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NEWSLETTER

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Worker's Compensation Update

This newsletter discusses a Michigan Supreme Court Order, issued June 3, 2011, *Harder v Castle Bluff Apartments*, S. Ct. No. 142616, and the administration of workers' compensation law in Michigan.

Harder v Castle Bluff Apartments – Wage Loss Benefits

In *Harder v Castle Bluff Apartments*, S. Ct. No. 142616, rel'd 6/03/2011, the Supreme Court denied the employer's Application for Leave to Appeal from decisions of the Board of Magistrates and Appellate Commission that awarded full wage loss benefits. However, a majority of Supreme Court Justices issued an order indicating partially disabled employees may not always be entitled to full wage loss benefits where they are still "able to earn", MCL 418.361, wages less than their maximum wage earning capacity after an injury occurred. The *Harder* Order says:

> We note that, contrary to the analysis provided by the Workers' Compensation Appellate Commission (WCAC), MCL 418.361(1) applies at all times to partially disabled workers, see *Lofton v Autozone, Inc.*, 482 Mich 1005 (2008), but the magistrate in this case found, and the record supports, that the plaintiff did not have the ability to earn wages within his qualifications and training, and the WCAC therefore properly affirmed the magistrate's decision.

A majority statement in *Harder* suggests an employer may be able to apply MCL 418.361(1) to reduce weekly wage loss benefits where evidence shows a partially disabled employee is "able to earn" wages that are less than the employee's pre-injury maximum wage earning capacity.

A minority of Justices did not join the majority's statement.

Justices Michael Cavanaugh, Marilyn Kelley and Diane Hathaway also voted to deny leave to appeal, but they said they did so "without the further statement found in the majority's order".

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Lofton is alive.

The Supreme Court Majority's approval of *Lofton v Autozone, Inc.*, 482 Mich 1005 (2008), S. Ct. No. 136029, rel'd 10/01/08, combined with the statement that § 361(1) applies at all times to partially disabled workers, suggests the Commission, Board of Magistrates and practitioners should give more credence to the Supreme Court statement in *Lofton*. The *Lofton* order said:

> If it is found that the 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.

On remand, the magistrate found Mr. Lofton was only partially disabled, but the Magistrate also found he was not able to earn anything.

Subsequently, the Commission said it did not believe *Lofton* controlled in any other cases, absent further direction from the Court, which had not been forthcoming, see *Ford v Gordon Food Service, Inc.*, 2009 ACO No. 207, slip opinion at 4. The Supreme Court order in *Harder* appears to provide further direction.

Background of *Harder*.

In *Harder v Castle Bluff Apartments*, 2010 ACO #77, the Commission panel (Commissioner Ries, former Commissioner Will and then Chairperson Gorchow) said where an employee returns to reasonable employment after a work injury, MCL 418.301(5) supplants § 361(1). Mr. Harder returned to less physical work (reasonable employment) after his injury until he was fired. While he worked, the Commission said § 301(5), *not* § 361(1), applied. The Commission said after he stopped working, § 301(5)(e) applied because he worked less than 100 weeks in reasonable employment. The Commission believed §301(5)(e) entitled Mr. Harder to full benefits based on his wage at the time of his injury.

The Supreme Court statement in *Harder* that § 361(1) applies at all times to partially disabled workers appears to contradict the Commission's belief § 301(5) can supplant § 361(1). Therefore, even in cases where an employee returns to "reasonable employment" after an injury, the fact-finder (and parties) may consider that a partially disabled employee still retains the ability to

earn a wage less than his maximum wage, in work suitable to his qualifications and training.

The Supreme Court statement did not, however, address issues such as (1) *who* must bear the burden of producing evidence of the value of lesser wages the employee is still "able to earn" and (2) *what evidence* is relevant or sufficient to meet a party's burden. A question remains concerning when and if the employee has met his burden of proving a *prima facie* case that entitled him or her to full benefits or something less than full benefits. Most likely, in a trial scenario, the burden of persuasion will shift back and forth as evidence is introduced. This shifting of burdens may also be a helpful model as employers and employees try to assess the calculation of wage loss benefits before a case ever goes to trial.

The Court did not yet address issues concerning what evidence is sufficient to permit an employer to pay less than the full benefit rate, and who must produce such evidence.

Future cases will have to address at what point the burden of persuasion falls on the employer after the employee proved disability. In *Harder*, the Commissioners held a reduction could not be made because the record did not contain information/evidence needed to determine what that lesser ability to earn was. These Commissioners held the employer must prove the amount, less than the maximum wage earning capacity, the employee is able to earn post-injury. These Commissioners placed the burden on the employer to present evidence of a *non-speculative* wage earning capacity. Future cases will probably have to consider the level of evidence the employee must present before the burden shifts or falls on the employer.

These Commissioners also required proof of an actual post-injury work experience. However, that requirement created a "Catch-22"; if the employee did "reasonable employment" for less than 100 weeks, the Commission held § 301(5) supplanted §361(1). The Supreme Court statement in *Harder*, suggests a majority of the Supreme Court do not agree § 361(1) can be supplanted by § 301(5).

An employer may still need a sound evidentiary basis for assessing what an employee is "able to earn" post-injury before concluding the employee is able to earn less than maximum wages under § 361(1). Prudence suggests an employer, who believes its injured and *partially* disabled employee remains "able to earn" less than his or her maximum wage earning

A prudent employer should acquire evidence that can reasonably support a non-speculative level of wages the employee is "able to earn.

The lesson from Harder's endorsement of Lofton may be that a partially disabled employee has an obligation to make a good-faith job search for available wages that may be less than his maximum wage earning capacity. If evidence of reasonable job leads are placed in the record and the employee did not make a good-faith attempt to search for and obtain such jobs, the fact finder may have to consider such evidence relevant to the wage loss benefit calculation.

The employer in Harder did not actually convince the Court to reduce a full benefits award to a partially disabled employee; but, Harder suggests the Court may agree it is appropriate to do so in a future case.

capacity, should muster reasonable evidence that allows the employer to calculate the employee's post injury wage earning capacity, in a non-speculative manner, *before* taking an offset for such retained wage earning capacity. Until courts resolve these issues, employers who believe the *Harder* order applies to their employee should anticipate they may have to support any decision they make to reduce full wage loss benefits for a partially disabled employee with evidence of jobs that are:

- non theoretical (name the employer and location),
- suitable to the employee's qualifications and training (including translatable skills) (describe the job duties),
- within the employee's restrictions (using available medical records and expert medical opinions),
- available to the employee (evidence they exist when made known to the employee), and
- describing what those jobs actually pay per week (including the hourly rate and the number of hours available).

If the employee does not return to work and earn wages with this information, the employer should try to assess whether the employee knowingly *avoided* these available work opportunities, e.g., whether the employee received notice of the job opportunities and how and where to apply for them, but did not pursue them in good faith or sabotaged efforts to obtain them.

Future cases may reveal some of these steps are not necessary or are not necessary until the employee presents evidence of what lesser value of wages the employee is able to earn. However, without further direction, these are reasonable steps to encourage a fact finder to conclude your case is subject to the directions in *Harder* and *Lofton*. The real value in these cases may be the sense that doing this preparation work and applying it to an appropriate case will be considered relevant under § 361(1).

Employees may still argue the *Harder* order has not changed current practice because the Supreme Court did not change the

underlying order granting full benefits to Mr. Harder and/or the *Harder* order was not issued in conjunction with a formal opinion and analysis.

However, *Harder* is the second order the Supreme Court has issued in which a majority of Supreme Court Justices said they will consider this issue where evidence shows the employee has the ability to earn wages less than his maximum wage earning capacity.

For those of you who attended the Kluczynski, Girtz & Vogelzang Annual Workers' Compensation Seminar in October, 2010, you may note this wage loss issue, in relation to *Lofton* and *Harder*, was discussed in greater detail at pages 78-100 of the case law summaries distributed at that seminar.

Administrative Changes

Our 5/31/2011 Newsletter provided notice of Governor Snyder's executive order 2011-6 that takes effect on August 1, 2011. This order merged the Workers' Compensation Appellate Commission with the Michigan Employment Security Board of Review. This merger resulted in a single appellate body designated as the Michigan Compensation Appellate Commission. Nine commissioners will be initially appointed to handle appeals from decisions involving workers' compensation and unemployment compensation claims.

All of these departments are now under the control of the Department of Licensing and Regulatory Affairs (LARA). Governor Snyder appointed Steven H. Hilfinger as the Director of this Department.

Michael Zimmer, the Executive Director of the Michigan Administrative Hearing System, will oversee all administrative hearing agencies

Magistrate Quist is moving on up

G. Jay Quist, who is currently chairperson of the Board of Magistrates, will become the Director of Employment Services for the Michigan Administration Hearings System. He will oversee the hearing and appellate tribunals that handle Workers Disability Compensation, Unemployment and Wage and Hour cases. In essence, he will be the director of the agencies directly responsible for litigation for these types of cases.

Kevin Elzenheimer will remain Director of the Workers' Compensation Agency responsible for administering all other aspects of the Workers' Compensation Agency, including, presumably, Director hearings and the Funds Administration.

To complete the 17 member Board of Magistrates, the Workers' Compensation Agency has appointed Robert Tjapkes to handle Flint cases, and Brian Boyle and John Buehler to handle cases in Detroit. Chris Slater remains on the Board of Magistrates and will handle cases in Grand Rapids and Kalamazoo. Lisa Klaeren will be appointed as the new Chairperson of the Board of Magistrates, to replace Chairperson Quist. The Agency will likely appoint one more magistrate to replace Magistrate Quist when he leaves the Board.

Information provided by Mr. Elzenheimer at the recent Michigan Self Insurers Association meeting indicated the Workers' Compensation Agency is contemplating and gathering suggestions for amendments to the Workers' Compensation Act. If you have ideas to improve the Act, the Agency may be receptive to them at this time. Attorneys in our office also are available to discuss your ideas, if you wish to discuss them.