasoned that plaintiff's actions did not reach a sufficient level of "moral turpitude" so as to trigger the intentional and wilful misconduct provision.

On further appeal to the Supreme Court, the Court reversed and denied benefits. The Court said: "Plaintiff's deliberate and categorical refusal to attend this mandatory function constituted insubordination." The Supreme Court said that there is no statutory requirement that the employee "misconduct" rise to a certain level. The Court rejected "the insertion of a 'moral turpitude' requirement into the text of MCL 418.305." The Court said "conduct is 'intentional

and wilful misconduct' if it is 'improper' and done 'on purpose' despite the knowledge that it is against the rules." The Court cautioned that the work rule "must be clearly established and consistently enforced in order for the employee to understand the mandatory nature of the rule and for its violation to constitute intentional and wilful misconduct."

The Court's decision was 4-3 with Justice Corrigan authoring the majority opinion and Chief Justice Taylor, Justice Markman, and Justice Young concurring. The dissent was authored by Justice Weaver who said that plaintiff's actions did not equate with the type of misconduct that had occurred in other § 305 cases. And, the dissent said Ms. Brackett had contended she was being singled out for her non-attendance.

#### **Burden of Proof on Duration of Disability**

In *Patterson v Delphi Corp* (SC Docket No. 135689, rel'd April 23, 2008), the Supreme Court addressed which party has the burden of proof with respect to the duration of disability.

Unlike *Stokes* and *Brackett*, this ruling from the Court was an order, not a full opinion. In the order, the Court said the case must be remanded to the Court of Appeals as on leave granted to "determine whether the WCAC evaluated the evidence from the perspective that, once a magistrate has determined that a claimant is suffering from a work-related disability for any period, the claimant remains entitled to worker's compensation benefits absent direct proof of recovery from that disability." The Court said that if that was the Appellate Commission's perspective, then the Appellate Commission applied an incorrect standard of proof. The Court said: "Simply because a claimant meets the burden of proof for one period does not mean that he or she necessarily meets that burden for all periods until proven otherwise. Rather, the claimant has the burden at all times of proving his or her entitlement to benefits by a preponderance of the evidence."

### **Partial Disability**

In *Link v Thomas Electric, L.L.C.*, 480 Mich 1035; 743 NW2d 564 (2008), the Supreme Court entered an order in a partial disability case.

The Magistrate had granted plaintiff an open award for bilateral carpal tunnel syndrome. The Magistrate said plaintiff was partially disabled and “has [a] residual wage earning capacity albeit at a lower rate than [at] his employment with Thomas Electric.” 2007 ACO #32. The Magistrate set a partial rate based on post-injury wages plaintiff earned on a newspaper delivery route and as a painter/light maintenance worker.

Before the Appellate Commission, plaintiff argued that the Magistrate’s order of a partial weekly rate “must be modified to provide that benefits can only be reduced when plaintiff is in receipt of actual earnings.” *Id.* The Appellate Commission agreed with plaintiff saying “we find that the plaintiff is entitled to wage loss benefits reduced by actual earnings only.” *Id.* The Appellate Commission said the Magistrate did not “contemplate a reduction of wage loss benefits unless there are actual earnings upon which to base the reduction.” *Id.*

On defendants’ appeal to the Supreme Court, the Supreme Court reversed the Appellate Commission’s ruling “that the magistrate’s order does not provide for an offset to the plaintiff’s worker’s compensation benefits except in the case of actual earnings.” 480 Mich at 1035. The Court said the Magistrate’s opinion accompanying his order “clearly gives the employer credit for the plaintiff’s ability to earn \$8.00 an hour, 25 hours per week,” and that the Commission “clearly erred in ruling that the magistrate’s order did not grant such credit.” *Id.* The Court then remanded the case to the Appellate Commission for reconsideration of the issue with this in mind.

### **Res Judicata**

In *Gee v Arthur B. Myr Industries, Inc*, 480 Mich 1154; 746 NW2d 612 (2008) (SC Docket No. 133762, entered April 9, 2008), the Supreme Court entered an order after oral argument on an application for leave to appeal. In the order, the Supreme Court reversed the Court of Appeals and held that *res judicata* barred plaintiff's second application for attendant care benefits.

In this case, the Workers' Compensation Appellate Commission had denied plaintiff's initial claim for attendant care benefits on the basis that plaintiff failed to present proof on a required element of that claim. That Appellate Commission decision became final. Plaintiff filed another application for benefits without alleging that his condition had changed for the worse since the prior litigation. The Supreme Court said in its order that *res judicata* applied because plaintiff's claim of attendant care was adjudicable and was adjudicated in the initial proceeding. The Supreme Court also noted plaintiff's most recent attendant care application was filed by plaintiff and not by the providers of the care.

### **COURT OF APPEALS**

#### **Aliens**

The Court of Appeals in the published opinion *Romero v Burt Moeke Hardwoods, Inc*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2008) (CA Docket No. 271122, rel'd July 29, 2008) addressed a complicated claim pursued by a Mexican citizen who had legally worked in the United States for a period of time prior to the expiration of his visa and his return to Mexico. The case intertwined facts and issues relating to aliens, a sexual misconduct charge, specific loss benefits, "reasonable employment," as well as a constitutional equal protection argument.

The facts were that Mr. Romero was a Mexican citizen recruited to train as a millwright in the United States. He and his company obtained a temporary visa for him to train

here. While here, plaintiff's right leg was severely crushed by a forklift at work leaving him with injuries, including the alleged loss of the specific use of his leg. Mr. Romero's employer did return him to "odd jobs" at the workplace after his injury and Mr. Romero earned lesser weekly wages for a short period of time at those "odd jobs." And, during that period of time, Mr. Romero was accused of sexual misconduct with the daughter of the company's owner. Plaintiff then returned to Mexico and his temporary visa expired about this time. Defendants alleged that plaintiff fled to Mexico to avoid arrest on the sexual misconduct charge, while plaintiff insisted that he was unaware of the arrest warrant and returned to Mexico only because his visa expired.

Defendants contended they were unconstitutionally deprived of equal protection of the law because they cannot now continue to offer plaintiff "reasonable employment" due to the fact he can no longer legally work in the United States. The Court of Appeals disagreed with defendants' constitutional argument. The Court said the employer hired plaintiff knowing his visa was temporary and there is no evidence the employer has offered plaintiff employment within a reasonable distance of his Mexican home.

The Court of Appeals also addressed defendants' argument that the Workers' Compensation Appellate Commission improperly engaged in *de novo* review by finding that plaintiff left the United States due to an expired visa, as opposed to fleeing to Mexico to avoid arrest on the sexual misconduct charge. The Court of Appeals said, although the Magistrate made no finding as to the reason for plaintiff's departure from the United States, the Appellate Commission was presented with a sufficient record where it could make its own determination on that point. The Appellate Commission had not concluded plaintiff fled the country due to a criminal charge but instead due to an expiring visa.

The Court of Appeals also addressed defendants' argument that the specific loss award had been resolved below under recent case law that clarified the specific loss provision. The Court of Appeals rejected the argument. The Court of Appeals said that, although the Magistrate used language that was "potentially misleading," the decision below did not reflect a misapplication of the law under the present governing specific loss standard and was supported by sufficient record evidence.

Defendants also argued that the "reasonable employment" provisions of MCL 418.301(5) should not have been invoked because a proper *Sington* analysis under MCL 418.301(4) had not occurred. The Court of Appeals disagreed saying that it is undisputed plaintiff is unable to perform millwright work as a result of his work injury, that all that plaintiff did afterwards were "odd jobs" for lesser weekly wages, and plaintiff proved he was unable to perform other lesser paying jobs that he had searched for and obtained in Mexico because he "cannot stand for more than an hour, squat, or climb a ladder without severe pain. He walks with a significant limp and falls down on occasion." The Court of Appeals said the WCAC need not have considered the entire universe of jobs suitable to plaintiff's qualifications and training of first-sentence § 301(4) purposes, as opposed to those that produce the maximum income.

Another issue related to the "wage loss" requirement in the second sentence of § 301(4). Defendants argued that plaintiff's wage loss resulted from the expiration of his visa rather than from his work injury. The Court of Appeals disagreed, saying plaintiff's wage loss is attributable to his work injury not to the expiration of his visa, as exemplified by the fact that plaintiff "could have worked as a millwright in Mexico had the injury not occurred."

As a result of these rulings, the Court affirmed the award.

### **Rakestraw/Significant Manner**

In the unpublished decision *Rohde v Delphi Corp* (CA Docket No. 267460, rel'd May 22, 2007), the Court of Appeals addressed plaintiff's challenge to a denial of benefits for a shoulder injury.

The Magistrate had denied plaintiff's claim on the basis that he suffered from age-related arthritis and his work had not contributed to the problem "in a significant manner" toward that problem, as required by MCL 418.301(2).

On appeal, plaintiff argued that § 301(2)'s significant manner requirements were inapplicable because he had a "medically distinguishable" problem as required by *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003). The Appellate Commission disagreed with plaintiff's argument and the Court of Appeals affirmed. The Court of Appeals said that "although plaintiff's arthritis and impingement were 'medically distinguishable,' they were related to such an extent that they were both 'conditions of the aging process.' Consequently, we find no error in the WCAC's conclusion that MCL 418.301(2) applied, and that plaintiff was not entitled to benefits."

## **WORKERS' COMPENSATION APPELLATE COMMISSION**

### **Partial Disability**

In *Kashou v Coca-Cola Enterprises, Inc*, 2008 ACO #89, the Magistrate granted plaintiff an open award at a partial disability rate in a case where plaintiff had not returned to any work post-injury. In so doing, the Magistrate relied upon vocational testimony showing plaintiff had a post-injury ability to earn that, while not matching his average weekly wage at the time of injury, reflected a residual wage earning capacity.

On appeal, the Appellate Commission affirmed. The Appellate Commission rejected plaintiff's argument that he was entitled to prevail at the maximum weekly rate of compensation as a matter of law because he had no actual post-injury wages. The Appellate Commission noted the Magistrate found that, while plaintiff attempted to obtain employment that was recommended to him by defendant, plaintiff's job seeking efforts were not successful due to his tendency to exaggerate his impairment to potential employers. Consequently, the Appellate Commission affirmed the open award of partial disability benefits.

**Acceptance of Attrition Plan Does Not Preclude Receipt of Wage Loss Benefits**

In *McCrorey v General Motors Corp*, 2008 ACO #100, the Appellate Commission affirmed an open award of benefits in a case where plaintiff accepted an attrition plan.

Plaintiff claimed a disabling work-related injury to his back and underwent two back surgeries. He also took a "buy out" from his employer as well as a regular retirement pension. As part of accepting the money in the buyout (or attrition plan), plaintiff signed a statement that he did not suffer from a disability and was able to work at his regular job. Plaintiff was receiving disability benefits at the time the buyout agreement was signed and had a pending workers' compensation application at that point as well.

The Magistrate found that plaintiff's representation in signing the attrition agreement created a "cloud on Plaintiff's credibility[; but] it does not disqualify him from receiving wage loss benefits."

On appeal, the Appellate Commission affirmed. The Appellate Commission noted, first, plaintiff said he did not recall reading that portion of the attrition plan addressing his ability to continue performing his regular job. And, the Appellate Commission rejected defendant's "wage loss" argument under the second sentence of MCL 418.301(4). Defendant argued that plaintiff's

signing of the agreement meant that his absence of wages was unrelated to his disabling back problem. In rejecting that argument, the Appellate Commission distinguished this case from the hypothetical retiree described in *Sington* by saying this particular plaintiff did not exit the labor market on a *permanent* basis. The Appellate Commission said “there is nothing to stop the plaintiff from reentering the work force if he recovers from his disability.”