

NEWSLETTER

Duncan A. McMillan, Editor

Worker's Compensation Update

This newsletter concerns one of the first workers' compensation cases issued by the new "Michigan Compensation Appellate Commission" that addressed the Supreme Court's order in *Harder v Castle Bluff Apartments*, S.C. #142616, rel'd 6/03/2011.

A new Appellate Commission decision says wages a partially disabled employee is "able to earn" are relevant, even if such wages are less than the employee's maximum wage earning capacity.

KGV's June 27, 2011 newsletter discussed the Supreme Court's pronouncement in *Harder* that MCL 418.361(1) requires a magistrate to consider the wages a *partially* disabled employee is "able to earn" after an injury. The *Harder* order reinvigorated the Supreme Court's order in *Lofton v Auto Zone, Inc.*, 482 Mich 1005 (2008). These orders suggest the Supreme Court will require magistrates, before determining the wage loss benefit rate, to consider evidence a partially disabled employee has the ability to earn wages less than his or her maximum wage earning capacity (the standard for establishing disability under *Stokes v Chrysler, LLC*, 481 Mich 266 (2008) and *Sington v Chrysler Corp.*, 467 Mich 144 (2002).

In *Brackenrich v Sun Chemical Corp.*, 2011 ACO #106, rel'd 8/30/2011 (a case handled by KGV attorneys), the new Appellate Commission remanded a magistrate's decision based on "reasonable employment" issues. However, in response to a cross-appeal argument KGV asserted on behalf of this employer, the Commission also considered that if the "reasonable employment" provisions did not continue to bar the plaintiff's claim for wage loss benefits, the amount of wage loss benefits could be reduced by considering wages the employee was able to earn had he accepted and not avoided work from other employers. The Commission panel said in light of the Supreme Court's recent orders in *Harder, supra*,

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as well as in *Umphrey v GMC*, S.C. #142694, rel'd 6/29/2011, and *Vrooman v Ford Motor Company*, S.C. #142824, also rel'd 6/29/2011, "the percentage of wage loss attributable to the compensable injury is to be calculated and compensated consistent with MCL 418.361(1)". The Commission described guidelines for making calculations using MCL 418.361 and MCL 418.371. The Commission said:

Where, as with offers of reasonable employment, an injured worker retains some wage earning capacity, but has not actually performed the job, MCL 418.371(5) directs that the average weekly wage for that job is determined by the usual wage for similar services. That same subsection presumes that the wage for the job corresponding to the residual wage earning capacity cannot be ascertained by normal means. Here, as with all bona fide offers of reasonable employment, a wage was attached to the actual job offer which the magistrate may find is the wage which is ". . . the usual wage for similar services . . ." per that subsection. Alternately, *Stokes* proofs might well provide the necessary information in other cases.

Ultimately, MCL 418.361(1) contains the actual calculation formula, as informed by MCL 418.313. Section 361(1) requires computation of 80% of the after tax average weekly wage for both the injury job and the jobs with respect to which the claimant retains a wage earning capacity. However, the director of the Agency, per § 313, must publish tables annually that conclusively establish those numbers based upon average weekly wages. Using the numbers so published, the benefits rate equals the number for the injury job less the number for the post injury jobs (in this case the offered and refused job).

The Commission remanded the case to the Board of Magistrates. Therefore, this case does not have a final opinion and order from the Commission. Nevertheless, it is an initial signal suggesting at least 3 Commissioners intend to comply with the Supreme Court's order in *Harder, supra*.

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Commission
suggests formula for
applying *Harder* and
Lofton, including
possible use of
Stokes proofs.

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