State Bar of Michigan

Workers' Compensation Section Newsletter

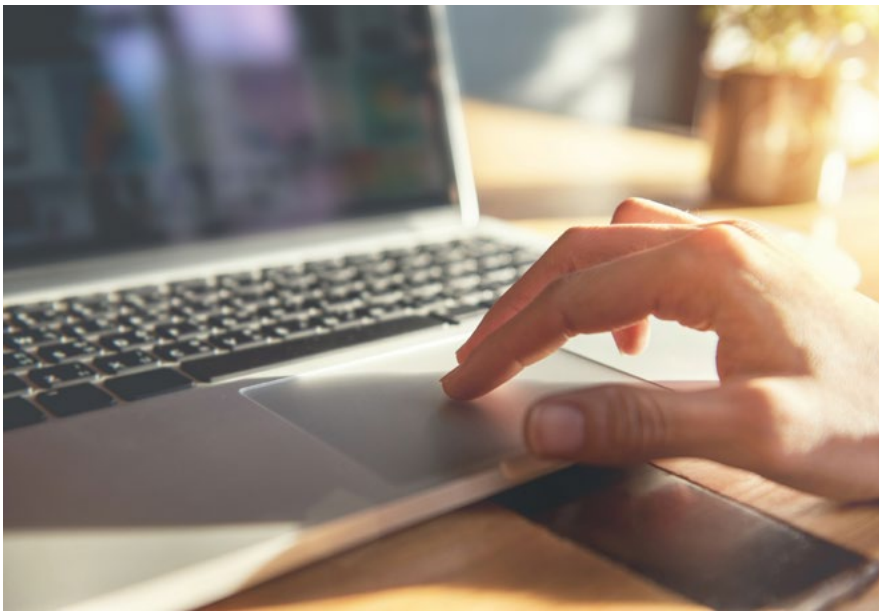
Late Spring 2020

Contents

Notice of Annual Meeting

Date: June 19, 2020
Time: 9:00am-10:30am
Location: Zoom Meeting, https://us02web.zoom.us/j/9951586439
Agenda To Follow

The annual meeting in Grand Rapids has been cancelled. However, the Council has arranged to conduct a Zoom meeting at the above- mentioned time. The required link is listed above and no password will be required. Should you have questions contact Dan Zolkowski at Dan.Zolkowski@accident-fund.com.



This newsletter is published by the Workers' Compensation Section, State Bar of Michigan

Dan J. Zolkwoski, Newsletter Editor

Opinions expressed herein are those of the authors or the editor and do not necessarily reflect the opinions of the section council, the membership, or their employers

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From the Chair

By Andrea L. Hamm

It is with great disappointment that I announce the cancelling of the June 18 – 19 Annual Meeting in Grand Rapids. We as a council determined that based on the demographic of our section members as well as our inability to safely social distance at this event, it needed to be cancelled. However, an abbreviated Annual Meeting must take place for voting purposes and to acknowledge all of our honorees. The meeting will be held virtually utilizing Zoom on June 19th beginning at 9:00 am. The link for the meeting is https://us02web.zoom.us/j/9951586439. The last set of numbers is the meeting number. There is no password required. Please join me in thanking Rick Lovernick for setting the meeting up as well as saving the section a substantial amount of money in doing so.

The Nominating Committee composed of Danielle Susser, Brian Goodenough and Jeffrey Kaufman nominated Alicia Birach, Jacob Bender and Matt Conklin as new members with Mr. Conklin taking the position of Treasurer. They also nominated the existing executive officers for one year terms as follows Rosa Bava, Chairperson; Jayson Chizick, Vice Chairperson; and Phillip Frame, Secretary. Last but not least, they nominated Sean Shearer for another term as a councilmember. We will vote on the above with nominations allowed from the floor as per the by-laws. The by-laws are available for review by all members of the section on our section webpage through the State Bar of Michigan. I encourage all of you to familiarize yourselves with the bylaws prior to the meeting.

The Hall of Fame Committee consisting of Tim Esper, Dennis Flynn, Rosa Bava and myself selected Cynthia Krieger and Roy Portenga for induction into the Hall of Fame. For the meeting, the introducer of both inductees will be allotted 5 minutes each and the inductees will be allotted 10 minutes each for their speeches. This timeframe is not arbitrary and was voted on by the council.

The 50-year members of the section will also be honored at this meeting. They consist of Samuel E. Gabriel; James R. Geroux; Stephen L. Redisch; Frederic J. Ruby; and Michael F. Zipser. Although they will not be allotted time for speeches, they will be congratulated for their endurance and dedication to workers' compensation section.

The very special Don Ducey Civility Award will be unveiled at the meeting. The creator of this award, Rosa Bava, was able to inform Mr. Ducey of this honor prior to his death and as expected he was humbled. Of course, the first recipient will be Mr. Ducey posthumously with hopefully both a family member and a member of his firm accepting on his behalf.

I hope that all of you will be able to join us for the meeting. I will ask the State Bar of Michigan to send out an eblast two weeks prior to the meeting as a reminder with the meeting logistics. There has been great confusion concerning the dissemination of information since the Covid-19 pandemic. Just to be clear, I do not provide the individual names of those who receive eblasts. In order to receive eblasts from the State Bar of Michigan, you have to be a registered member of the section. If you have not been receiving the eblasts, you can contact Julie Turcotte at jturcotte@michbar.org. She is the person currently responsible for sending all of the eblasts.

As I indicated in the prior Newsletter, I consider myself very fortunate to have been hired by Barry Adler who opened my eyes to world of workers' compensation. I miss you all even those of you who raise my blood pressure and look forward to seeing you all soon.

May you and yours remain healthy and safe,

—Andrea Hamm

Message from WDCAC Chair

Daryl Royal, Workers' Disability Compensation Appeals Commission Chair

In my last column, I wrote that many things about appeals in Michigan workers' compensation cases had changed, but that at least our contact information had not. And now, of course, that has changed! Our new phone number and email address are as follows:

Phone: 517-284-9312
Email: LEO-WDCAC@michigan.gov
The fax number remains unchanged. For now.

Despite the challenges we all face from the COVID-19 virus, the Appeals Commission is still working and still deciding cases. At the time of my last column in early February, we had 51 appeals pending. As of April 30, that number had decreased to 46. That number would have been lower, but we have had some cases remanded to us from the Court of Appeals. These cases were part of a recent flurry of workers' comp cases being considered by that Court.

We have also issued some guidelines for handling appeals during the pandemic, which were distributed through the Agency and the Section. If anyone missed those, please email me at RoyalD1@michigan.gov for a copy. We have also been working on updating our administrative rules, to replace the rules previously promulgated when our predecessor commission was a part of MAHS/MOAHR. We will be telling you more about that as things move forward.

As always, copies of our opinions, and those of our predecessors, may be found at https://adms.apps.lara.state.mi.us/appellatecommission/opinionsearch. You can also sign up for notifications when we issue new opinions at https://www.michigan.gov/wdca. Just scroll to the bottom of the page for more information . 🛠

From the Desk of the Director

On March 5, 2020, a press release from Governor Whitmer's office announced that I was appointed Director for a term "commencing March 22, 2020, and expiring March 21, 2023". The delay between the appointment and the start of my term was occasioned by my need to wrap-up certain activities I was involved in which is a story for another article. I am both greatly honored to be given another opportunity to lead the Workers' Disability Compensation Agency and appreciative of the positive response received from the bar.

Five days after the appointment announcement, on March 10, MDHHS identified the first two presumptive-positive cases of COVID-19 and the Governor signed EO 2020-4, "Declaration of State of Emergency." The Corona Virus had arrived in Michigan.

I arrived at my Woodlake Circle office on Monday, March 23. There were many staff that I knew from my prior positions and many that were new. Although I was warmly greeted, there were no handshakes. Rather, I watched as carts of computer hardware wheeled past my windows, pushed by staff members that were going to be working "remotely." The Board of Magistrates, now re-united with the WDCA, had stopped face-to-face hearings resorting to redeeming cases by teleconference; the now Workers' Disability Compensation Appellate Commission members working remotely. After only a week or so on the job, I joined the ranks of those working remotely. Unlike years of commuting from Huntington Woods to Lansing, my daily commute is now up and down the stairs of my home in E Lansing. 80 miles reduced to just 14 steps.

I commend former Director Mark Long and the staff for the great effort putting together the remote working operation in short order. Through those efforts, we now have almost 90% of the Lansing staff working at home with no deterioration of our productivity or service to our customers. I thank Mark for the fine job and appreciate that he will be continuing his service to the Agency as Deputy Director. His experience and expertise are greatly valued. Special kudos for the work on the WORCS 2 project.

Before I forget, updated information about the re-scheduled hearing calendar can be found at: https://www.michigan.gov/documents/leo/COVID_General_Updates_688926_7.pdf

I also need to mention that as described in my earlier memo, the "Stay Safe, Stay Home" orders are still in place impacting injured worker attendance at medical appointments that are not for emergencies or treatment (such as

IME's) as well as making "job search" all but impossible. Additionally, facilities that are not for medical treatment or emergency care are significantly restricted.

My original plan for this note was a recitation of the many challenges faced during my first time as Director and a list of the challenges ahead for my second. I thought of listing all the bankruptcies, reorganizations, hearings office closures and many more. As difficult as these events were to handle, none involved thousands sick and hundreds dying.

Today, there is an over-riding challenge that faces the State of Michigan and the WDCA: Covid-19. As you know our rules provide for reporting injuries: **Section R. 408.31 - Report of injury; claim for compensation, additional reports; weekly rate of compensation.** Rule 1.**(1)** An employer shall report immediately, to the bureau, on form 100, all injuries, including diseases, which arise out of and in the course of the employment, or on which a claim is made, and result in any of the following: **(a)** Disability extending beyond 7 consecutive days, not including the date of injury. **(b)** Death. **(c)** Specific losses.

Since April 5, the date the Agency started compiling the data, through 5/12, we have received 851 Covid-19 claim filings including 6 deaths. As of 5/11, MDHHS has reported 47,522 confirmed cases with 4,584 confirmed deaths. Governor Whitmer is steadfast in her efforts to protect the people of this state and we will support that effort by complying with all Executive Orders while fulfilling our twin objectives of protecting injured workers and their employers. I appreciate your support in that endeavor. 🛠

Case Law Update

By Michael Reinholm, Assistant General Counsel for AF Group

Since the last newsletter came out the courts have been somewhat busy. The Supreme Court issued two orders in workers compensation cases. The Court of Appeals issued two published and two unpublished workers compensation opinions.

The Supreme Court entered an order in ***Bell v City of Saginaw,*** (SC 159813, 11/20/2019), addressing disability.

This case had generated interest at the lower appellate levels because the magistrate found, and the appellate commission and Court of Appeals affirmed the finding, that because the plaintiff had failed to make a good-faith job search he was not entitled to any wage loss benefits, that the absence of a job search meant the magistrate did not have to make a residual wage earning capacity determination to decide if partial disability benefits were appropriate. The Supreme Court order does not address partial disability or the job search requirement. In the end, it is about establishing a *prima facie* disability claim.

The magistrate found that the plaintiff suffered a work injury and was "at least partially disabled from performing his prior employment as a firefighter." Jumping ahead a bit, the magistrate found that after 01/01/2014 the plaintiff was "not entitled to ongoing wage loss benefits since he has failed to substantiate a good faith effort to look for work. Since I have found that plaintiff has failed to make a good-faith effort to look for work within his qualifications and training, the residual wage earning capacity determination is moot."

The commission and Court of Appeals affirmed. That Court of Appeals addressed the job search requirement, the Supreme Court order does not.

The Supreme Court order directs the magistrate to make findings of fact regarding "what jobs, if any, [the plaintiff] is qualified and trained to perform *within the same salary range as his maximum earning capacity* at the time of the injury." This is a reference to *Stokes* factor 2.

Relative to factor 2, while finding plaintiff unable to perform jobs paying his maximum wages in an unrestricted capacity, the magistrate did not identify the actual jobs. Thus, the remand to address "what jobs, if any, [the plaintiff] is qualified and trained to perform *within the same salary range as his maximum earning capacity* at the time of the injury."

The Court's order seems to focus on the requirements of establishing a *prima facie* case of disability. The *Bell* order states "the magistrate shall make findings regarding this component [factor 2] of a *prima facie* case of disability. On the basis of those findings, the magistrate shall then make findings as to whether the plaintiff successfully bore his burden of proving the remaining components of a *prima facie* case of disability."

In ***Cramer v Transitional Health Services of Wayne,*** (SC 160312, 04/17/2020), the Supreme Court remanded this case to the Court of Appeals to consider issues regarding the significant contribution test. Specifically: (1) whether the

appellate commission correctly concluded that the magistrate properly applied the four-factor test in *Martin v Pontiac School District*, 2001 Mich ACO 118, and the standard in *Yost v Detroit Board of Education*, 2000 Mich ACO 347; (2) whether the *Martin* test is at odds with the principle that a preexisting condition is not a bar to eligibility for workers' compensation benefits and conflicts with the plain meaning of MCL 418.301(2); and (3) whether the appellate commission correctly concluded that the magistrate's lack of causation conclusion was supported by the requisite competent, substantial, and material evidence utilizing the proper standard of law.

Omer v Steel Technologies, Inc, (CA 344310, 04/16/2020), is a published Court of Appeals decision addressing disability.

Not clear from the decision is the fact that because of the applicable dates of injury the present statutory definition of disability was not applicable in this case. The applicable definition of disability is to be found in *Stokes v Chrysler LLC,* 481 Mich 266 (2008) and §301(4). At that time the statute stated only that "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 magistrate granted plaintiff a closed award of benefits. Defendant appealed. The defendant argued the magistrate had found disability based on the medical testimony alone. The commission agreed with the proposition that medical testimony alone is insufficient to prove disability. "With respect to proof of disability, the competency of testimony by treating and examining physicians as experts is in the area of identifying injury and/or disease based functional limitations of a physical and/or emotional nature. Their medical training generally does not afford them any particular expertise with respect to how such limitations translate into wage earning limitations in the workplace." The commission determined that the "conclusory statements in this regard of Dr. Suliman and the chiropractor are thus not competent evidence of disability (wage loss)." The commission reversed the closed award on the basis that the magistrate's disability finding was based on medical testimony alone.

The Court reversed. In doing so, the Court made several broad statements regarding proving disability with medical testimony alone. The Court:

- stated that it found "no legal merit to the MCAC's determination that treating physicians 'generally' may not provide competent testimony regarding whether a patient's condition results in a compensable disability."
- stated the defendants had "not identified a single case holding, as a matter of law, that a treating physician cannot provide competent evidence (or a competent opinion) regarding a claimant's disability."
- held "that a general, per se rule deeming 'incompetent' the opinion testimony of treating physicians regarding disability lacks any legal basis and contravenes MCL 418.841(6)."
- stated that minimal testimony by a treating physician may suffice as competent, material, and substantial evidence of disability.

However, the premise of the holding, that the finding of disability was based only medical evidence, is untrue. The Court noted multiple times that the magistrate relied on the plaintiff's testimony, Dr. Suliman's testimony, medical records "and the vocational testimony of Barbara Feldman."

- "Contrary to the MCAC's later ruling, the 'substantial evidence' underlying the magistrate's disability finding was not limited to Dr. Suliman's testimony, as the paragraph below reflects: I find that plaintiff's work-related injury prevented him from performing all of the jobs within his qualifications and training which pay maximum wages. This finding is based on the credible testimony of the plaintiff, the credible testimony of Dr. Suliman, Concentra records, disability slips from Dr. Saleh and the vocational testimony of Barbara Feldman."
- "The magistrate also relied on Dr. Suliman's August 4, 2011 disability slip restricting Omer from excessive bending or twisting and lifting more than 20 pounds, as well as Feldman's testimony and the 'Concentra restrictions,' which demonstrated that Omer 'would be limited to sedentary work' and that 'he would not be capable of returning to a job at which he earned his highest wages.' The magistrate added, 'Barbara Feldman testified that with the 20-pound weight restriction, she was not able to find a job that pays plaintiff's maximum pre-injury rate of pay.'"
- "Omer's evidence was not limited to the testimony of Suliman and the disability slip signed by Dr. Saleh. Omer himself testified regarding his disability, and that testimony, in combination with the medical evidence and the testimony of Barbara Feldman, fully satisfied the 'substantial' and 'competent' evidence requirements."

Since the finding of disability was not based on medical testimony alone, why did the Court address the issue whether a finding of disability could be based on medical testimony alone?

The Court also cited several previous court decisions for the proposition that a physician's testimony is sufficient to prove disability. The date of injury in all the cited cases was years before the 1987 definition of disability.

There is a concurring opinion. While also voting to reverse the commission, the judge disagreed that, except under limited circumstances, proving disability with medical testimony alone is possible.

Before going further, the concurring judge also missed the date of injury question and what law is applicable. Her decision is based on the current statutory definition, which did not apply in this case. But, what she said seems equally true of the 1987 definition since both statutes define disability as 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.

She did not read the commission opinion "as ruling that a doctor can never testify about whether a claimant is totally disabled. As the MCAC recognized, a doctor who treated the claimant will be able to discuss the claimant's restrictions or physical limitations as a result of an injury. It follows that if a claimant's injury is so severe that the restrictions are that he or she cannot return to any employment, then the doctor's testimony could establish total disability." But, for

> a doctor to testify that a claimant with restrictions other than being unable to return to any employment is "totally disabled," he or she would have to know the claimant's qualifications and training, and all work that the claimant could perform with his or her qualifications and training. Otherwise, the doctor could not know whether the claimant's restrictions or physical limitations prevented the claimant from "perform[ing] all work suitable to his qualifications and training ...." *Id*. That is, the doctor would not have sufficient knowledge to offer an opinion on whether the claimant was "totally disabled."

The Court also addressed what the commission described as a burden of proof issue.

Plaintiff's vocational expert performed no labor market survey to determine whether there were any lesser paying jobs available to the claimant, and the claimant testified that he looked for no work of any kind himself. The commission said the magistrate treated that lack of evidence as a failure of proofs by the defendant. The commission agreed this was a failure of proofs, but by plaintiff:

> these deficiencies are failures by the plaintiff to undertake his burden to quantify the claimed work-related limitations in wage earning capacity. To the extent that this lack of evidence bears upon quantifying the appropriate weekly wage loss benefits to award, they indicate plaintiff is failed to sustain his burden of proving any entitlement to such a benefit. In the face of such failure, no need for the defendants to present rebuttal evidence arises.

The Court said the commission, not the magistrate, misallocated the burden of proof. The Court finally cited *Stokes* for the proposition that a plaintiff must show that his "work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages." Then the Court said that "[o]nly if the claimant *is* capable 'of performing some or all of the jobs identified jobs as within his qualifications and training that pay his maximum wages' must the claimant show that he cannot obtain these jobs." This implies there is no obligation to search for lesser paying jobs.

However, the majority does not note that the magistrate specifically found there "was no testimony from either of the vocational experts that plaintiff was capable of performing any jobs within the Concentra restrictions issued on March 10, 2011 which were the only restrictions applicable during the relevant period." In other words, there was no evidence of lesser paying jobs suitable to plaintiff's qualifications and training and within his restrictions for the plaintiff to search for. Why did the Court address an issue regarding a claimant's obligation to search for post-injury work when there was no evidence of any available post-injury work suitable to the plaintiff's qualifications and training and within his restrictions?

Smith v Chrysler Group, LLC, (CA 339075, 02/25/2020), is a published Court of Appeals decision addressing the exceptions to the general rule that injuries occurring while going to or coming from work are not compensable.

The plaintiff worked as a salaried auditor. He lived in Clarkston. His office was at the Chrysler Technology Center in Auburn Hills. He was injured while driving his personal car from his home to the Jefferson Avenue North Assembly Plant in Detroit to conduct an audit. He was paid mileage for the trip.

The magistrate found that the plaintiff's injuries arose out of and in the course of his employment. The commission reversed, finding that the plaintiff did not satisfy three of the four factors noted in *Stark v LE Myers Co,* 58 Mich App 439 (1975). The Court reversed.

After noting the well-settled rule that injuries sustained while going to and from work are not compensable, the *Stark* Court identified four "[c]onsiderations relevant to the ultimate determination of whether an injury to an employee while on the way to work is sufficiently employment-related to be compensable: 1. Whether employer paid for or furnished employee transportation. 2. Whether the injury occurred during or between working hours. 3. Whether the employer derived a special benefit from the employee's activities at the time of the injury. 4. Whether the employment subjected the employee to excessive exposure to traffic risks."

The Court discerned two errors in the commission decision. One, the Court held that the commission, and magistrate, appeared to treat the *Stark* factors, not independent exceptions, but as four factors of a balancing test. In other words, if any one of the identified exceptions is applicable the claim is compensable.

Two, the Court noted that since *Stark* three other coming and going exceptions have been identified: whether the employee is on a special mission for the employer; whether the travel comprised a dual purpose combining employment-related business needs with the employee's personal activity; or whether the travel took place as a result of a split-shift working schedule or employment requiring a similar irregular non-fixed working schedule. The commission erred by failing to consider the three additional exceptions.

The Court then turned its consideration to the exceptions, and concluded that the plaintiff came within two, the special mission exception and the employer paid/furnished transportation exception.

The special mission exception applies "when an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself."

The Court concluded that the plaintiff was on a special mission given his testimony that

> approximately 70% to 80% of his employment consisted of traveling to various locations across the western hemisphere. In other words, it was plaintiff's job to travel to different locations to conduct audits—plaintiff did not merely work different shifts at different locations. [Further,] defendant directed plaintiff to be away from his place of employment at the CTC that day to perform his duties; the "particular circumstances" of his trip to JANAP was "an integral part" of his employment.

Regarding the employer paid for or furnished transportation exception, plaintiff testified that he was paid mileage when traveling "to perform his job duties at this and other locations."

Adams v Amcomm Telecommunications, Inc, (CA 346502, 04/09/2020), is an unpublished Court of Appeals decision also addressing the coming and going exceptions.

Plaintiff was as a cable installer. Defendant provided him with a van displaying the company logo and phone number. Defendant assigned plaintiff to cable installation job sites daily and allowed him to drive the van to work, including driving from home to defendant's warehouse for equipment and driving to installation job sites. Plaintiff was an hourly employee and his pay did not include travel time to and from the warehouse or to and from job sites at the beginning and the end of the work day.

Plaintiff was taking a scheduled, unpaid vacation day from work. His supervisor called that morning and told Plaintiff that there was installation work available for him to perform that day. Plaintiff was directed to go to the warehouse to reconcile the cable equipment in the van. Plaintiff agreed to do so and then perform the installation work. Plaintiff started driving the van from his home to defendant's warehouse. On the way he was involved in a car accident. He had not clocked in before the accident because he had not yet arrived at the warehouse.

The magistrate found that no exception to the coming and going rule applicable. The commission affirmed. The Court again reversed.

The Court identified the same six exceptions discussed above in *Smith.* It again criticized the commission for using a balancing test regarding the exceptions instead of treating each "factor" as an independent test. The Court found plaintiff's claim came within the exception covering "employer paid for or furnished employee transportation as part

of the employment contract." Specifically, plaintiff's employer owned the truck, the employer paid all costs related to owning and operating the truck, plaintiff was permitted to drive the truck to and from work and to and from jobs every day, and was driving to the employer's warehouse to reconcile his equipment before proceeding on to an installation job.

Warren v A.D. Transport Express, Inc, (CA 345005, 02/25/2020), is an unpublished Court of Appeals decision addressing *Rakestraw*.

The plaintiff filed a claim for 2013 lumbar and cervical injuries. The record showed that when he was 16 he fractured a lumbar vertebrae and in 1997 he injured his neck in a car accident.

The plaintiff's treating doctor testified that the plaintiff's work caused the disabling condition. Defendants expert received a history that before 2013 plaintiff experienced back and muscle pain for years following the earlier injuries. The doctor testified the symptoms the plaintiff complained of were consistent with degenerative changes.

The magistrate awarded benefits. Defendants appealed to the commission raising one issue, did the work events cause a change in pathology? The commission found it did not and reversed the award. The commission said that the plaintiff's treating doctor did not have the history of the prior injuries, which caused the magistrate to fail to apply *Rakestraw*. Plaintiff appealed to the Court, which reversed the commission.

The Court found *Rakestraw* inapplicable in this case. "Unlike in *Rakestraw,* here, plaintiff did not argue that the work incident aggravated a pre-existing condition. Rather, plaintiff argued that the two work incidents caused him to suffer from new injuries. Even though plaintiff had suffered prior injuries to his neck and back, his theory was not that the work incident aggravated any pre-existing conditions, rather that he suffered new injuries at work and that his old injuries had healed prior to his work injuries."

But, the Court applied the wrong legal standard. The Court was correct that *Rakestraw* did not apply. The date of injury is after the Legislature partially codified *Rakestraw.* The statute's application is not limited to claims alleging the aggravation of a pre-existing condition. "A personal injury under this act is compensable if work *causes*, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury." The requirement of a new work related pathology applies whether the plaintiff's theory is that work caused, accelerated, or aggravated, accelerated, or caused a pre-existing condition.

In ***Agueros v Bridgewater Interiors, Inc,*** 2020 ACO #4, the commission examined a disability question. The magistrate granted plaintiff a closed award of benefits. The commission reversed the finding that plaintiff was disabled. Although "plaintiff clearly had a medical impairment as a result of the injury during the period of time the magistrate awarded wage loss benefits, plaintiff did not adequately demonstrate any economic impact from the injury as required by MCL 418.301(4) and (5)."

The magistrate found that the plaintiff had "clearly provided testimony regarding his education, the skills he has and his work experience and training. There is no indication in this record that plaintiff has failed to disclose any necessary information." This satisfies MCL 418.301(5)(a).

The next step is to determine whether the plaintiff has provided "evidence as to the jobs, if any, he or she is qualified and trained to perform within the same salary range as his or her maximum wage earning capacity at the time of the injury." MCL 418.301(5)(b). The commission found that plaintiff failed to satisfy this provision.

The magistrate addressed section 301(5)(b), finding that "plaintiff has established his maximum wage earning capacity to be the wages he earned at defendant in January 2014 (as stipulated to) of $718.00 per week. Based upon plaintiff's credible testimony regarding his prior employment and earnings at that employment, the wages at defendant were the highest wage he is ever earned."

This finding was based on plaintiff's testimony alone. The plaintiff was asked if he had considered what types of jobs he would be capable of performing, other than his injury job, and plaintiff indicated he had not. He did not consult with anyone regarding other jobs that might be suitable to his qualifications and training and did not talk to employers in fields of employment other than the kind in which she had previously worked. The plaintiff did not offer vocational expert testimony.

The commission observed that the magistrate's findings regarding the jobs the plaintiff was qualified and trained to do "begins *and ends* with a list of plaintiff's past jobs." A "mere list of jobs performed in the past by the employee is necessary, but not *sufficient* [to prove disability] if the list leaves open the possibility that there are other jobs at the maximum wage level that the employee might be able to perform that utilize the skills and training one has gained from the work the employee has performed." "Plaintiff's testimony provides no basis for assessing whether any other work exists - other than his prior work - which pays the maximum wage in which plaintiff might be able to perform." Thus, the disability finding was reversed.

In ***Razo v G M & Sons, Inc,*** 2020 ACO #8, the commission addressed **§301(4)(c)**'s wage loss requirement in the context of seasonal employment. Note that the defendants

only challenged whether the plaintiff was entitled to wage loss benefits during the off-season.

The plaintiff was a seasonal worker, typically laid off from November to April. During this time he collected unemployment benefits. There was evidence that plaintiff had searched for work. The magistrate found that evidence "persuasive that there are no jobs available to him within his qualifications and training that pay his maximum wages, or anything close to that figure . . . His efforts to find jobs that paid less were also unsuccessful." This job search, however, was apparently not done during his traditional off-season. The plaintiff had testified that during the off-season he did not actively look for work, indicating he did register with Michigan Works! and thought they looked for jobs for him. The magistrate granted an open award for total disability. Defendants appealed.

On appeal the defendants argued that the magistrate failed to apply the second sentence of §301(4)(c), requiring that the claimant establish "a connection between the disability and reduced wages." The third sentence states that wage "loss may be established, among other methods, by demonstrating the employee's good-faith effort to procure work within his or her wage earning capacity." Plaintiff argued that the magistrate had found that he made a good faith job search, satisfying the third sentence, and that this established a connection between the disability and the reduced wages, satisfying the second sentence.

The commission found that a remand was necessary to allow the magistrate to address the connection between the disability and wage loss plaintiff's off-season.

The magistrate may have believed this issue was addressed for the following reasons. The magistrate had found that the plaintiff "received unemployment benefits when the weather grew too cold for cement work, and was called back to work in the spring. I find plaintiff's receipt of those benefits to be part of his employment. His inability to collect unemployment benefits currently is due to his wage loss that is directly attributable to the work-related injury and the medical inability to perform his prior job." Was the magistrate saying that receiving unemployment benefits was in essence part of the plaintiff's wages, that he was not receiving those benefits/wages because of his work-related injury, and this established a connection between the disability and the plaintiff's lost or reduced wages?

The commission said it was "unclear what relevance, if any, non-receipt of unemployment benefits has to determine wage loss issues under the Act. Her fact findings do not include a finding that plaintiff was denied unemployment benefits or evidence explaining the reason for denial, if one occurred." Again, the commission remanded the case to address whether and how the plaintiff's wage loss during the off-season was connected to the disability.

In ***Bryant v On Time Medical Transportation***, 2020 ACO #10, the commission held that it may grant additional time with in which to file a brief on appeal despite the fact that the Act, while specifically providing for additional time to file a claim for review, §859a(1), and to file the trial transcripts, §861a(5), does not provide that additional time can be granted to file a brief on appeal. §861a(6)-(7).

In ***Stackable v Gtech Corp***, 2019 ACO #30, the commission concluded that whether medical treatment is reasonable and necessary does not ultimately depend on whether it is successful. Citing *Cuddington v United Health Services, Inc.,* 298 Mich App 264, 274 (2012), the commission observed that whether medical treatment is reasonable and necessary "requires a fact-intensive reasonableness inquiry focusing on the totality of the circumstances surrounding the employee, the workplace, the nature of the injury, and the injuries adverse effect on employee's overall health and well-being. No single factor is dispositive, and a reasonableness inquiry may encompass any evidence bearing on whether medical services were necessary." The commission distinguished *Rayis v Utica Packing Company,* 1991 ACO #214, where after undergoing "physical therapy over an extended period for care the employee indicated did nothing to relieve his pain. The [commission] was therefore dealing with a lengthy course of fruitless treatment. This case, by contrast, involves discrete procedures and a limited series of injections that were not repeated when no relief was achieved."

Moving? Changing Your Name?

In order to safeguard your member information, changes to your member record must be provided in one of the following ways:

- *Login to SBM Member Area* with your login name and password and make the changes online.
- *Complete contact information change form* and return by email, fax, or mail. Be sure to include your full name and P-number when submitting correspondence.
- *Name Change Request Form*—Supporting documentation is required