2020 ACO #14

S T A T E O F M I C H I G A N
WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

DONALD TRAYNOR,
PLAINTIFF,

V DOCKET #19-0021

STATE OF MICHIGAN,
DEPARTMENT OF CORRECTIONS,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE SIMS.

BARRY D. ADLER FOR PLAINTIFF,
MARK D. WILLIAMS FOR DEFENDANT.

MISCELLANEOUS OPINION

MCMILLAN, COMMISSIONER

INTRODUCTION

Plaintiff, Donald Traynor, timely filed an interlocutory appeal with the Michigan Compensation Appellate Commission (MCAC). Plaintiff seeks relief from Magistrate John M. Sims' June 18, 2019 pre-trial order that requires he cooperate with an in-person interview with a vocational expert retained by his employer, defendant, Department of Corrections/State of Michigan, self-insured. Defendant filed a motion asking the Workers' Disability Compensation Appeals Commission (WDCAC)[1] to dismiss plaintiff's "interlocutory appeal without prejudice to plaintiff raising the arguments made in an appeal or cross-appeal after Magistrate Sims' decision on the underlying application."[2]

[1] Pursuant to Executive Reorganization Order 2019-13 effective August 11, 2019, the MCAC was abolished. The authorities, powers, duties, functions and responsibilities of the MCAC are transferred to the Workers' Disability Compensation Appeals Commission (WDCAC).

[2] While these matters were pending, plaintiff appealed an order from the Director of the Workers' Disability Compensation Agency "staying" plaintiff 's request for vocational rehabilitation services pursuant to MCL 418.319. That appeal is addressed in a separate opinion and order.

## STANDARD OF REVIEW

When reviewing a magistrate's Opinion and Order, the Worker's Disability Compensation Act (Act) requires the WDCAC, as it did the MCAC, to evaluate both the magistrate's findings of fact and applications of law. We review the magistrate's fact findings under the competent, material, and substantial evidence standard. MCL 418.861a(3). We examine the entire record, MCL 418.861a(4), and make a qualitative and quantitative review of the evidence. MCL 418.861a(13). Once we review the record, we determine whether a reasonable person would find the evidence is adequate to support the magistrate's findings. MCL 418.861a(3) ("substantial evidence means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion"). The WDCAC examines the magistrate's application of the law under a *de novo* standard. *Abbey v Campbell, Wyant & Cannon Foundry (On Remand),* 194 Mich App 341, 351; 486 NW2d 131 (1992); *see Calovecchi v Michigan,* 461 Mich 616, 621-622; 611 NW2d 300 (2000). A magistrate's conclusions of law are "subject to reversal if based on erroneous legal reasoning or the wrong legal framework." *DiBenedetto v West Shore Hospital,* 461 Mich 394, 401-402; 605 NW2d 300 (2000). MCL 418.861a(11) limits the WDCAC's review authority to "only those specific findings of fact or conclusions of law that the parties have requested be reviewed."

## BACKGROUND AND FACT FINDINGS

Magistrate Sims issued an *un*-appealed opinion and order, mailed July 25, 2018, that held plaintiff injured his right shoulder and right biceps at work on January 28, 2014. The magistrate ordered defendant to pay wage loss replacement benefits for a closed period between January 29, 2014, and March 10, 2017. The magistrate found plaintiff was partially disabled and capable of working, but, as of March 10, 2017, plaintiff did not make a good faith job search. The magistrate held plaintiff should have made a good faith job search to prove he had a compensable disability pursuant to the fourth step in proving disability under *Stokes v Chrysler LLC,* 481 Mich 266; 750 NW2d 129 (2008). No party appealed the magistrate's July 25, 2018, Opinion and Order. This opinion and order became final and subject to the doctrine of *res judicata*. *Gose v Monroe Auto Equipment Company*, 409 Mich 147, 162-163; 294 NW2d 165 (1980) (litigation of all matters that were litigated or that could have been litigated in the prior proceedings are precluded in subsequent litigation); *Paige v City of Sterling Heights*, 476 Mich 495, 521 n 46; 720 NW2d 219 (2006); *see Pike v City of Wyoming,* 431 Mich 589, 595-596; 433 NW2d 768 (1988).[3]

[3] Because plaintiff's alleged injury occurred after December 19, 2011, the effective date of 2011 P.A. 266, the steps described in MCL 418.301(5)(a) through (d) apply to the *prima facie* disability issue. MCL 418.891(4) provides, "Notwithstanding sections 301(14) and 401(10), the amendments to this act made by 2011 PA 266 apply to personal injuries and work-related diseases incurred on or after December 19, 2011". The definition of "disability" in MCL 418.301(5) largely tracks the definition set forth in *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). Where differences exist, *Stokes* controls for injuries that occur before December 19, 2011, and the statute, as amended in 2011, controls for injuries that occur on and after December 19, 2011. However, no party appealed the magistrate's application of *Stokes* as support for his rulings concerning disability. Therefore, we do not disturb the magistrate's disability findings, *Gose*, 409 Mich at 162-163; *Paige*, 476 Mich at 521 n 46; *Pike*, 431 Mich 595-596.

The magistrate's July 25, 2018, opinion summarized evidence he received in the June 14, 2018, hearing and the magistrate's fact findings.[4] The magistrate found plaintiff injured his left hand on December 1, 1986, while working for a prior employer. Four fingers of his left hand were mangled. Plaintiff said he can use his left hand to pick up light items, but he has no grip to handle small items. His left thumb weakened over time. He had a bone removed from it. He has arthritis in the left hand. He treats with Dr. Richard W. Ganzhorn, M.D. He continues to play drums in a band. He wears a leather glove and uses sticky tape to help his grip. He said he drops his drumsticks while drumming.

On February 5, 1989, plaintiff began working for defendant as a maintenance mechanic. He eventually obtained a journeyman's electrician status. On January 28, 2014, he injured his right upper extremity as he tightened the spring of a garage door in the facility where he worked. He said he felt and heard a pop in his right arm. His long-time treating doctor, Dr. Ganzhorn, diagnosed a ruptured bicep tendon and a full thickness tear of his right rotator cuff resulting from the alleged January 28 incident. The magistrate expressed doubts about this testimony. Plaintiff had a long history of pre-existing problems in both shoulders, arms, and elbows. Nevertheless, the magistrate concluded, "I find injury to the right shoulder as a full thickness tear of the rotator cuff occurring on January 28, 2014 and the disability resulting therefrom." (Magistrate opinion at 45.)

He added, "(h)owever, that disability is partial, not total." (Magistrate opinion at 45.) He found the testimony of Dr. Richard Lemon, M.D. and plaintiff's extensive use of his right upper extremity as he played drums demonstrated plaintiff did not suffer the specific loss of his right arm. (*Id*.) The magistrate denied plaintiff's claim for permanent and total loss of the industrial use of his right arm and left hand pursuant to MCL 418.361(3)(g). He contrasted the testimony of Dr. Ganzhorn, supporting a loss of use allegation, against testimony of other witnesses and video evidence of plaintiff using both upper extremities while drumming. He found plaintiff's testimony "to be less than credible, in light of the videos I observed, especially with regard to his testimony as to his ability to use his right upper extremity." (Magistrate opinion at 43.)

The last issue the magistrate addressed in the 2018 decision was:

> 3. Whether the Plaintiff engaged in a good faith job search or whether he was required to engage in a good faith job search under the circumstances of this case. (Magistrate opinion at 46.)

The magistrate found plaintiff proved the first three (of four) required steps for proving a *prima facie* case of disability under *Stokes*, 481 Mich at 281-284. He concluded plaintiff was not

[4] The magistrate's July 25, 2018 Opinion, beginning on page 5 and running through page 41, summarizes witness testimony, exhibits and procedural history. The magistrate's "ANALYSIS AND FINDINGS", are provided at pages 41 through 48 of that opinion.

entitled to wage loss benefits after March 11, 2017, because plaintiff did not prove the fourth step of a disability analysis. The magistrate wrote:

**CONCLUSIONS**

* * *

> Plaintiff is entitled to wage loss benefits at the rate of $714.42 per week from January 29, 2014 through August 31, 2014. Plaintiff is entitled to wage loss benefits at the rate of $132.69 from September 1, 2014 through March 10, 2017. I find that he is not eligible for wage loss benefits from and after March 11, 2017 as a result of his failure to make a good faith job search as required by law. (Magistrate opinion at 47-48.) (Footnotes were added by the WDCAC.)

The magistrate's July 25, 2018, opinion and order became final when the 30-day appeal period, MCL 418.859a, expired without an appeal, by any party, to the MCAC.

Post July 25, 2018 Petitions

On September 19, 2018, plaintiff filed a *new* Application for Mediation or Hearing. He alleged the same date of injury, alleged work event and injury to his right upper extremity that the magistrate addressed in his July 2018 opinion and order. In the new application, plaintiff alleges he "is engaging in good faith job search under existing law, but defendant refuses to pay benefits as ordered by Magistrate's Opinion dated July 16, 2018."[5] Plaintiff seeks reinstatement of wage loss benefits. Defendant filed a "Carriers Response" and affirmative defenses.

On May 29, 2019, defendant filed a Motion to Compel Plaintiff's Cooperation with Vocational Evaluation." Defendant asserts MCL 418.301(6) provides defendant with "a right to discovery if necessary . . . to sustain its burden [to produce evidence to refute plaintiff's showing that he is disabled under MCL 418.301(5)] and present a meaningful defense." Defendant asserts that after plaintiff filed his recent application, asserting he is looking for work, defendant retained the services of a vocational expert, Dr. Andrew Nay, to make a vocational assessment analyzing plaintiff's qualifications and training, to make a transferable skills analysis, to conduct a labor market survey, and to evaluate plaintiff's wage earning capacity. Defendant asserts plaintiff's attorney refused to cooperate in the scheduling of an in-person meeting between plaintiff and Dr. Nay. Defendant asserts an in-person interview is necessary to defend defendant against plaintiff's proofs.

On June 13, 2019, the magistrate conducted a hearing to address defendant's motion (6/13/2019 hearing transcript (hereafter HT) at 4.) In view of plaintiff's new Application for Hearing, defendant argued MCL 418.301(6) gave defendant a right to have discovery to refute plaintiff's anticipated new evidence that he is making a good faith job search. (6/13/2019 HT at

[5] The magistrate did not order defendant to pay wage loss benefits after March 10, 2017.

5-6.) Defendant's attorney asserted he understood plaintiff's attorney claimed defendant waived its right to have a vocational expert interview plaintiff because defendant did not utilize a vocational expert during the 2018 trial. Defendant argued it was not necessary to engage a vocational expert at the prior hearing because plaintiff's own vocational expert, Mr. James Fuller, had revealed plaintiff was not looking for any work. (6/13/2019 HT at 6-7.)

In response, plaintiff argued defendant waived the right to offer evidence of plaintiff's transferable skills by not engaging a vocational expert in the prior litigation. He argued the only issue before the magistrate in the pending trial is whether plaintiff is looking for work within his physical limitations. He argued defendant's "purposes" are "sufficiently" considered by offering a "current labor market survey of what jobs pay that physically he can do." (6/13/2019 HT at 7-8.)

Defendant responded that an in-person interview will likely offer more complete information concerning the type of jobs plaintiff is looking for, and how his work and life skills, as an electrician, disc jockey and musician, may translate into the ability to secure a job. Defendant argued a vocational expert is trained to assess what experiences and training might transfer to other jobs in the job market. (6/13/2019 HT at 11-12.)

The magistrate's order, signed and electronically e-mailed to the parties on June 18, 2019, ordered plaintiff and his attorney to . . .

> . . . cooperate in scheduling and participating in an in-person interview with Dr. Andrew Nay of Hostetler Fontaine and Associates to enable Dr. Nay to perform a vocational assessment for the purposes of analyzing plaintiff's qualifications and training, and preparing a transferrable skills analysis, labor market survey/wage earning capacity evaluation. (Magistrate Order mailed July 22, 2019.)

His order added "that plaintiff may also obtain and offer supplemental proofs from Mr. James Fuller or another vocational expert if he chooses to do so."

The MCAC timely received plaintiff's Claim for (Interlocutory) Review. The WDCAC timely received the transcript of the June 13, 2019 hearing, plaintiff's appellant's brief, and defendant's brief.

## ISSUES PRESENTED

Plaintiff asks the WDCAC to consider the following issue:

IS DEFENDANT PRECLUDED FROM PRESENTING PROOFS AS TO PLAINTIFF'S QUALIFICATIONS AND TRAINING, AN ISSUE SETTLED BY THE MAGISTRATE'S PRIOR DECISION, AND IS NO INTERVIEW REQUIRED FOR ANY ADDITIONAL VOCATIONAL ISSUES? (Plaintiff's September 17, 2019, brief at iii.)

On October 16, 2019, defendant filed a motion to dismiss plaintiff's interlocutory appeal "without prejudice to plaintiff seeking review of Magistrate Sims' decision on the Motion to Compel after trial." Plaintiff filed his "Answer" to defendant's motion.

ANALYSIS AND APPLICATION OF LAW

Defendant's motion to dismiss plaintiff's interlocutory appeal is granted; the WDCAC will not entertain the interlocutory appeal filed by plaintiff.

Because the magistrate's order is not a final order on the merits of the case, plaintiff's appeal is an interlocutory appeal. The WDCAC has authority to consider interlocutory appeals, but such authority is discretionary, not mandatory. *Williams v Wayne County*, 1994 Mich ACO #19; *Orr v General Motors Corporation*, 1990 Mich ACO #292. As plaintiff recognizes "consideration of an interlocutory appeal is discretionary with the Commission." (Plaintiff's September 17, 2019, brief at 4.) Such appeals have a tendency to delay final dispositions. The WDCAC will not favorably consider an interlocutory appeal unless the appellant sets forth reasons why review of the case after the magistrate's final decision is not adequate to protect the appellant's rights, in the event the magistrate committed error. *Martinez-Medina v Exel Global Logistics*, 2017 Mich ACO #4; *Walker v Metropolitan Environmental Services, Inc.*, 2014 Mich ACO #50, at 2 ("As noted in *Lopez v Hardys Holsteins*, 2005 Mich ACO #151, where there is no compelling reason why awaiting review of the magistrate's final decision of trial will not provide adequate remedy, such appeals will not ordinarily be entertained.")

Plaintiff asks the WDCAC to grant an interlocutory appeal and reverse the magistrate's order requiring plaintiff to cooperate with an in-person interview with Dr. Nay. Plaintiff argues "reviewing a final decision will not provide an adequate remedy," because "(o)nce defendant has an interview, any subsequent review will not be able to restore the parties to their prior position if it is found that the interview is not appropriate." (Plaintiff's September 17, 2019, brief at 4-5; Plaintiff's October 25, 2019, Answer at 2.)

Defendant's motion to dismiss plaintiff's interlocutory appeal argues plaintiff has not proffered sufficient reason to conclude that appellate review, after the magistrate decides plaintiff's current Application for Hearing, will not provide an adequate remedy if the magistrate's June 18, 2019, order is found to create error.

In this instance, defendant has the more convincing argument. Plaintiff has not proffered sufficient reason to conclude appellate review, MCL 418.859a, after the magistrate decides

plaintiff's current Application for Hearing will not provide an adequate remedy if the order requiring plaintiff to cooperate with an in-person interview with Dr. Nay is erroneous. Plaintiff has not described what prior position will be prejudiced or unrestorable if Dr. Nay conducts an in-person interview with plaintiff. The magistrate or an appellate tribunal can disregard or exclude opinion and fact evidence offered to address issues that are found to be irrelevant or precluded by the doctrine of *res judicata* or law of the case. In contrast, an order that prevents a party from utilizing procedures allowed by MCL 418.301(6)[6] to discover potentially relevant and admissible evidence before trial may create error that requires a new pre-trial and trial. In fairness to plaintiff, the magistrate's order allows plaintiff to obtain his own updated vocational evidence to support his claims.

Plaintiff argues an in-person interview with Dr. Nay will not provide any information relevant to an issue that is not precluded by the doctrine of *res judicata*. Plaintiff argues, "(t)he only purpose served by a vocational interview would be to *redetermine* Plaintiff's qualifications and training which *have* been decided." (Plaintiff's October 25, 2019, Answer at 2.) Plaintiff argues the magistrate already decided, in the *un*-appealed July 25, 2018 opinion and order, that plaintiff met his burden of proving his qualifications and training. Plaintiff argues this finding cannot be changed. *Gose*. Plaintiff can assert this argument at the hearing before the magistrate and in an appeal of the magistrate's decision if plaintiff is disappointed by the magistrate's decision. Plaintiff has not demonstrated that an in-person interview with Dr. Nay would diminish plaintiff's ability to assert that argument at trial or in an appeal.

Plaintiff's argument does not address other issues the defendant may raise to challenge plaintiff's claim that he should now be entitled to wage loss benefits if he proves he is seeking work. The magistrate noted that in the first trial he found plaintiff had residual wage-earning capacity, but he never decided what that residual wage-earning capacity was. (6/13/2019 HT at 13-14.) He said it was not necessary to do so, because plaintiff failed to prove disability after March 10, 2017. Plaintiff said he retired after he had surgery and was not making any effort to find post injury work. The magistrate found the opinion of Mr. Fuller, plaintiff's vocational expert, that plaintiff had no residual wage-earning capacity was not credible. Therefore, the burden of production never shifted to the defendant to refute plaintiff's proofs. (6/13/2019 HT at 9-10.) The magistrate said in the current litigation, the relevant issues will be whether plaintiff made a good faith effort to find work after the original trial, and, if he did, "are there no jobs that he can find with his good faith effort, or does he have a residual wage earning capacity that hasn't been exercised?" He said defendant has a right to have plaintiff evaluated by a vocational expert to assess these issues and what plaintiff's residual wage-earning capacity is. (6/13/2019 HT at 15.)

[6] MCL 418.301(6) provides the following:

> (6) Once an employee establishes an initial showing of a disability under sub-section (5), the employer bears the burden of production of evidence to refute the employee's showing. In satisfying its burden of production of evidence, the employer has a right to discovery if necessary for the employer to sustain its burden and present a meaningful defense. The employee may present additional evidence to challenge the evidence submitted by the employer.

The magistrate also said he will allow plaintiff to secure his own vocational evaluation and present new evidence if he chooses to do so. (*Id.*) In this case, we are reluctant to interfere with the magistrate's discretion to allow parties the opportunity to obtain evidence the magistrate anticipates will be needed in the next hearing. MCL 418.851 ("The worker's compensation magistrate at the hearing of the claim shall make such inquiries and investigations as he or she considers necessary.")

## CONCLUSION

We grant defendant's motion to dismiss plaintiff's request for an interlocutory appeal of the magistrate's June 18, 2019 Order. Plaintiff has not set forth convincing reason to conclude appellate review of the magistrate's final order will not be adequate to protect plaintiff's rights.

Board of Magistrates Chairperson[7] McMurray concurs.

Duncan A. McMillan Commissioner

Luke A. McMurray Chairperson
Workers' Compensation
Board of Magistrates

Chairperson Daryl Royal is not participating.
Commissioner Granner S. Ries is not participating.

[7] Pursuant to Executive Reorganization Order 2019-13, effective August 11, 2019, "[i]f the Workers' Disability Compensation Appeals Commission does not have the vote of two or more members to decide a case because a member does not participate in a case in accord with section 4(g), the chairperson of the Workers' Compensation Board of Magistrates shall participate in the case and cast a vote upon reviewing the record."

STATE OF MICHIGAN
WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

DONALD TRAYNOR,
PLAINTIFF,

V DOCKET #19-0021

STATE OF MICHIGAN,
DEPARTMENT OF CORRECTIONS,
SELF INSURED,
DEFENDANT.

This cause came before the Workers' Disability Compensation Appeals Commission (WDCAC) [1] on a claim for interlocutory review filed by plaintiff from Magistrate John M. Sims' order mailed June 8, 2019. Defendant filed a motion to dismiss plaintiff's interlocutory appeal. The WDCAC has considered the record and counsel's briefs and concludes that plaintiff's interlocutory appeal should not be entertained by the WDCAC and should be dismissed. Therefore,

IT IS ORDERED that defendant's motion to dismiss plaintiff's interlocutory appeal, without prejudice to plaintiff raising the arguments made in an appeal or cross-appeal after Magistrate Sims' decision on the underlying application, is GRANTED.

IT IS ORDERED that plaintiff's interlocutory appeal will not be entertained by the WDCAC and is DISMISSED.

Duncan A. McMillan Commissioner

Luke A. McMurray Chairperson[2]
Workers' Compensation
Board of Magistrates

Chairperson Daryl Royal is not participating.
Commissioner Granner S. Ries is not participating.

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