

Recent Michigan Case Law Developments

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RECENT CASE LAW DEVELOPMENTS

I. MCL 418.301(4), both sentences.

Section 301(4) reads:

As used in this chapter, “disability” 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. The establishment of disability does not create a presumption of wage loss. MCL 418.301(4).

Last year, as everyone knows, the Supreme Court in *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008) addressed the first sentence of the above statute and explained how the definition of disability is to be applied as a practical matter. Since *Stokes* was released by the Supreme Court, there have been two significant Court of Appeals’ opinions, both of which are unpublished, illustrating how the Court of Appeals views implementation of the *Stokes* opinion. Those cases are addressed below in subsection A. below. It is also important to recognize that even if a claimant satisfies the first sentence of the above statute, *i.e.*, satisfies the *Stokes*’ disability test, the claimant must still meet the second sentence in the statute above in order to receive weekly benefits. The second sentence has received more attention in the last year and is addressed in subsection B. below.

A. The Court of Appeals Implements *Stokes*.

The Court of Appeals has rather recently released two unpublished opinions in cases remanded to it by the Supreme Court for reconsideration in light of *Stokes*. Unpublished opinions are not precedent, but they can be cited so long as a copy of the opinion is provided to the court and opposing parties. See, MCR 7.215(C)(1).

After release of *Stokes*, the Supreme Court had remanded most cases to the Board of Magistrates, but it remanded the following two cases to the Court of Appeals to hear as on leave

granted. What differentiated these cases from the others that had been remanded to Magistrates was that in these two cases there had already been vocational testimony proffered by the parties in the record, even though both cases had been tried before the Supreme Court's *Stokes* opinion. Both cases had resulted in open awards of weekly benefits.

The first case is *Kenney v Alticor, Inc* (CA Docket No. 278090, rel'd June 18, 2009). In *Kenney*, the defendant challenged whether plaintiff was "disabled" under *Sington* and *Stokes*. The Workers' Compensation Appellate Commission had found:

plaintiff's testimony that she would not have refused any job offered to her because she was desperate for a job and that she was unable to find an employer willing to hire her for any job was sufficient to establish that she was unable to perform all the jobs within her wage-earning capacity that pay any rate, let alone that pay at the maximum rate.

The Court of Appeals disagreed with the Appellate Commission, saying "plaintiff's generalized and conclusory testimony regarding her inability to find an employer willing to hire her for any job simply lacks sufficient detail to allow a proper and thorough disability analysis under the stringent requirements detailed in *Stokes*." The Court explained:

... Although the appellate courts of this state have observed that a claimant's testimony alone is sufficient to support a finding of disability, see, e.g., *Sanford v Ryerson & Haynes, Inc*, 396 Mich 630, 637; 242 NW2d 393 (1976); *Woods v Sears, Roebuck & Co*, 135 Mich App 500, 504; 353 NW2d 894 (1984); *Black v Gen Motors Corp*, 125 Mich App 469, 474; 336 NW2d 28 (1983), and although *Stokes* acknowledged that a claimant can establish what jobs, if any, the claimant is qualified and trained to perform within the same salary range as his or her maximum earning capacity without expert testimony and through the claimant's own testimony, *Stokes, supra* at 282, the claimant is still required to present an objective means to assess employment opportunities, such as job listings from a newspaper, a job-placement agency, or a career counselor. *Id.*

Rather than reverse the award, the Court remanded the case to the Board of Magistrates without retaining jurisdiction for a new evidentiary hearing and a new decision on disability.

The second case is *Martin v Eaton Corp* (CA Docket No. 276134, rel'd July 21, 2009).

Here, the Appellate Commission had rejected defendant's argument that plaintiff did not sufficiently prove disability. The Appellate Commission had said:

that in light of the limited duties plaintiff performed as a janitor and the lack of recent training in the jobs he had performed in the distant past, the magistrate did not err in finding him disabled from working in the jobs paying the maximum wage and that it is unreasonable to expect him to look for work within those types of jobs.

The Appellate Commission had also noted that plaintiff was "diligently seeking employment."

On review, the Court of Appeals again disagreed with the Appellate Commission that such proofs satisfied *Stokes/Sington*. The Court reviewed *Stokes'* different steps and said that where – as in this case – the key second *Stokes* step is not adequately addressed, it becomes "impossible" for plaintiff to satisfy the steps which follow. The Court described that second step of the *Stokes* analysis as follows:

The second step requires proof of what jobs plaintiff is *qualified and trained* to perform within the same salary range as his maximum earning capacity when he suffered his injury. Plaintiff's proofs on this step were deficient. Although plaintiff is not required to present a transferable-skills analysis, he "must provide some reasonable means to assess employment opportunities to which is qualifications and training might translate." *Id.* at 282. The focus is on jobs within plaintiff's maximum salary range. Plaintiff provided no solid evidence regarding jobs for which he is qualified and trained that fall within his maximum salary range. Delmar [plaintiff's vocational expert] found that plaintiff's work for defendant "was skilled and transferable," but he did not identify the specific nature of those jobs to which plaintiff's skills might translate. Delmar acknowledged and recognized plaintiff's additional employment training and history, but did not examine whether plaintiff's background would otherwise qualify him for jobs which he could obtain wages within his maximum earning capacity. Instead, Delmar found that plaintiff's retail experience "was too remote in time to be relevant to be included as a component of his present wage earning capacity," and he made the same conclusion with regard to plaintiff's work as a tax preparer. Delmar also dismissed plaintiff's work experience with Ralston in the food packaging industry as being too isolated to that

industry. Step two must be approached and proven as outlined in *Stokes*.

Step two of the *Sington/Stokes* test requires an articulation of the jobs for which plaintiff is qualified and trained and that fall within his maximum earning capacity. It requires a more particular statement of such jobs than that which the magistrate made. Had the parties and Delmar had the benefit of *Stokes*, it is likely that their treatment of this matter would have been more complete. (Bracketed words added).

The Court again vacated the Appellate Commission's determination in *Martin* and remanded the case without retaining jurisdiction to the Magistrate for reconsideration and, if requested, a new hearing to allow additional proofs. The Court added that "[p]roper consideration" of subsequent *Stokes*' steps "is impossible in the absence of a complete and proper determination under step two."

These cases are helpful in underscoring the very exacting burden of proof borne by claimants with respect to the first sentence "disability" issue. "[G]eneralized and conclusory" testimony from claimants and/or their vocational experts that "lacks sufficient detail" does not suffice. *Kenney*, slip op at p 2. Claimants must "identify the specific nature of those jobs to which plaintiff's skills might translate." *Martin*, slip op at p 4.

B. Second Sentence Cases.

The Workers' Compensation Appellate Commission has recently issued an *en banc* opinion that now explains the claimant's burden of proof under the second sentence of § 301(4). The *en banc* case is *Epson v Event Staffing, Inc*, 2009 ACO #152. *En banc* opinions from the Appellate Commission are precedent. MCL 418.274(9). This was a case involving a professional football player, but the holding of the Appellate Commission is clearly designed to speak to situations beyond seasonal employment. The flashpoint for the opinion was the defendant's argument that the plaintiff-football player should not be entitled to weekly wage loss benefits during the off season on the reasoning that he would not have been playing football and earning a salary anyway during that

time period. That is, even though the football player’s physical problems extended into the off season, the defendant’s position was that no weekly wage loss benefits are payable because there is no weekly “wage loss” *due to the work condition*.

In a 3-1 *en banc* opinion (there were only four Commissioners at the time), the Appellate Commission undertook an analysis of the second sentence of § 301(4), typically called the “wage loss” provision. Recall it says: “The establishment of disability does not create a presumption of wage loss.” The precise meaning of this sentence had been addressed in *Haske*, in *Sington*, in post-*Sington* Supreme Court orders, the recent Court of Appeals case of *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1; 760 NW2d 586 (2008), and in other recent Appellate Commission opinions.

The *en banc* majority reviewed all of this history and came to the following conclusion on the meaning of the second sentence. The *en banc* majority said:

The [Supreme] Court also noted it had previously disavowed the concept that a plaintiff was automatically entitled to wage loss benefits regardless of the reason for the plaintiff’s unemployment. *Epson, supra*, slip op at p 28.

* * *

“Under the wage-loss approach, an employee may prove a disability under the subsection 301(4) and thus be *eligible* for benefits and yet not be *entitled* to benefits because of other factors.” *Epson, supra*, slip op at p 29 (emphasis in original).

* * *

Disability and compensable wage loss are separate issues. *Epson, supra*, slip op at p 27 n 1.

* * *

The Michigan Supreme Court’s *Haske* wage loss concept is perhaps best illustrated in the case of *Castellon v Delphi Automotive Systems Corporation*, 475 Mich 898 (2006). The

magistrate agreed Ms. Castellon had work-related carpal tunnel syndrome. However, he denied wage loss benefits because the plaintiff went off work for a non-work-related condition, Bell's Palsy. *Epson, supra*, slip op at p 30.

The *en banc* majority noted that Chief Justice Kelly in the Supreme Court's *Castellon* opinion had said: **“In such a situation, plaintiff would not be entitled to benefits because she still would not be out of work due to a work-related condition.”** *Epson, supra*, slip op at p 30 (emphasis in original). The Appellate Commission also quoted the Supreme Court's opinion in *Harvey v General Motors Corp*, 482 Mich 1044 (2008):

“...the Workers' Compensation Appellate Commission erred in stating that an employee does not need to demonstrate a connection between wage loss and the work-related injury. An employee is indeed required to demonstrate such a connection. See MCL 418.301(4); *Sington v Chrysler Corp*, 467 Mich 144, 160-161 (2002).” *Epson, supra*, slip op at p 31 n 3.

The Appellate Commission then noted the recent unpublished Court of Appeals opinion *Raybon v DP Fox Football Holdings LLC* (CA Docket No. 268634) and said that, while seasonal employees are not automatically disentitled to benefits during the off season, employees – after proving *Stokes* “disability” – need to also demonstrate that such disability is the reason for their absence of wages. The Appellate Commission said:

... Mr. Epson does need to factually link his wage loss, during the season and after the end of the season, to his work-related injury. *Epson, supra*, slip op at p 32.

* * *

... we would remand on the limited issue of whether Mr. Epson's wage loss is compensable. *Epson, supra*, slip op at p 33.

Most Magistrates miss this. That is, most Magistrates award benefits upon finding that the claimant satisfies the *Stokes* disability standard and has no post-injury wage without considering whether the disability is the reason for the claimant's loss of wages.

C. Lofton and Partial Disability.

There was confusion relating to the Supreme Court's entry and release of its orders in *Lofton v AutoZone, Inc* (SC Docket No. 136029, rel'd July 15, 2009). Recall that *Lofton* is the case which had been remanded by the Court last year to the Board of Magistrates. That remand was:

for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008). If it is found that plaintiff is disabled under MCL 418.301(4), but that the limitation of wage earning capacity is only partial, the magistrate shall compute wage loss benefits under MCL 418.361(1), based upon what the plaintiff remains capable of earning.

In remanding the case, the Court retained jurisdiction and set a time limit for the Magistrate's remand decision.

On remand, the Magistrate granted plaintiff weekly benefits at the maximum weekly rate of compensation. The case then returned to the Supreme Court. On June 17, 2009, the Appellate Commission received the following 4-3 order from the Court:

By order of October 1, 2008, this Court vacated the decision of the Workers' Compensation Appellate Commission (WCAC) mailed April 4, 2007, and remanded this case to the Board of Magistrates for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008), with instruction that the magistrate assigned to the case take additional proofs upon request of either party and issue a decision. This Court retained jurisdiction. On order of the Court, the assigned magistrate having subsequently presided over an evidentiary hearing and having submitted a new decision in accordance with this Court's instructions, we REMAND this case to the WCAC for review of any challenges the parties may have to the magistrate's decision pursuant to the standard of review established in MCL 418.861a. The motion for leave to file brief amicus curiae is GRANTED.

We do not retain jurisdiction.

Chief Justice Kelly and Justices Cavanagh and Hathaway disagreed with the above ruling and would have granted leave to appeal.

For unexplained reasons, the above order was retracted by the Court. The following month, on July 15, 2009, the Court issued another order. The substance of the Court's July 15, 2009 order reads the same *verbatim* as the Court's June 17, 2009 order quoted above. The only difference is the votes of the Justices. Whereas in the June order, Chief Justice Kelly and Justices Cavanagh and Hathaway would grant leave to appeal, in the July order, Chief Justice Kelly and Justices Weaver and Hathaway would grant leave to appeal.

In any event, the case has now returned to the Appellate Commission without the Court retaining jurisdiction.

There is a general misconception that the Court's *Lofton* order is unique in its statement regarding partial disability benefits under MCL 418.361(1) [the partial disability provision]. There are actually many cases that recognize the same thing that *Lofton* does, *i.e.*, that the partial disability provision can determine a disabled claimant's rate ***even if the claimant is not actually earning full wages post-injury***. See, *e.g.*, *Link v Thomas Electric, LLC*, 480 Mich 1035; 743 NW2d 564 (2008); *Frammolino v Richmond Products Co*, 79 Mich App 18; 260 NW2d 908 (1977); *Barrett v Bohn Aluminum & Brass Co*, 69 Mich App 636; 245 NW2d 147 (1976); *Benefield v WR Grace Co*, 34 Mich App 442; 191 NW2d 567 (1971); *Mayse v Wirt Transport Co*, 1997 ACO #528; *Kashou v Coca-Cola Enterprises, Inc*, 2008 ACO #89; *Todor v Northland Farms, LLC*, 2008 ACO #153.

Finally, note how the partial disability argument is connected to the second sentence of § 301(4), just as the Supreme Court had recognized in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), when it said:

We noted that, once it is found that an employee is disabled under § 301(4), the employee then must establish wage loss in order to compute wage loss benefits under MCL 418.361 [the partial disability provision]. The clear language of the second sentence of § 301(4) militates against any holding that the terms “wage earning capacity” and “wage loss” are synonymous. *Sington*, 467 Mich at 160 n 11 (bracketed words added).

Therefore, where a *portion* of a claimant’s wage loss is attributable to the work injury and a *portion* is attributable to a non-work-related reason (*e.g.*, failure to look for lesser paying work), then our argument is that the portion of wage loss not attributable to the work injury is not compensable under the workers’ compensation system. Workers’ compensation is designed to hold the employer and carrier liable *only* for that portion of the absence of wages that is attributable to the work injury. *E.g.*, *Simpson v Lee & Cady*, 294 Mich 460; 293 NW 718 (1940).

II. Attorney Fees on Unpaid Medical Expenses.

In *Petersen v Magna Corp*, 484 Mich 300; ____ NW2d ____ (2009), a majority of the Supreme Court agreed that employers and insurance carriers (not medical providers or medical creditors) can be assessed plaintiff counsel’s fees on unpaid medical expenses.

The *Petersen* opinion produced five different opinions from the seven Justices. Chief Justice Kelly authored the lead opinion with Justice Cavanagh concurring. Justice Hathaway authored the second opinion with Justice Weaver concurring. Both of these opinions reach the same result – the result described in the paragraph above – but for different reasons. Justice Markman dissented in a lengthy opinion. Justice Young dissented in a separate opinion. And, Justice Corrigan dissented joining Justice Markman’s dissent and part of Justice Young’s dissent.

With respect to the first opinion authored by Chief Justice Kelly (with Justice Cavanagh concurring), the Chief Justice finds that the statutory language at issue is ambiguous in the sense that it does not identify among whom the attorney fees are to be prorated, *e.g.*, the employee, the

employer, the insurance carrier, or the medical provider or medical creditor. The Chief Justice concludes that the sentence at issue only allows for proration between employers and their carriers. In response to one of the dissents, Chief Justice Kelly clarifies that nothing in her opinion is to be construed as *requiring* a Magistrate to prorate a fee against an employer or the employer's carrier; it is instead a matter of the Magistrate's discretion.

In the course of her opinion, the Chief Justice embarks on a discussion of how to determine when a statute is ambiguous. In so doing, the Chief Justice disapproves of more recent opinions from the Supreme Court that define ambiguity. The Chief Justice then discusses *stare decisis* and would change the rules as to when Supreme Court precedent can be overturned.

The second opinion authored by Justice Hathaway (with Justice Weaver concurring) agrees with the lead opinion but "only to the extent that it [the lead opinion] concludes that the term 'prorate' in MCL 418.315(1) applies exclusively to employers and their insurance carriers." What Justice Hathaway disagrees with in the lead opinion is the lead opinion's finding that the statute is ambiguous. Justice Hathaway finds it unambiguous. For that reason, Justice Hathaway undertakes no discussion of ambiguity and *stare decisis*.

The primary dissenting opinion is that of Justice Markman. Justice Markman says the proration sentence in § 315(1) contemplates a division of attorney fees among the different medical providers who reap the benefit of the unpaid medical award, as opposed to assessment of fees on employers or carriers. Justice Markman says the majority is adding an additional cost upon the workers' compensation process "by penalizing employers and forcing them to pay not only for their own attorneys, but also for their employees' attorneys." Justice Markman also criticizes the Chief Justice's definition of ambiguity, saying it creates "an extraordinarily low threshold for finding

ambiguity” which permits a Justice to “utilize whatever factors are deemed appropriate [by that Justice] in reaching a result.”

Justice Young joined in parts of Justice Markman’s dissent, but he would hold that the term “prorate” applies only to a proration between the claimant and the employer – not to medical providers or medical creditors who are not parties to the case or represented by counsel. Justice Young says the majority’s opinion will have a chilling effect on employers and carriers contesting medical expenses.

Finally, Justice Corrigan fully agreed with Justice Markman’s opinion and a portion of Justice Young’s criticism of the majority’s holding.

The bottom line in all of this is that we should now be prepared to face requests from plaintiff attorneys for imposition of attorney fees on the employers and carriers in relationship to unpaid medical expenses. Please bear in mind on the positive side, however, that this is an entirely discretionary point for the Magistrate. That is, a Magistrate is not obliged to impose attorney fees on unpaid medical expenses. Case law from the Appellate Commission in terms of *when* a Magistrate can legitimately impose attorney fees on the employer and/or carrier provides that: “At a minimum, he or she [the Magistrate] must find each medical expense for which a fee is imposed was 1) reasonable and necessary and 2) the employer had appropriate notice they were due.” *Beattie v Wells Aluminum Corp*, 2005 ACO #157. *Beattie* adds that when the “validity and necessity of such benefits and treatment are reasonably in dispute, the magistrate cannot order the payment of such fees (without some findings and rationale upon which to rest his discretion) based only on his opinion that such would promote the assistance of counsel in medical dispute cases where there are only minimal wage benefits in dispute.” *Beattie* has largely been followed as

setting forth the governing standard for determining when attorney fees can be imposed on employers and carriers.

Finally in this regard, the Act says in MCL 418.858(1):

... The payment of fees for all attorneys and physicians for services under this act shall be subject to the approval of a worker's compensation magistrate. In the event of disagreement as to such fees, an interested party may apply to the bureau for a hearing. After an order by the worker's compensation magistrate, review may be had by the director if a request is filed within 15 days. Thereafter the director's order may be reviewed by the appellate commission on request of an interested party, if a request is filed within 15 days.

The question thus arises: if a Magistrate orders attorney fees payable by the employer/carrier in a decision that, for example, also grants the employee an open award, should (must?) the employer/carrier appeal the attorney fee request to the Director in 15 days while also appealing the award to the employee to the Appellate Commission? It is not clear.

III. Other *En Banc* Appellate Commission Cases.

Besides *Epson*, two other recent *en banc* opinions from the Appellate Commission are important. One addresses specific losses, the other vocational rehabilitation proceedings under MCL 418.319.

In *Trammel v Consumers Energy Co*, 2009 ACO #126, the Appellate Commission unanimously held that, in determining specific losses under MCL 418.361(2) where there has been an implant in the body, the "usefulness" of the body member at issue is to be determined without considering the ameliorating effects of the implant.

The Appellate Commission *sua sponte* decided to *en banc* this case and then unanimously reached the result described above. In so doing, the Appellate Commission rejected the defendant's argument that two Court of Appeals' cases, *Tew v Hillsdale Tool & Manufacturing Co*, 142 Mich App 29; 369 NW2d 254 (1985) and *O'Connor v Binney Auto Parts*, 203 Mich App 522; 513 NW2d

818 (1994), control insofar as they say implants are to be considered in assessing “usefulness” for specific loss purposes. The Appellate Commission disagreed with the defendant’s position, finding that *Cain v Waste Management, Inc*, 465 Mich 509; 638 NW2d 98 (2002) and *Cain v Waste Management, Inc (After Remand)*, 472 Mich 236; 697 NW2d 130 (2005) expressed disagreement with *Tew* and *O’Connor*.

In the *en banc* decision *Slais and Workers’ Compensation Agency v State of Michigan, Department of State Police*, 2009 ACO #10, the Appellate Commission considered the question of whether vocational rehabilitation proceedings undertaken pursuant to MCL 418.319 [the vocational rehabilitation provision] must be transcribed proceedings with an evidentiary record. The initial step under § 319 is a proceeding conducted by the Director (or the Director’s designee) and the next step (if taken) is a hearing before a Magistrate.

The facts were as follows. Plaintiff had been a Michigan state trooper who was injured and could not be returned to work. Years ago, defendant began the traditional type of vocational rehabilitation described in § 319. Plaintiff resisted those efforts, insisting he wanted to attend law school as his vocational rehabilitation. The dispute was heard at the initial level by Mr. David Campbell, the state’s vocational rehabilitation consultant. No transcript was made of the vocational rehabilitation proceeding held before Mr. Campbell. Mr. Campbell issued his decision in favor of plaintiff. Defendant then applied for a hearing before a Magistrate. There, defendant argued that the proceeding before Mr. Campbell should have included a formal record with state-funded transcription of the hearing. Defendant further argued that a formal evidentiary hearing on the record is also required before the Magistrate. The Magistrate disagreed with the defendant on both points and also ruled for plaintiff.

Defendant appealed to the Appellate Commission. The Director of the Workers' Compensation Agency intervened and supported plaintiff's position. The Appellate Commission decided to hear the case *en banc* with an oral argument.

The Appellate Commission then issued a 4-1 decision. All Commissioners agreed that the hearing before the Magistrate must be an evidentiary hearing on the record. The Appellate Commission said to rule otherwise would deprive a party of due process of law. And, the Appellate Commission said, the Magistrate is "starting over with the evidence" and not limited to the materials submitted at the initial level. The Appellate Commission held in pertinent part:

As indicated earlier in this opinion, we believe that even before considering constitutional issues, that the Worker's Disability Compensation Act requires that in rehabilitation hearings before a magistrate, stenographic notes or the use of recording equipment is mandatory. Further, to the extent that the Commission's opinion pertaining to constitutional issues is pertinent, we find that failure to grant such a hearing so recorded before a magistrate would deprive the appellant due process of law. The proceeding before the magistrate is a *de novo* hearing. Essentially the magistrate is starting over with the evidence. The parties are not limited to submitting the exhibits or "testimony" discussed or used at the informal hearing with the director's representative/mediator. Because there is no record of the informal hearing, practically there would be no way for the magistrate to discern what transpired at the informal hearing level.

The Appellate Commission then remanded the case to the Magistrate for a hearing on the merits, saying a "record shall be made of such proceedings, utilizing stenographic notes or the equivalent thereof."

The dissenter agreed with the above but would also require that the hearing at the initial level before the Director's representative similarly include "a record of the proceedings before the director."

IV. Cases on the Horizon.

There are upcoming oral arguments before the Supreme Court on two issues which suggest that the Supreme Court may be ruling on these two issues in the coming months.

Next month, the Supreme Court will be hearing oral argument in *Loos v J.B. Installed Sales, Inc* (SC Docket No. 137987). The issue in *Loos* is whether the claimant is an “employee” or an independent contractor in light of income tax filings. More specifically, the case relates to the extent to which a Magistrate may rely upon IRS and income tax filings to determine whether the claimant is an “employee” or an independent contractor.

Also to be argued (probably in December or January) are two cases relating to that provision of the Act addressing Michigan exercising jurisdiction over injuries occurring outside of the state, MCL 418.845. This statute – prior to its amendment this year – had required that the claimant be a resident of the state of Michigan at the time of injury *and* be employed under a contract of hire made in Michigan. The Legislature via its January 13, 2009 amendment to § 845 provided that now if the employee meets either of those two requirements, then Michigan has jurisdiction. In the consolidated cases, *Bezeau v Palace Sports & Entertainment, Inc* (SC Docket No. 137500) and *Brewer v A.D. Transport Express, Inc* (SC Docket No. 139068), the issue is whether the Legislature’s amendment is retroactive so as to apply to injuries occurring before the amendment’s effective date of January 13, 2009.