

NEWSLETTER

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Worker's Compensation Update

We enjoyed seeing many of you again at KGV's 15th Annual Workers' Compensation Seminar on September 30, 2011. This newsletter will address updates of issues discussed at that seminar and more recent cases.

PROPOSALS TO AMEND THE WDCA

On 10/26/2011, Michigan House Commerce Committee voted to refer the final (revised) version of House Bill 5002 to be considered by the House of Representatives. This bill proposes to amend the Workers' Disability Compensation Act (WDCA). This bill includes amendments that codify some decisions from the Supreme Court, negate other decisions and makes other changes:

- **§§ 210, 212 and 213** – Amendments to these sections reduce the procedural steps for appointing Magistrates, but retain the requirement the appointee be a member in good standing of the Michigan Bar who has been licensed to practice law in Michigan Court for five or more years. Essentially, these Amendments eliminated the Qualifications Advisory Committee and Term Limits (previously 12 years). **§ 274** also eliminated the Qualifications Advisory Committee from the appointment process for Appellate Commissioners.
- **§ 301(1)** – This Amendment requires a compensable injury to be one that caused, contributed to, or aggravated pathology in a manner that was medically distinguishable from the employee's prior condition (codifying *Rakestraw v General*

*Appointment process
streamlined*

*Personal injury
(Rakestraw is codified)*

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Dynamics Land Systems, Inc.). The Amendment says: "A personal injury covered under this Act is compensable if it causes, contributes to, or aggravates pathology in a manner that is medically distinguishable from the employee's prior condition." The final version does *not* eliminate Chapter 4 of the Act.

- **§ 301(2)** – This Amendment said conditions subject to the "significant manner" standard include conditions of the aging process, including, but not limited to heart, cardiovascular conditions and *degenerative arthritis*; this Amendment also said mental disabilities are compensable if they arise out of actual events of employment, not out of unfounded perceptions thereof, "and if the employee's perception of the actual events is reasonably grounded in fact or reality" (codifying *Robertson v Daimler Chrysler Corp.*). The final version did *not* say compensable mental disabilities were limited to those that resulted from greater mental stresses than a reasonable employee experiences in similar employment (a provision that was in the earlier version of HB 5002). This revision may have been a consequence of complaints raised by representatives of Public Safety employees.

- **§ 301(4)** – This Amendment retains the definition that a disability is 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 Amendment adds that such a limitation of wage earning capacity (WEC) occurs only if the work injury caused the employee to be unable to perform all jobs that pay his maximum wages in work suitable to the his qualifications and training (Q & T) "including work that may be performed using the employee's transferable work skills." This Amendment codified *Sington v Chrysler Corp.* and *Stokes v Chrysler, LLC*). This Amendment also contains language that says:

A disability is total if the employee is unable to earn in any job paying maximum wages in work suitable to the employee's qualification and training. A disability is partial if the employee retains a wage earning capacity at a pay level less than his or her maximum wages in work suitable to his or her qualifications and training.

Mental disability and conditions of aging (Robertson is codified)

Disability (Sington and Stokes standards are codified)

These two sentences appear to say that considering the universe of jobs that pay the injured employee's maximum wages in work suitable to his Q & T, his disability is total if he is "unable to earn" in any such jobs. However, the disability is only partial if he retains the capacity to earn wages at less than his maximum wage in this universe. Subsection **(B)** of the Amendment defines "wage earning capacity" as "the wages the employee earns or is capable of earning at a job reasonably available to that employee, whether or not actually earned. This provision adds an employee "has an affirmative duty to seek work reasonably available to that employee. A Magistrate may consider good-faith job search efforts to determine whether jobs are reasonably available." The provisions appear to codify the Orders the Supreme Court issued in *Lofton v Auto Zone, Inc.* and *Harder v Castle Bluff Apartments*. (See also *Glave v Battle Creek School District*, 2011 ACO #117 that said the burden of proving the employee's post-injury wage earning capacity "in all jobs, regardless of pay rate," is allocated to the employee, sl. op. at 6.) Subsection **(C)** defines wage loss as the amount of wages lost due to a disability. This Section also says the employee shall establish a connection between a work injury and reduced wages in establishing the wage loss. This provision codifies *Romero v Burt Moeke Hardwoods, Inc*

- **§ 301(5)** – This Amendment requires an employee wishing to prove disability and wage loss to (A) disclose his Q & T, (B) present evidence of jobs, if any, he is qualified and trained to do within the same salary range as his maximum WEC at the time of his injury, (C) prove the work related injury prevented the employee from performing jobs identified in subsection (B), and "(D) if the employee is capable of performing any of the jobs identified in subsection (C) show that he or she cannot obtain any of those jobs." The Amendment said evidence the employee presents "shall include a showing of a good-faith attempt to procure post-injury employment if there are jobs at the employee's maximum wage earning capacity at the time of the injury."
- **§ 301(6)** provides if the employee has met this *prima facie* standard of proving disability and wage loss, the burden of

Wage earning capacity and ability to earn (Lofton and Romero are codified)

Disability – Prima facie case (Stokes standard is codified)

production shifts to the employer to refute the employee's evidence. The Amendment said the employer has a right to discovery if necessary to sustain its burden of production to present a meaningful defense. The employee then has a right to present more evidence to challenge the employer's evidence. These provisions codify the steps the Supreme Court outlined in *Stokes v Chrysler, LLC*.

Total disability

- **§ 301(7)** – provides that if the work injury caused total disability and wage loss, the employer shall pay “weekly compensation equal to 80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate determined under § 355. Compensation shall be paid for the duration of the disability.” This provision appears consistent with current law regarding benefits due to a totally disabled employee. However, the last sentence clarifies liability for such benefits exists only “for the duration of the disability.”

Partial disability

- **§ 301(8)** – This Amendment says the employee is entitled to partial disability and wage loss benefits that would pay wage loss benefits “equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the employee's wage earning capacity after the first injury, but not more than the maximum weekly rate determined under § 355.” Again, the Amendment adds a sentence, “compensation shall be paid for the duration of the disability.” Because **§ 301(4)(B)** “defines wage earning capacity as wages the employee earns or is capable of earning at a job reasonably available to the employee, whether or not actually earned, this provision may alter prior practice and codify *Lofton, supra, Harder, supra and Glave, supra*, discussed above. The addition of the phrase “for the duration of the disability” suggests the legislature rejected arguments that plaintiffs were entitled to continuing wage loss benefits, under some circumstances, such as doing favored work for less than 100 weeks, even if they are not still disabled.

Employee's fault as a reason for firing from “reasonable

- **§ 301(9)(a)** - This amendment says if an employer fires an employee from reasonable employment (favored work) for “fault of the employee,” such firing means the employee shall be considered to have voluntarily removed himself from the work force and is no longer entitled to any wage

loss benefits during the period of refusal. This provision modifies *McJunkin v Cellasto Plastic Corp.*, 461 Mich 590 (2000) and *Russell v Whirlpool Financial Corp.*, 461 Mich 579 (2000); that held an employee who loses his job “for whatever reason” after doing “reasonable employment” for less than 100 weeks, was entitled to continue receiving wage loss benefits even if he was fired because of his own fault, see *Perez v Keeler Brass Company*, 461 Mich 602 (2000).

- **§ 301(9)(b)** – This Amendment says if an employee returns to work and earns less than his maximum wage, the employer can take a credit for the after-tax average weekly wage the injured employee “earns” after the date of injury, rather than what he is “able to earn” (language that is in the current statute). This provision appears to simplify the calculation of benefits an employee performing “reasonable employment” is entitled to receive and eliminates an argument that further consideration should be given to the wages the employee is able to earn. Future litigation may arise concerning how this change relates with how the employee’s base rate is calculated under § 301(4)(B), that said the employee’s wage earning capacity takes into account wages the employee is capable of earning in a job reasonably available to the employee whether or not actually earned.
- **§ 301(9)(d)** – This proposal says if the employee, after his injury, returns to “reasonable employment” and then loses the post-injury employment, he must still be disabled to receive benefits. This Amendment also says to be entitled to benefits the employee must lose his job through no fault of the employee (whether or not he has worked less than 100 weeks, a requirement of *McJunkin, supra, Russell, supra*). The Amendment says if the employee was employed for less than 100 weeks he shall receive compensation based on his average weekly wage at the time of the original injury; this provision indicates he has not, through this employment, established a new wage earning capacity. However, if the employee was employed for 100 weeks or more but less than 250 weeks, after he exhausts unemployment benefits, the Magistrate must assess whether the employee has “not established a new wage earning capacity.” If he does not prove he did not establish a new wage earning capacity, the Magistrate must presume he has established a post-injury wage earning capacity. If the employee has not established a

employment” will gain relevance (McJunkin and Russell standard modified)

Calculation of benefits due to employee who returns to reasonable employment are clarified

When has employee established or not established post-injury wage earning capacity

new wage earning capacity, benefits are based on his average weekly wage at the original date of injury. The Amendment also says if the employee was employed for 250 weeks or more, he is "conclusively presumed to have established a post-injury wage injury capacity."

Employer and carrier will no longer be liable for plaintiff's attorney fees on medical bills (Peterson rejected)

- **§ 315** – This Amendment makes attorney fees based on medical expenses chargeable to the employee or medical provider, or both, but not to the employer or carrier; this Amendment would alter the result in *Petersen v Magna Corp*, 484 Mich 300 (2009). In *Petersen*, the Supreme Court held that when a plaintiff's attorney succeeds in obtaining an order requiring an employer to pay medical bills, the magistrate, in his or her discretion, may order the employer and carrier to pay an added attorney fee, to the plaintiff's attorney, up to 30% of the medical bills, even though the plaintiff attorney's efforts served only the plaintiff and the medical provider. The proposed amendment would make the attorney fee chargeable only to the persons who benefited from the plaintiff's attorney's services.

The period an employer controls medical treatment is expanded

- **§ 315** – The current provision in § 315 says "After 10 days from the inception of medical care is provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician." The Amendment expands the 10-day period to 45 days.

Vocational rehabilitation appeals

- **§ 319** - This proposal gives a party who disagrees with an order of the director concerning vocational rehabilitation 15 days after the order is mailed to appeal to the appellate commission. The current provision directed the parties to appeal to a Magistrate.

Who is a conclusive dependent in death cases

- **§ 331** – This proposal limits persons who may be conclusively presumed to be wholly dependent for support upon a deceased employee to children under the age of 16 years or 16 years or over if the child is physically or mentally incapacitated from earning, living with his parent at the time of the death, or if the child was living with a former spouse of the employee or if the child was deserted by the deceased employee. Questions concerning dependency of other persons must be determined in accordance with the facts at the time of the injury.

- **§ 353** – The Commission also limited the persons who may be considered dependents of an injured (but not deceased) employee to a child under the age of 16 years or 16 years or over if physically or mentally incapacitated from earning, living with his parent at the time of the injury. The question of dependency for other persons must be decided in accordance with the facts at the time of the injury and in accordance with other provisions of these sections of the Act. The Amendment to § 353(B) also says a dependent of an injured (not deceased) employee must be a person who receives at least one-half of his or her support from the injured employee.

- **§ 354** – This proposal modifies the credits/offsets an employer may apply against wage loss liability under §§ 351, 361 or 835 paid to an employee who receives benefits described in § 354. The Amendment says the coordinatable benefits subject to § 354 must be benefits the employee “received or is receiving” during this same time period for which the employer is liable for wage loss benefits. The Amendment modified Subsection **(D)** to clarify the amount of pension or retirement payments the employer can coordinate is the after-tax amount of such benefits the employee receives or is eligible to receive at “normal retirement age.” Subsection **(12)** also said an employee is not required to apply for early Federal Social Security old age insurance benefits or to apply for an earlier reduced pension or retirement benefits; therefore, it is not necessary for the employee to do so “to avoid a reduction in wage loss benefits.”

- **§ 360** – This Amendment concerns jurisdiction over claims brought by professional athletes hired outside of Michigan; this provision makes such employees exempt from the Michigan Workers’ Compensation Act if certain conditions are met.

- **§ 361 (Specific Loss Provisions)** – This Amendment gives the fact finder authority to consider whether joint replacement surgery, implants or other medical procedures may have restored usefulness of the body part (so the employee will not have, in reality, suffered the specific loss of the body part). This proposal responds to *Trammel v Consumers Energy* where the Appellate Commission held the plaintiff’s medical implant was not to be taken into account when evaluating

Who is a conclusive dependent of a disabled employee

Credits and offsets under § 354

Professional athletes

How specific loss is determined (Trammel standard rejected)

Electronic filing will be permitted

Chapter 4 provisions retained with some modification to conform to amendments in Chapter 3

Interest rate an employer pays under § 801 is changed

Redemption procedures are streamlined

whether the employee had lost the use of the body part, despite the fact the surgical correction restored the usefulness of the body part.

- **§ 381** – This Amendment allows claims to be filed with the “agency either electronically, as prescribed by the Director, or on forms prescribed by the Director, within two years after the occurrence of the injury.” This provision allows the Agency to begin receiving claims electronically.
- **§ 401** – Contrary to the original version of HB 5002, the final version does retain Chapter 4 provisions of the Act. An Amendment to **§ 401(2)(b)** concerning “personal injury” says mental disabilities, to be compensable, must arise out of actual events of employment, not unfounded perceptions thereof and “the employee’s perception of the actual events” must be “reasonably grounded in fact or reality.” This provision, similar to the modification to § 301(2), codifies *Robertson v Daimler Chrysler Corp.* **§ 401(3)(a)** conforms the Chapter 4 provisions to the Amendment to **§ 301(5)(a)** that say an employee shall be considered to have voluntarily removed himself from the work force if he is terminated from reasonable employment for fault of the employee. **§ 401(3)(d)** also says if an employee loses his “reasonable employment through no fault of his own he must still be disabled to receive workers’ compensation benefits.” The other Amendments to this section of the Act conform to the Amendments to Chapter 3 concerning loss of “reasonable employment” that are part of **§ 301(9)** discussed above.
- **§ 625** – This Amendment modifies the filing requirements for notices insurers must provide to the Director and the Agency.
- **§ 801** – Modifies the interest rate provisions of MCL 418.801(6) to make the rate consistent with the interest rates applied to judgments in other civil actions.
- **§ 801(7)** - This Amendment requires the Agency, on or before April 1, 2012, to implement systems for the detection and prevention of fraud, waste and abuse.
- **§ 835 (Redemptions)** – The Amendment says a carrier may notify the employer of a proposed redemption through an electronic transmittal not less than 10 business days before the redemption is held.

- **§ 836** – The Amendment adds a subsection **(2)** that says the parties may stipulate in writing to the determinations in subsection **(1)** that the Magistrate must make before approving a redemption. The Amendment says “If both parties stipulate in writing to those determinations, the stipulation shall serve as a waiver of hearing, and the Magistrate may approve the redemption agreement.” (Apparently without a formal hearing.)
- **§ 837** – This proposal allows an approved Redemption Order to be distributed electronically to the parties.
- **§ 847(1)** – This Amendment allows the parties to submit an application for hearing electronically. Subsection **(2)** also says the Opinion and Opinion of the Magistrate may be filed and distributed electronically.
- **§ 853** – Adds a provision that says a subpoena signed by an attorney of record in the action “has the force and effect of an Order signed by the Workers’ Compensation Magistrate or Arbitrator associated with the hearing.”

You can view legislative bills on the internet at “michigan.gov”; click:

- Michigan government
- Legislative Branch
- Michigan Legislature-Home
- Then insert the House or Senate Bill number where indicated.

However, depending upon when you attempt to view this Bill, you may find only the prior version of HB 5002 is on the website. If you need further information, please contact our office or your representative in the Legislature.

*Attorneys of record will
be allowed to sign
subpoenas*

NEW CASE LAW

Medical Marijuana

For statutory reasons, the Appellate Commission held an employer is not liable for medical costs of treatment using medical marijuana

At KGV's September seminar, Attorney Allen Geurink discussed the status of issues concerning medical marijuana and the work place. One of the cases discussed was *Todor v Northland Farms*. The Appellate Commission has now also issued its opinion, following remand, from the Board of Magistrates, in *Todor v Northland Farms, LLC*, 2011 ACO #119. The Appellate Commission affirmed the Board of Magistrate's holding that an employer is not required to pay for an injured employee's use of medical marijuana. The Commission held § 333.26427(c)(1) of the Michigan Medical Marihuana Act, MCL 333.26421, et. seq., forbids using the MMMA to force an insurer to pay for costs associated with the use of medical marijuana. However, the Commission said if an injured worker needs medical services or treatment, the Magistrate must decide, under the WDCA, whether the employer must pay for those services or treatments, including medical marijuana. The Commission said MCL 418.315(1) governs the medical expenses and services an employer must reimburse. However, § 315 "specifically excludes any professional service that was not subject to State registration or licensure before January 1, 1998." Because the registration and licensure provisions of the MMMA did not begin until 2008, 10 years after the statutory cut off date in § 315, § 315 excludes services associated with medical marijuana.

Disability, Wage Loss and Ability to Earn Issues

Todor also addressed disability, wage loss and ability to earn issues

In *Todor, supra*, the Commission remanded the case to the Board of Magistrates to reconsider disability and wage loss issues in light of *Harder v Castle Bluff Apartments*, S.Ct. 142616, rel'd 6/03/2011. The Commission reiterated the formula a magistrate should apply when calculating the benefits for a partially disabled employee. The Commission previously described the same formula in *Brackenrich v Sun Chemical Corp.*, 2011 ACO #106, rel'd 8/30/2011 (which was the topic of KGV's last newsletter) and subsequent cases *Doty v General Motors Corp.*, 2011 ACO #108, *Smith v General Motors Corp.*, 2011 ACO #107, *Remelts v Knappe & Vogt Manufacturing Co.*, 2011 ACO #113, and *Glave v Battle Creek School District*, 2011 ACO #117.

In *Harder, supra*, the Supreme Court advised the Workers Compensation Agency and the practicing bar that:

MCL 418.361(1) applies at all times to partially disabled workers, see *Lofton v Auto Zone, Inc.*, 482 Mich 1005 (2008).

In *Lofton*, 482 Mich 1005 (2008), rel'd 10/01/2008, the Supreme Court previously issued a Remand Order that 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.

In *Brackenrich, supra*, the Commission panel 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,

Commissioners' recent decisions hold Lofton standard applies and explain formula for assessing partial wage loss benefits

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 statement that *Stokes* proofs may provide necessary information suggests evidence of work suitable to the employees' qualifications and training that paid less than his maximum wage earning capacity is relevant. In *Doty v General Motors Corp.*, 2011 ACO #108, the Commission subsequently said:

With that understanding, we look to *Stokes* for guidance as we attempt to establish a method for determining the wage earning capacity in all employments that are suitable to plaintiff's qualifications and training. Following the *Stokes* multi-step process allows each party to present evidence that meets the approval of the Court. This, presumably, would also reduce remands because the court has endorsed this method for establishing post-injury wage earning capacity. Therefore, we endorse the *Stokes* process to determine wage earning capacity to calculate wage loss.

When an injured employee retains a wage earning capacity, but has not actually worked in the job, MCL 418.371(5) directs that the average weekly wage for that job is determined by the usual wage for similar services. Again the *Stokes* proofs normally would provide that information.

Finally, 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 that the claimant retains an earning capacity. However, the director of the Agency, according to section 313, must publish tables annually that conclusively establish those numbers based on average weekly wages.

Using the numbers from the table, the benefit rate equals the number for the injury job less the number for the post-injury jobs where plaintiff retains an earning capacity.

APPLICATION

The magistrate failed to provide enough analysis of the *Lofton* standard for an affirmance of his findings. The magistrate simply concluded that plaintiff's diligent job search satisfied her burden of proof. The search, standing alone, does not satisfy *Lofton*. Rather, the magistrate must follow the law to develop plaintiff's post-injury wage earning capacity for all work suitable to plaintiff's qualifications and training. Then, a job search that covers those potential jobs will satisfy plaintiff's burden. Without knowing the scope of the jobs, the diligence of the search is irrelevant.

Id., 5-6; *Smith, supra, Remelts, supra, Glave, supra* and *Todor, supra* contained identical formulas.

In *Glave v Battle Creek School District*, the Commission reiterated the above formula, and also said the burden of proving the post injury wage earning capacity "in all jobs, regardless of pay rate" is allocated to the employee. This panel, slip op. at 6, said:

The magistrate must now determine plaintiff's injury related wage loss using the *Harder* and *Stokes* directives. Those cases necessitate a determination of the post-injury wage earning capacity in all jobs, regardless of pay rate. When making this determination, the magistrate must allocate the burden of proof to plaintiff. Then, the magistrate must utilize the other statutory provisions to calculate the associated benefit rate.

Other Wage Loss Issues

Seasonal Work: In *Davis v Jackson Public Schools*, 2011 ACO #121, the plaintiff, an art teacher, historically earned all of her income only during the regular school year. She had no plans to work during the summer of 2008 and had never before sought or

Seasonal workers

obtained employment during summer months when school was not in session. Her employer stipulated she was disabled from February, when her injury occurred, through August 26, 2008, when she returned to work. Defendants argued any wage loss during the summer period was not due to the compensable injury, but to the fact she never intended to work during the summer, did not work during the summer and historically had never worked during the summer. Ms. Davis argued her average weekly wage and contract was based on 39 weeks of work, but she received the wages over a period of 52 weeks, resulting in equal payments for the whole year. However, because of her injury in February 2008, she was unable to work the remainder of that school year after April 2, 2008. This inability to work reduced the amount of wage credits paid in the summer wages. Thus, her summer wages were reduced from what they would have otherwise been because of the injury. The Commission said:

Therefore, it is obvious that she did have a reduction in her wages in the summertime and it was a direct result of the compensable injury in February of 2008. For this reason we would affirm the Magistrate's finding that a causal relationship has been demonstrated between the stipulated to work injury and any wage loss sustained by plaintiff between June 10 and August 24, 2008.

However, the Commission disagreed with the Magistrate's finding that, based on *Gasparick v HC Price Construction Co.*, 398 Mich 438 (1976), plaintiff did not still have to present proof of quantified wage loss before a disability can be found compensable. The Commission said it had to consider amendments to the Act and caselaw addressing disability issues that transpired after *Gasparick* was issued. The Commission noted that MCL 418.301(4), the definition of disability, contained a concluding sentence that said, "The establishment of disability does not create a presumption of wage loss." Therefore, a finding of disability does not infer a presumption of wage loss. (The Commission referred to that part of *Haske v Transport Leasing, Inc., Indiana*, 455 Mich 628 (1997), that the Supreme Court did not overrule in *Sington v Chrysler Corp.*, 467 Mich 144 (2002). The Commission said, "The reason to require proof of wage loss is to permit calculation under MCL 418.361 of the weekly wage loss benefit to be paid." Therefore, a Magistrate must calculate or quantify the post-injury earnings or earnings potential based on

the proofs presented at trial. The parties, in the case before it, did not stipulate to total disability; therefore, Section 361 had to be considered, see, also *Lofton v Auto Zone, Inc.*, 482 Mich 1005 (2008); *Harder v Castle Bluff Apartments*, 489 Mich 951 (2011); *Umphrey v General Motors Corp.*, 489 Mich 978 (2011); and *Vrooman v Ford Motor Company*, 489 Mich 978-979 (2011). Plaintiff was required to submit proofs or secure stipulations of fact that permit quantification of her wage loss. Without that proof, she has not met her burden of proving entitlement to weekly wage loss benefits. The Commission affirmed the Magistrate's finding that this plaintiff's wage loss between June 10 and August 24, 2008, was causally related to her work injury. However, the Commission also said:

In this light, *Gasparick*, notwithstanding, while the magistrate has correctly concluded that any wage loss in this case has been shown to be causally connected to the stipulated to work-related disability, plaintiff's failure to submit proofs or secure a stipulation of fact that would permit quantification of such wage loss, prevents plaintiff from sustaining her burden on this record of proving entitlement to weekly wage loss benefits. To the extent that the magistrate's decision indicates to the contrary, it is in error.

Like vocational rehabilitation provisions, MCL 418.319, and reasonable employment provisions, MCL 418.301(5), the "able to earn" provisions described in *Harder*, *Lofton*, and the post-June 2011 Commissions decisions described above appear to be tools that encourage a partially disabled employee to return to the work force and mitigate an employer's liability for wage loss benefits, even if the post-injury wages may not be as high as the pre-injury wage. However, as discussed at the seminar, these provisions should also encourage employers to help employees return to the work force when they are able to do available work. The best use of these tools requires realistic considerations of the nature of the employee's injury and cooperation between the employer and the employee.

Causation

In *Campbell v Bi-County Hospital/Henry Ford Health System*, 2011 ACO #120, the lack of credibility in plaintiff's history made him

Lack of credibility doomed the employees' ability to prove work caused a pathological change

unable to prove a work injury caused pathological changes. In *Campbell*, the Commission affirmed a denial of benefits because the plaintiff did not prove a compensable personal injury, pursuant to *Rakestraw v General Dynamics Land Systems, Inc.*, 469 Mich 220 (2003), reh den, where there was no change in pathology. The plaintiff had a pre-existing condition, a workers' compensation claim with a prior employer, that he settled. He was off work before he began working for the defendant employer. Either unintentionally or intentionally, he misrepresented the extent of his prior injury and the amount of time he missed from work because of that earlier injury. He also was not forthcoming in his history of the injury to his treating and testifying doctor. The Magistrate gave more weight to the opinions of the employer's expert witnesses because plaintiff's doctor formed the opinion of a new significant injury based on the incorrect history the claimant gave him. The Magistrate found no change in the pre-existing pathology, as *Rakestraw* required, to prove a personal injury. She based this finding on various MRI's of plaintiff's back that were performed before and after the alleged injury at the defendant employer. The other medical experts agreed this plaintiff had a pre-existing degenerative back condition without a clearly defined change in pathology.

NEW COURT OF APPEALS DECISIONS

On October 13, 2011, panels of the Michigan Court of Appeals issued 4 new decisions. All of the decisions were unpublished; therefore, they do not have precedential authority over other Court panels or the Workers' Compensation Agency; however, they may be considered persuasive.

Traveling Employees and Timing of Claim. The first case, *Djelaj v RGIS Inventory Specialists*, per curium opinion No. 292091, affirmed an award of benefits to an employee injured in a motor vehicle accident (MVA) while driving her own vehicle between work assignments on April, 2000. She obtained no-fault benefits from the intervening plaintiff, AAA of Michigan. She stopped working in March 2001. In March 2004, she filed her workers' compensation claim. The magistrate awarded benefits. The Commission affirmed, subject to the 2 year back rule.

Timing of Claim and Tolling. The Court of Appeals rejected the defendant's argument that Ms. Djelaj's claim was untimely per

MCL 418.381(1). She filed the petition more than 3 years after her last day of work (LDW). The magistrate and Commission concluded her receipt of no-fault benefits from her personal insurance carrier tolled (delayed) the running of the statute of limitations, i.e. the time she had to file her claim. The Court of Appeals said § 381 contained a provision that said the statute of limitations did not run during the time the claimant was compensated for the disability by workers' compensation benefits or benefits other than workers' compensation or where the employer provided favored work. The Court of Appeals said "benefits other than workers' compensation" the claimant may receive do not have to come from the employer (*Colbert v Conybeare Law Office*, 239 Mich App 608, 618 (2000)). The Court of Appeals rejected the employer's argument that no-fault benefits did not trigger that tolling provision.

Djelaj addressed going to and coming from work rule, causation, claim provisions (tolling) and "back" rules

Traveling Employee and General Going To and Coming From Work Rule. The Court of Appeals also affirmed the award because the Commission found the MVA occurred while the plaintiff was traveling between work assignments, not from her home to her work at the beginning of a work day or from her last assignment to her home at the end of her work day. The general going to and coming from work rule would normally preclude benefits for an injury that occurred to an employee while traveling between his/her home and a fixed work site at the beginning or end of the work day; *McClure v General Motors Corp.* (on rehearing), 408 Mich 191 (1980), also applied the general going to and coming from work rule to an employee injured while traveling, off his employer's premises, for personal reasons during a lunch break, see also *Suarez v Michigan Multi King, Inc.* 2011 ACO No. 10).

Causation. The Court of Appeals panel also rejected the employer's argument Ms. Djelaj did not prove a change in her preexisting pathology that caused her back symptoms: a change in the preexisting pathology is necessary to establish a personal injury under MCL 418.301(1) based on *Rakestraw v General Dynamics Land Systems, Inc.*, 469 Mich 220 (2003); and *Fahr v General Motors Corp.*, 478 Mich 922 (2007). The Court of Appeals deferred to the Commission's finding that her treating doctor said her spinal pathology before the MVA was not unstable, but it was unstable after the MVA. He then saw a lot of motion in a joint and a "ligamentous issue" he attributed to the MVA.

One Year Back and Two Year Back Rules. The Court of Appeals also rejected the employer's argument that the 1 year back Rule, MCL 418.833(1) applied to claims for reimbursement by the plaintiff (employee) and the intervening no-fault insurance carrier. The Court of Appeals said this 1 year back Rule, in § 833(1), did not apply because this plaintiff had not received workers' compensation benefits before she made her first application for workers' compensation benefits. The previous benefits she received were no-fault benefits. The Court of Appeals panel upheld the Commission's application of the 2 year back Rule, MCL 418.381(2), even as against the claims of one insurance carrier against another. (see *Beverly v Reynolds Metals Co.*, 197 Mich App 436 (1992).

Did Commissioners Agree Enough to Create a Final Order?

The next 3 cases, *Mansour v AZ Automotive Corp.*, memorandum opinion, No. 292241, *Angel v A1 South, LLC/Grand Rapids Griffins*, per curium opinion No. 295015, and *Brock v General Motors Corp.*, per curium opinion No. 292938, addressed the issue of whether (or not) the Commission had issued a final opinion or whether the decision had to be remanded for a final opinion.

In *Mansour*, the Court of Appeals vacated and remanded the Commission's decision because the decision was authored by a single commissioner. The other 2 commissioners only concurred in the result. The Court of Appeals panel said in *Findley v Daimler Chrysler Corp.*, 289 Mich App 483 (2010), leave pending 488 Mich 1034 (2011), a Court of Appeals panel held a Commission decision was not final and reviewable by the Court of Appeals unless it was a true majority decision, *id.* at 494. The Court of Appeals panel in *Mansour* said:

[A] true majority decision is one in which at least a majority of the commissioners agree regarding the material facts and the ultimate outcome.

Final decision from Appellate Commission requires a majority agree with the result and the reasons for that result

Id. at 495 (*Mansour* sl. op. at 1). The *Mansour* panel said where only one commissioner signed the opinion, and the other 2 commissioners merely concurred in the result, the Commission had not provided a “true majority decision in which the commissioners agreed regarding the material facts.”, *Id.*

In *Angel, supra*, the Court of Appeals panel again vacated and remanded the Commission’s decision authored by a single commissioner. The other two commissioners concurred only in the result. This panel said

A concurrence in result signifies agreement with the ultimate outcome (i.e., the result), but does not signify agreement with the facts or legal reasoning set forth in the lead commissioner’s opinion. Thus, the WCAC did not provide a true majority decision in which the commissioners agreed regarding the material facts or legal bases for the matters decided.

Id., sl. op. at 2. The Court of Appeals panel again vacated the Commission decision because it “did not provide a true majority” and returned it to the Commission to make adequate findings of fact and explain its legal reasoning.

In *Brock*, however, the Court of Appeals panel affirmed the Commission’s denial of wage loss benefits. In *Brock*, the lead opinion was signed by 1 commissioner; a second commissioner concurred in the result; the third commissioner issued a separate opinion that concurred in the result and dissented in part. However, the lead opinion and the separate concurrent/dissent agreed upon the critical facts, the legal reasoning and the ultimate outcome. They agreed the magistrate properly found the plaintiff failed to make a *prima facie* showing of disability under *Stokes v Daimler Chrysler, LLC*, 481 Mich 266, 297-298 (2008). The majority of the commissioners agreed the magistrate properly found plaintiff failed to demonstrate she had disclosed all of her qualifications and training (step 1 of *Stokes*) and she failed to consider other jobs that pay her maximum pre-injury wage to which her qualifications and training translate (step 2 of *Stokes*). The Court of Appeals panel said:

Although their opinions diverged concerning the correctness of the magistrate’s analysis of

causation, with respect to the failure to satisfy *Stokes*, they agreed regarding "the material facts and the ultimate outcome." *Findley*, 289 Mich App at 495.

Id., sl. op. at 2. The Court also made an interesting comment regarding whether or not there was a need for the concurring/dissenting commissioner to sign the order that denied plaintiff's claim for wage loss benefits. The court panel said:

Although the concurring/dissenting commissioner did not sign the order that denied plaintiff's claim for wage loss benefits, he expressly agreed with the lead opinion's denial of wage loss benefits. The signatures on the order do not control our determination whether a majority of the commissioners agreed regarding the material facts and the ultimate outcome.

In summary, the WCAC reached a true majority decision to deny wage loss benefits for the reason that plaintiff failed to satisfy one of the steps necessary to establish a *prima facie* case of disability under *Stokes*, ...

Id., sl. op. at 2.

MORE COMMISSION DECISIONS ADDRESS JURISDICTION AND MEDICAL BENEFIT ISSUES

Medical Care, Due Process and Subject Matter Jurisdiction of the WCA Director

In *Goulder v General Motors Corp.*, 2011 ACO No. 122, the Commission held the Agency Director did not have subject matter jurisdiction to decide whether an employer must provide a proposed medical benefit. The Commission said subject matter jurisdiction to decide this issue exists with the magistrate, not the Agency Director, MCL 418.847 and MCL 418.205. Therefore, the Commission voided the Agency Director's order that the employer pay for modifications to the employee's home.

While addressing this issue, the Commission said the defendant employer had a due process right, because it had a property

right in the money necessary to pay benefits, to have the proper workers' compensation proceeding before a tribunal with appropriate jurisdiction to decide an issue that might deprive that employer of a property interest. The Commission also said a magistrate must give adequate notice of any unpublished prehearing procedures before the magistrate can enforce those procedures. The Commission said in *Slaten v Human Services, Inc.*, 2001, ACO No. 33, the Commission "forbade the magistrate from excluding evidence because a party failed to follow his unpublished practice". *Goulder, supra* at 3. The Commission said when considering a plaintiff's claim for medical benefits under MCL 418.315, the magistrate must determine whether any proposed benefit is medically necessary to cure the effects of the work injury and then explore whether the cost of the proposed treatment is reasonable. The Commission said "the magistrate weighs the cost against the ability to cure the affects of the injury using a cost/benefit analysis." *Id.* at 3. The Commission said only medical opinions can establish the medical necessity to cure the effects of the injury and also whether the employee's "recovery would necessitate reversing the modifications."

The office of the Agency Director lacks jurisdiction to decide what medical benefits an employer is liable for under the WDCA

In *Jozlin v Ford Motor Company*, 2011 ACO No. 123, the magistrate held chiropractic care was not a reasonable and necessary medical treatment for Mr. Jozlin's injury. The magistrate found a previous decision found Mr. Jozlin had a work related injury. He was awarded treatment in the form of a weight loss program. However, Mr. Jozlin's attempt to reopen the nature of his injury and allege an older injury to his shoulder, elbows, hands and wrists were barred by *res judicata*. The magistrate said Mr. Jozlin could have previously litigated those conditions when he had the hearing on his initial petitions alleging August 20 and October 23, 2002 injuries. The magistrate denied plaintiff's claim for hypertension prescriptions related to his found injuries because medical testimony did not show plaintiff's hypertension was due to anything but an "unknown etiology". She also found Mr. Jozlin failed to prove a mobility device was reasonable and necessary because he did not show it was related to anything other than his body habitus and cardiopulmonary issues, rather than his compensable back condition. Also, the scooter plaintiff wanted had a capacity of carrying someone who weighed 450 pounds while plaintiff's current weight was at least 500 pounds. Therefore, she found the mobility device was not reasonable and necessary. The magistrate also denied plaintiff's claim for mileage expenses

Res judicata barred employee's attempt to expand prior decision to include conditions present when the case was originally tried

Continued chiropractic treatment may be limited where such treatment fails to be reasonable and necessary

because he failed to submit mileage expenses that the employer had not paid, except for claims for chiropractic treatment, which was denied in any event.

The Commission affirmed the Magistrate's Decision. Plaintiff's chiropractic expert opined Mr. Jozlin needed constant and frequent chiropractic treatment to treat his work related back condition. However, this doctor also admitted that during the 7 years he treated Mr. Jozlin, Mr. Jozlin had not gotten better because of his treatment. The treatment was only palliative in nature. The magistrate adopted testimony of defendant's experts, a chiropractor, and a physical medicine rehabilitation specialist. The physical medicine and rehabilitation specialist said plaintiff's size meant his spinal structure was not affected by chiropractic care. The Commission said the magistrate's decision was supported by the testimony of another doctor who said plaintiff's hypertension existed before plaintiff's back injury and cannot be blamed on weight gain or a single factor. Therefore, the Commission affirmed the magistrate's finding the hypertension and weight gain was not due to the work injuries. The Commission said the magistrate is obligated to reject medical opinions on causation that do not have adequate medical history to support the opinions. The Commission also said the magistrate's decision could be supported by the employer's chiropractic expert who said the official disability guidelines from the American College of Occupational and Environmental Medicine suggest chiropractic care for up to 18 visits may be prudent in an initial phase but long-term treatment should be avoided. The Commission also noted plaintiff's need for a mobility scooter was caused by his excessive weight, not by a compensable injury. The Commission said the magistrate was correct in denying treatment for bilateral shoulder, elbows, wrists injuries, and hypertension under the doctrine of res judicata. Mr. Jozlin had the opportunity to raise these issues during the original trial and at various points since the trial.

Reimbursement of Employer For Medical Benefits Paid During an Appeal

In *Anderson & Karmanos Cancer Institute, Petitioner v State of Michigan Medical Benefits Fund*, 2011 ACO No. 124, the Commission held the employer was entitled to

reimbursement from the Michigan Medical Benefits Fund (Fund) for reimbursement of medical benefit the employer paid the employee during an appeal. The Fund resisted reimbursing the employer for benefits the employer paid during an appeal, pursuant to MCL 418.862(2), by claiming the employer could have asserted the employee was eligible to receive medical benefits through her husband's health care policy. The Fund relied on a sentence in Administrative Rule 2a (2) that said "If other insurance coverage is or was available to cover medical benefits paid under § 862(2) of the Act, then the Bureau will not make reimbursement." The Commission said if the Administrative Rule conflicted with the statute, the statute governs because administrative agencies do not have common law power, but are limited by the statutes that create the administrative agencies. The Commission said the rule the Fund relied was not consistent with the statute. The Commission affirmed the magistrate's finding that the statute said medical benefits shall be paid during the appeal (by the employer) and the claimant employee is not required to prove again and again there is no other insurance available in order to receive medical care awarded under the Act. The magistrate noted that if the employer had refused to pay medical expenses on the basis that plaintiff had not proved she had no other insurance, the employer's appeal would have been dismissed for failure to comply with the magistrate's order. The magistrate, applying the statute, and not Administrative Rule 2a(3), ordered the Fund to reimburse the employer pursuant to § 862.

The Michigan Medical Benefits Fund was ordered to reimburse the employer for benefits it paid during an appeal

FEDERAL COURTS ADDRESS RETALIATORY FIRING CLAIMS

Retaliatory Discrimination for Pursuing a Workers' Compensation Claim and Standards for a Civil Rights Claim

MCL 418.301(11) says an employer shall not discharge an employee or discriminate against an employee because the employee filed a complaint or instituted a proceeding under the WDCA.

In *Wansitler v Hurley Medical Center*, 25 MIWCLR 116 (E.D. Mich) the United States District Court denied the defendant's motion for summary judgment that asked the court to dismiss

the plaintiff's workers' compensation retaliatory discharge claim. The court held that if plaintiff establishes a *prima facie* case of retaliatory discharge under the WDCA, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the plaintiff's discharge. The Court said there was a genuine issue of fact that still needed to be addressed because the plaintiff had not accumulated enough unscheduled absences to warrant being fired for the reason the employer offered. Therefore, the Court believed the plaintiff had established the employer's reported reason to fire him was pretextual.

In *Graham v Access Business Group, LLC*, 25 MIWCLR 117 (W.D. Mich 2011), the District Court granted the employer's motion for summary judgment against the plaintiff's wrongful termination lawsuit. The court said the plaintiff had not identified evidence the individuals who decided to fire her were aware she was engaged in an activity protected by the WCDA.

For readers who have more interest in this issue and attended KGV's September 30, 2011 seminar, please refer to page 146-150 of the case law summaries handout.