2013 ACO # 91

S T A T E O F M I C H I G A N
MICHIGAN COMPENSATION APPELLATE COMMISSION

SARAH P. MOORE,
PLAINTIFF,

V DOCKET #11-0039

DETROIT BOARD OF EDUCATION,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE MERWIN.

MARGARET A. O'DONNELL FOR PLAINTIFF,
ALBERT T. NELSON, JR. FOR DEFENDANT.

OPINION

BROWN, COMMISSIONER

Defendant appeals the decision of Magistrate David B. Merwin, mailed February 7, 2011, granting plaintiff's claim for reasonable and necessary medical and related expenses associated with treatment for plaintiff's back and psychological condition. The plaintiff, Ms. Moore, a Detroit Public Schools teacher, allegedly sustained injuries during an altercation involving students in her classroom on March 4, 2008. Prior alleged workplace injuries are claimed to have occurred on April 23, 1998, during a student altercation, and October 16, 2002, when a chair collapsed underneath the plaintiff.

Defendant contends the magistrate utilized improper legal reasoning and interpretation when applying the facts to the standards as stated in *Rakestraw v General Dynamics Land Systems, Inc.,* 469 Mich 220 (2003). The defendant also appeals the magistrate's award of attendant care, as unsupported by competent, material, and substantial evidence on the whole record. Finally, the defendant asserts the magistrate failed to apply the correct legal standard in his assessment of the plaintiff's alleged psychiatric disability.

On October 12, 2011, the defendant submitted a supplemental authority written argument which suggests that the magistrate's finding of partial disability requires an analysis of retained wage earning capacity as set forth under *Lofton v AutoZone, Inc*, 482 Mich 1005 (2008), *Harder v Castle Bluff Apartments*, 489 Mich 951 (2011), and *Brackenrich v Sun Chemical Corporation*, 2011 ACO #106.

In response, on October 19, 2011, plaintiff made a motion to dismiss defendant's claim and assess costs under MCL 418.861b of the Worker's Disability Compensation Act (Act) or to strike defendant's request for review under the supplemental authority written argument. Plaintiff's motion to dismiss defendant's claim and assess costs under MCL 418.861b is denied. We remand to the magistrate to address the defendant's supplemental authority argument along with several issues raised in defendant's January 2011 appeal.

MAGISTRATES RULINGS

Magistrate Merwin found:

> [P]laintiff did experience a work related injury while working for defendant on all 3 dates [April 23, 1998, October 16, 2002, March 4, 2008] she has alleged. The first 2 injuries affected primarily her back with some symptoms into her legs. The last injury has affected her back and legs plus she alleges experiencing psychological or emotional problems which she attributes to the 03/04/08 injury. [Magistrate's opinion at 22.]

From the eight deposed doctors' testimony, Magistrate Merwin made candid credibility findings when he opined:

> . . . I do find the more significant injuries were psychological and emotional. In reaching that conclusion I rely on the testimony of Dr. Cornette, Dr. Rubenfaer and Dr. Fuerst. I also rely on my multiple opportunities to observe plaintiff . . .
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> * * *
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> I do find her PTSD [posttraumatic stress syndrome] to be related to the injury and I find her regular psychotherapy and her periodic psychiatric treatment and medications to be reasonable and necessary and related to the 03/04/08 injury.
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> * * *
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> Her physical condition limits her ability to stand on her feet all day or to ambulate significant distances. I rely on the testimony of Dr. Gibson, Dr. Newman and Dr. Jenkins for most of the physical limitations. She described limitations on her ability to lift, bend and twist which she reasonably testified were essential functions of her job as a science teacher . . .
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> * * *
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> . . . [H]er descriptions of her job and the pressures one would have to face from students, parents, fellow teachers and administrators convince me she is disabled both physically and psychologically from any of her prior work. I find her physical limitations to be of significantly lesser importance in her overall disability as her primary disabling problems are psychological and emotional.

* * *

> I was not impressed by the testimony of Dr. Kezlarian. His conclusions were at odds with that of Dr. Cornette and Dr. Rubenfaer. I thought both of them had much more contact with plaintiff, putting them in a better position to evaluate her condition. I also did not accept the opinions of Dr. Fink. I found he selectively ignored certain objective testing which did not agree with the conclusion he wanted to reach. [*Id*. at 23-24.]

Regarding plaintiff's attendant care award, the magistrate found the plaintiff's exhibit 10 – a document plaintiff's caregiver created to reflect hours spent on plaintiff's care between March 4, 2008, and June 18, 2009 – far exceeded the attendant care needed or provided to the plaintiff. The plaintiff's daughter, Siarah Phillips, a certified professional patient care technician, was the caregiver. The magistrate calculated the plaintiff sought attendant care compensation for approximately 2,933 hours.

Because the magistrate did not doubt the plaintiff needed attendant care, a 90 day attendant care award, beginning with the March 2008 injury date, was granted: 6.2 hours per day for 30 days, 5 hours per day for the next 30 days and 3 hours per day for the final 30 days. The compensation rate was $10 per hour – comparable to Miss Phillips's private sector wages.

Generally, the defendant was found responsible for reasonable and necessary medical expenses associated with the plaintiff's back and psychological condition.

LAW

I. Standard of Review

The Act requires the Appellate Commission to perform two essential functions when reviewing a magistrate's decision under two entirely different standards. First we examine the magistrate's fact findings under the competent, material, and substantial evidence standard. MCL 418.861a(3). We must review the entire record. MCL 418.861a(4). The review must include both a qualitative and quantitative analysis of the evidence. MCL 418.861a(13). After our review of the record we must determine whether a reasonable person would find the evidence adequate to support the magistrate's finding. In addition to our fact-finding review, magistrate statements and applications of the law are reviewed under a de novo standard.

The Appellate Commission's review of statements of law are only limited to the extent that upon appeal, a party must articulate which statements and applications of law are submitted for review. MCL 418.861a(11).

Findings of fact by the magistrate are deemed conclusive if supported by competent, material, and substantial evidence on the whole record. Substantial evidence is that which

considering the whole record – all the evidence for and against a determination – a reasonable mind would accept that determination as adequate to justify a conclusion. MCL 418.861a(3).

II. Applicable Law and Statute

A. Burden of Proof and Credibility: *Aquilina* & *Isaac*

The plaintiff has the burden of proof regarding each element of a plaintiff's workers' compensation claim. The elements must be proven by a preponderance of the evidence. *Aquilina v General Motors Corporation*, 403 Mich 206 (1978). An injury or disease arising out of and in the course of employment that places a limitation on the claimant's wage earning capacity in work suitable to his or her qualifications and training must be proven. MCL 418.301(1) & (4).

Regarding a magistrate's credibility determination, as recognized by the Appellate Commission's predecessor the Workers' Compensation Appellate Commission (WCAC) in *Isaac v Masco Corporation*, 2004 ACO #81 at 5:

> The magistrate's credibility determination is entitled to deference because the hearing officer has the opportunity to view and judge witnesses. Moreover, the magistrate is not obligated to deal with the credibility issue like a light switch, turning it either on or off.
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> The magistrate's choice of which medical expert opinion or opinions to adopt is within his or her discretion and we defer to that choice, if it is reasonable. The magistrate need not adopt expert opinions in their entirety but may give differing weight to different portions of testimony. And, although a magistrate may give preference to a treating expert's opinion, she need not do so. [Footnotes omitted.]

B. Previous Injury: *Rakestraw*

For a later injury to be considered compensable when a plaintiff has multiple injuries, a later injury must manifest as a medically distinguishable condition as evidenced by a pathologic change. *Rakestraw v General Dynamics Land Systems, Inc.*, 469 Mich 220 (2003); *Fahr v General Motors Corporation*, 478 Mich 922 (2007). In other words, for a subsequent injury to be proven there must be evidence that work caused an injury that is medically distinguishable from the progression of the underlying pre-existing condition.

C. Attendant Care: *Kushay*

Limits to attendant care are described in pertinent part under § 418.315(1) of the Act:

> Attendant or nursing care shall not be ordered in excess of 56 hours per week if the care is to be provided by the employee's spouse, brother, sister, child, parent, or any combination of these persons.

In *Kushay v Sexton Dairy Company*, 394 Mich 69 (1975), the court further delineated what services the employer could or could not be responsible for providing under an attendant care award:

> The language of the statute, "reasonable medical, surgical and hospital services and medicines or other attendance or treatment", focuses on the nature of the services provided, not on the status or devotion of the provider of the service. Under the statute, the employer bears the cost of medical services, other attendance and treatment. . . .
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> Ordinary household tasks are not within the statutory intendment. House cleaning, preparation of meals and washing and mending of clothes, services required for the maintenance of persons who are not disabled, are beyond the scope of the obligation imposed on the employer. Serving meals in bed and bathing, dressing, and escorting a disabled person are not ordinary household tasks. [*Id*. at 74.]

D. Mental Disability: *Robertson, Gardner, and Martin*

Defendant challenges the magistrate's finding of psychiatric disability and award. The statute contains the applicable standard. MCL 418.301(2) provides:

> Mental disabilities . . . shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof, . . .

The Supreme Court, in *Robertson v DaimlerChrysler Corporation*, 465 Mich 732 (2002), has explained what must be demonstrated to establish mental disability under § 301(2):

> We conclude that, to satisfy the mental disability requirements of the second sentence of § 301(2), a claimant must demonstrate: (a) that there has been an actual employment event leading to his disability, that is, that the event in question occurred in connection with employment and actually took place; and (b) that the claimant's perception of such actual employment event was not unfounded, that is, that such perception or apprehension was grounded in fact or reality, not in the delusion or the imagination of an impaired mind. [*Robertson* at 752-753; footnote omitted.]

* * *

> Thus, in applying the proper statutory test, the factfinder must first determine whether actual events of employment indeed occurred. Then, in analyzing whether a claimant's perception of the actual events of employment had a basis in fact or reality, i.e., the claimant's perception was "founded", the factfinder must apply an objective review *by examining all the facts and circumstances surrounding the actual employment events in question* to determine whether the claimant's perception of such events was reasonably grounded in fact or reality. [*Id.* at 755; emphasis added; footnote omitted.]

Though partially overruled on other issues, *Gardner v Van Buren Public Schools*, 445 Mich 23 (1994) is instructional with regards to its statement that relevant work events must be examined in the broader context of the plaintiff's circumstances so that the *causative significance* of the work event may be measured. In this respect *Gardner* provides:

> In determining whether specific events of employment contribute to, aggravate, or accelerate a mental disability in a significant manner, the factfinder must consider the totality of the occupational circumstances along with the totality of a claimant's mental health in general.
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> The analysis must focus on whether actual events of employment affected the mental health of the claimant in a significant manner. This analysis will, by necessity, require a *comparison of nonemployment and employment factors*. Once actual employment events have been shown to have occurred, the *significance of those events to the particular claimant must be judged against all the circumstances* to determine whether the resulting mental disability is compensable. [*Gardner* at 47; emphasis added; footnote omitted.]

In *Martin v City of Pontiac School District*, 2001 ACO #118, (en banc) this Commission's predecessor considered *Gardner* when it articulated a four part inquiry related to mental disabilities:

> To conclude that significant contribution exists, the four-factor test provides two analytical forms of assistance. The test seeks to quantify the two categories of contributors to a claimant's condition, occupational and non-occupational, the latter of which includes the natural progression of any condition which naturally progresses on its own. The test then seeks to compare qualitatively the occupational contributors to the non-occupational contributors.
>
> The first factor requires raw mathematics: count the contributors. When the non-occupational contributors outnumber the importance of various occupational contributors, work contributors are less likely to reach the significant standard. The converse holds when the occupational contributors outnumber the non-occupational contributors. Relatedly, the magistrate must also consider the magnitude of the disparity between the number of occupational and non-occupational contributors. The larger the disparity, the more or less likely that work contributors constitute significant contributors.

> The second factor for quantifying the contributors requires relative comparison of the contributors: find which contributors contribute the most. To accomplish this, medical opinions are critical. They assist the magistrate's attempt to establish a hierarchy of contributors. The magistrate may adopt a medical assessment that any contributor minimally, moderately or maximally influenced the progression of the condition. Alternatively, albeit rarely, a magistrate may accept a medical professional's assignment of a mathematical percentage for the contributors, if the professional expresses the opinion in mathematical percentages. In either case, assignment of relative weight must occur.[14]
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> [14] We offer a note of caution about the form of medical opinion currently prevalent in significant manner cases. Too often, the opinions conclude that a contributor is or is not significant. We view such opinions as mere conclusory statements, not sufficient to comply with the multi-factor test. For a medical opinion to be supportive of the magistrate's legal conclusion that contribution is significant, it must clearly express relative contribution in light of all the contributors. Thus, it is imperative for the expert to be accurately informed of all applicable factors.
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> The third factor is the duration of the contributor: longer duration may indicate more contribution. In many cases, the medical opinions address the importance of the duration of the contributor. However, when the medical opinions omit duration, the magistrate should take this into account. An employee seeking a significant manner finding may wish to develop proofs which indicate a lengthy duration of the occupational contributors. In contrast, employers may wish to emphasize the lengthy duration of the non-occupational contributors. Likewise, each party may develop proofs shortening the duration of the contributors harmful to their argument.
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> Fourth, the magistrate must examine whether any permanent effect resulted from any contributor. Stated differently, the magistrate must evaluate the ability of medical treatment, including rest and abstaining from work, to reverse the effect of the contributor. In those instances where the contributors can be separated, the more lasting effect produces greater significance. [*Id*. at 12-13.]

E. Partial Disability: *Harder*, *Lofton,* and its progeny

As is now well recognized, *Harder v Castle Bluff Apartments*, 489 Mich 951 (2011), affirmed that *Lofton v AutoZone, Inc*, 482 Mich 1005 (2008), "applies at all times to partially disabled workers." The court in *Lofton* decided:

> 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) on the basis of what the plaintiff remains capable of earning.

Under MCL 418.301(4):

> "[D]isability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.

In a subsequent decision, *Umphrey v General Motors Corporation*, 489 Mich 978 (2011), the court advanced their endorsement of *Lofton* and reached the conclusion that the WCAC should not have summarily rejected the defendant's argument that a *Lofton* evaluation was required. Pointedly, the court noted "[*i*]*f it is determined* that the plaintiff is only partially disabled, then a calculation of wage loss benefits must be made . . ." **[**Citation omitted; emphasis added.]

Finally in *Vrooman v Ford Motor Company*, 489 Mich 978 (2011), the Court both reaffirmed *Lofton* and addressed the former WCAC's reluctance to uniformly follow *Lofton* and its progeny. The magistrate in *Vrooman* found the plaintiff proved total disability even though there was vocational evidence that there was work the plaintiff could perform, but that work would not pay the plaintiff's maximum wage. The Commission majority affirmed. By endorsing the dissenting opinion in *Vrooman*, wherein Commissioner Przybylo recommended the magistrate be reversed in part and remanded for wage loss analysis, the Court's reversal hinged upon the absence of indicia that the plaintiff was completely unable to work.

APPLICATION

A. Credibility

The magistrate concluded that the witnesses presented were credible, yet he did not believe the extent of Ms. Philips's attendant care claims. The veracity of those attendant care claims are discussed further below. The magistrate relied upon each of the plaintiff's five expert medical witnesses – none of whom, for various reasons, authorized plaintiff to return to work without restriction as of the date of the hearing.

The magistrate rejected both of defendant's expert witnesses, Dr. Fink and Dr. Kezlarian in forming his opinion that Ms. Moore was mentally and physically completely unable to return to work. Dr. Fink – a board-certified occupational medicine doctor – never reviewed Ms. Moore's job description, nor did he visit or appraise Ms. Moore's school, science lab, or similar work settings. The defendant's board-certified psychiatrist, Dr. Kezlarian, also declared the plaintiff able to return work. Dr. Kezlarian did not compare Ms. Moore's typical activities before and after the March 2008 injury. Both doctors made broad stroke dismissals of Ms. Moore's claimed symptoms and complaints. Their limited examination of Ms. Moore's

professional requirements and her physical and mental abilities after the March 2008 incident made much of Dr. Fink and Dr. Kezlarian's testimony less credible.

B. Previous Injury: *Rakestraw*

In reaching a reasonable and necessary medical expenses award associated with the plaintiff's physical injuries, the magistrate attributed the plaintiff's physical restrictions to her mental injuries. That finding, which the magistrate did not explain, did not relieve the magistrate of his responsibility to analyze the plaintiff's physical injury claims under *Rakestraw v General Dynamics Land Systems, Inc., supra*.

Principles set forth in *Rakestraw* are to be applied in situations where the plaintiff seeks compensation for a work related physical injury that occurs after a preceding physical injury. Subsequent alleged injuries must be shown to have resulted in a pathological change that distinguishes the prior injury from the presently alleged injury.

There was undisputed evidence of the plaintiff's two prior work-related injuries, in April 1998 and October 2002. The magistrate included zero analysis of the plaintiff's physical condition related to her April 1998 and October 2002 injuries versus her physical condition following the March 4, 2008, injury.

The magistrate's decision was nearly void of physical medical evidence fact finding despite his lengthy "Summary of Evidence." Because the magistrate did not demonstrate how his decision was made nor did he demonstrate that there was a proper evidentiary basis to support it, we remand this portion of the magistrate's decision for analysis of evidence previously presented. Fact findings must be made and applied to *Rakestraw*. A decision must be rendered regarding the claimant's alleged physical injuries as a result of the March 2008 incident, as well as the 1998 and 2002 injuries.

C. Attendant Care: *Kushay*

Ms. Phillips's testimony about the care she provided her mother after her 2008 injury was clearly inconsistent with the hours recorded on plaintiff's exhibit 10, purportedly Ms. Phillips's attendant care work log. Ms. Phillips did not begin keeping the log until May 2008. She admitted that the entries between the injury date in March 2008 and the date she began keeping the log in May 2008 were estimates.

Plaintiff's general practice doctor recommended eight hours attendant care, seven days per week. An attendant care compensation award based on those professional recommendations may have been sustainable. Notably, Ms. Phillips's testimony clearly suggested she almost always rendered less than eight hours care per day, and in some cases, even less than the five or six hours she recorded on her "attendant care log," plaintiff's exhibit 10.

Under *Kushay v Sexton Dairy*, 394 Mich 69 (1975), services required for the maintenance of persons who are not disabled, are not within the scope of services an employer is responsible for compensating. Likewise, "ordinary household tasks are not within the statutory intendment…[such as] house cleaning, preparation of meals and washing and mending of clothes," *Kushay* at 75.

Ms. Phillips and Ms. Moore lived in the same residence. Ms. Phillips prepared her mother's meals, did laundry, and administered personal care; some tasks Ms. Phillips performed were for her own benefit as well as her mother's. All were facts that should have been analyzed under *Kushay*, however, the magistrate failed to perform any *Kushay* analysis.

The magistrate's point – that Ms. Phillips clearly administered far less care than what was indicated on her "work log" – was a logical conclusion based upon the record. Nevertheless, the magistrate's 90 day award – 6.2 hours per day for 30 days, 5 hours per day for 30 days, and 3 hours per day for 30 days, consecutively awarded beginning with the 2008 injury date – was not supported by competent, material, and substantial evidence on the record. We remand for further analysis.

D. Mental Disability: *Robertson, Gardner, and Martin*

As the Court of Appeals recognized in *Binkley v Alstom Power, Inc.*, COA #295890, unpublished opinion issued March 8, 2011, "[w]e certainly do not want to discourage magistrates from using common sense when appropriate. However, the disability analysis required in this case calls for more than can be gleaned from common sense or even a permissible inference." In *Binkley*, a magistrate called it 'common sense' that a former steel worker suffered a diminished wage earning capacity after he suffered a severe injury.

While it may seem intuitive that the plaintiff satisfies the "work related mental injury" requirement after being assaulted during a gang-related altercation in her classroom, a magistrate must still analyze claims for mental injury and disability under MCL 418.301(2) of the Act within the legal guidelines and principles set forth under *Robertson*, *supra, Gardner*, *supra,* and *Martin*, *supra*.

Again, the magistrate provided scant fact finding based upon psychological medical expert witness evidence, and even less reasoning concerning how he reached his conclusion that "her restrictions are primarily based upon her PTSD condition and at this time she cannot maintain a full time position with any employer. She is psychologically disabled from all employment." [Magistrate's opinion at 25.]

While a plaintiff's perceived behavior as a witness at trial, which the magistrate cited extensively as the foundation for finding mental disability, certainly adds to or detracts from a witness's credibility, mental disability claims cannot be established by that alone. The magistrate must still conduct fact finding relevant to the controlling legal authority.

Accordingly, we remand this portion of the decision for fact finding and analysis in light of *Robertson*, *Gardner* and *Martin*, again based upon the record evidence.

E. Partial Disability: *Harder*, *Lofton*, and its progeny

Application of the *Harder*, *Umphrey*, and *Vrooman* cases, which gave validity to the Court's ruling in *Lofton*, necessitates a finding based on whether a plaintiff is partially or totally disabled. If the former, an analysis necessary to determine the plaintiff's diminished wage earning capacity is in order. We note that when the aforementioned post-*Lofton* cases were decided, this case was still in litigation and *Lofton* was not being afforded precedential effect.

Consequentially, the *Lofton* order was no clear impetus for parties to present proofs to satisfy the rule in *Lofton*, or for the magistrate to appraise those proofs. In this instant, the magistrate's decision was infused with precatory language regarding the extent of plaintiff's physical ability. The magistrate was slightly more definitive in fettering out the extent of plaintiff's mental ability. Though we find as much by way of comparison to the magistrate's appraisal of the plaintiff's mental ability, it is most likely that the magistrate would not find the plaintiff totally physically disabled.

> Plaintiff had clerical skills, teaching skills, the ability to work with multiple populations, science skills, the ability to work in a lab, the ability to work for a pharmaceutical company, the ability to work for a waste management company, water or sewer company or an environmental company. Plaintiff also has respectable computer skills. If she had no restrictions, plaintiff might be able to earn respectable and very good wages in non-teaching employment. [Magistrate's opinion at 25.]

The record provided some evidence of the plaintiff's transferable skills that would allow a wage earning capacity analysis in relation to her physical abilities. Those skills were minimally examined at trial because plaintiff's vocational expert stopped analysis of available jobs after factoring in the plaintiff's most restrictive return to work medical recommendations:

> *Q*: Utilizing the medical restrictions which you summarized in your report, did you come to an opinion as to whether utilizing these restrictions Ms. Moore is able to find work at her maximum wage within her qualifications and training?
>
> *A*: I was given a number of different medical restrictions. If, as I so stated, Dr. Fink released her to return to work without restrictions, she could go back to her former teaching position.
>
> Dr. Gibson restricted her from working and she would not have a wage-earning capacity.

> She reported that Dr. Jenkins did not release her to return to work, which is her treating neurologist, I believe.
>
> Dr. Newman did provide a report with a number of medical restrictions. Based on those restrictions as outlined by Dr. Newman, I was unable TO [sic] find any jobs that would pay her maximum pre-injury rate of pay. [Barbara Feldman's deposition at 19–20.]

Notably, a doctor's statement that a plaintiff is not ready to return to work, cannot be considered a conclusive or credible piece of evidence that a plaintiff cannot return to any job that is within that person's qualifications and training, and is therefore totally disabled. The magistrate made no finding that the plaintiff was partially disabled. Rather, he appears to have leapt to a conclusion that plaintiff was totally disabled simply due to her inability to find a job within her restrictions which paid her maximum wage at time of injury.

Again, a doctor's restriction prohibiting an employee's return to work is not conclusive evidence that plaintiff has a diminished wage earning capacity sufficient to prove disability. "It is this emphasis on the *vocational* opinion of a medical expert, as the pre-emptive evidence on the question of vocational capacity, which is flawed," *Peterson v Consumers Energy Company*, 2012 ACO #31. Similarly, a doctor's converse opinion, taken alone, is not conclusive evidence that a plaintiff has no diminished wage earning capacity.

In the wake of *Lofton*, *Harder*, and *Vrooman*, it is clear that when there is no indication that a plaintiff is completely disabled, either physically or mentally, a magistrate must continue his inquiry and conduct a wage loss analysis. Again, the Court in *Lofton* directed:

> 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) on the basis of what the plaintiff remains capable of earning.

Further, the magistrate's ruling concerning the plaintiff's physical injuries was confined to her ability to perform her job as a science teacher. "Her physical restrictions play a role in that she cannot physically perform the duties required of a middle school or high school science teacher." [Magistrate's opinion at 25.]

We remand for evidence and fact finding under the *Lofton*, *Harder*, *Umphrey*, and *Vrooman* standards. Once those proofs have been presented by either side, if partial disability is found, the extent of wage loss attributable to the compensable injury should be assessed.

CONCLUSION

Magistrates serve an indispensable role as fact finders. A magistrate must not abdicate "the throne" of their most important function in deciding a matter. Facts found within a

magistrate's decision appealed to the Michigan Compensation Appellate Commission are to be affirmed if they are supported by competent, material, and substantial evidence on the record. We cannot find as much in this matter because of the absence of fact finding and legal reasoning performed by the magistrate. Moreover, the Commission wishes not to assume the wholesale position as fact finder, as would be required in this case, based upon the lack thereof. Therefore, we set aside the magistrate's decision and remand for fact finding and legal analysis consistent with this decision.[1] We do not retain jurisdiction.

Commissioners Przybylo and Wyatt concur.

Danielle M. Brown	Commissioner
Gregory A. Przybylo	Commissioner
George H. Wyatt III	Commissioner

[1] To set aside, or vacate, a magistrate's decision, has been criticized in some circumstances as beyond the statutory authority of this Commission's predecessor. *Gretel v Worker's Compensation Appellate Commission*, 217 Mich App 653 (1996). Yet similar action by the former WCAC has withstood challenge before the Court of Appeals. *MacNeil v WCAC*, No. 211170, 1999 WL 33439141 (July 9, 1999) (Unpublished). A challenge to similar action by the current Commission was likewise rejected in *Geoghegan v MCAC*, Court of Appeals No. 316579, (July 25, 2013) (Unpublished). In contrast to *Gretel*, *MacNeil* and *Geoghegan* are in harmony with *McAvoy v H.B. Sherman Company*, 401 Mich 419, 444 (1977), which recognized that the power to vacate (set aside) exists at any appellate stage. When a magistrate's decision is manifestly deficient in fact finding and analysis required by the relevant legal standards, we are without an alternative remedy that is fair to all parties save to vacate the defective decision and remand for proceedings consistent with what the law requires.

STATE OF MICHIGAN
MICHIGAN COMPENSATION APPELLATE COMMISSION

SARAH P. MOORE,
PLAINTIFF,

V DOCKET #11-0039

DETROIT BOARD OF EDUCATION,
SELF INSURED,
DEFENDANT.

This cause came before the Appellate Commission on a claim for review filed by defendant from Magistrate David B. Merwin's order, mailed February 7, 2011. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be remanded. Therefore,

IT IS ORDERED that the magistrate's decision is set aside and this matter is remanded to the magistrate for fact finding and legal analysis consistent with this decision. We do not retain jurisdiction.

Danielle M. Brown Commissioner

Gregory A. Przybylo Commissioner

George H. Wyatt III Commissioner