

STATE OF MICHIGAN  
WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

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TOM P. MARKS,  
PLAINTIFF,

V

DOCKET #18-0004

GENERAL MOTORS COMPANY,  
SELF INSURED,  
DEFENDANT.

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APPEAL FROM MAGISTRATE WOONS.

MICHAEL P. DOUD FOR PLAINTIFF,  
THOMAS J. RUTH FOR DEFENDANT.

OPINION

ROYAL, CHAIRPERSON

This matter came before the Michigan Compensation Appellate Commission (“MCAC”)<sup>1</sup> on a claim for review filed by plaintiff Tom P. Marks on January 16, 2018, from an order of Magistrate Lisa Woons mailed December 18, 2017. Plaintiff claimed that defendant General Motors Corporation had wrongly reduced his workers’ compensation benefits in light of a labor market survey.

Plaintiff claimed benefits based upon a September 3, 2009, date of injury, and the magistrate noted that “[p]laintiff was initially paid benefits at a rate of \$723.00 per week from April 5, 2013 through October 6, 2013. As of October 7, 2013, and continuing, plaintiff has been paid reduced benefits at the rate of \$461.66 per week.” (Magistrate’s opinion at 2.) The magistrate, however, found that plaintiff had no residual wage-earning capacity through December 31, 2016, and held that benefit reductions were not appropriate through that date because he had conducted an adequate job search. Beginning January 1, 2017, the magistrate held that plaintiff’s “documented job search” was insufficient to demonstrate an inability to earn wages, and she reduced his benefit rate to \$314.18 thereafter.

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<sup>1</sup> Pursuant to Executive Order No. 2019-13, effective August 11, 2019, the MCAC was abolished. Its authorities, powers, duties, functions, and responsibilities were transferred to the Workers’ Disability Compensation Appeals Commission (“WDCAC”).

We find competent, material, and substantial evidence on the whole record does not exist to support the finding that plaintiff was able to earn on and after January 1, 2017. MCL 418.861a(3). Accordingly, we modify the magistrate’s order to preclude a reduction in plaintiff’s weekly wage loss benefits on or after January 1, 2017, and until further order.

### STANDARD OF REVIEW

Findings of fact made by the magistrate shall be deemed conclusive if supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3). “Substantial evidence” is defined in MCL 418.861a(3) as “such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion.” The Supreme Court has stated in *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994), that “ ‘[s]ubstantial evidence’ has a classic definition: the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance.” See also *City of Romulus v Department of Environmental Quality*, 260 Mich App 54, 63; 678 NW2d 444 (2003); *Blanzy v Brigadier General Contractors, Incorporated*, 240 Mich App 632, 637; 613 NW2d 392 (2000).

Review of the “whole record” means that we consider “all of the evidence in favor and all of the evidence against a certain determination,” MCL 418.861a(4), and our consideration must entail “both a qualitative and quantitative analysis of that evidence in order to ensure a full, thorough, and fair review.” MCL 418.861a(13). In construing this language, the Michigan Supreme Court has held that the statutory language permits the WDCAC to “in some circumstances substitute its own findings of fact for those of the magistrate, if the [WDCAC] accords different weight to the quality or quantity of evidence presented.” *Mudel v Great Atlantic & Pacific Tea Company*, 462 Mich 691, 699-700; 614 NW2d 607 (2000).

The *Mudel* Court reaffirmed the prior opinion issued by the Court in *Holden v Ford Motor Company*, 439 Mich 257, 268; 484 NW2d 227 (1992).<sup>2</sup> The *Holden* Court recognized that “some latitude must be given the [appellate administrative tribunal<sup>3</sup>], should it find that the magistrate’s findings of fact are not supported by ‘competent, material, and substantial evidence on the whole record,’ if there is to be any effective appellate review, administrative or judicial, at all.” As this

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<sup>2</sup> *Holden* had previously been abrogated in *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507; 563 NW2d 214 (1997), before subsequently being revived by *Mudel*, 462 Mich at 696-697.

<sup>3</sup> The various iterations of this tribunal (see *Bryant v On Time Medical Transportation*, 2020 Mich ACO #10 at 9, n22) – both versions of the WCAC, the MCAC, and now the WDCAC – were and are all subject to the same review standard, embodied in MCL 418.861a. That standard has not been amended since 1985, with the exception of an inconsequential change in MCL 418.861a(13) and the creation, irrelevant here, of MCL 418.861a(15) by 1994 PA 97. Neither change impacts the result here.

language indicates, our factual review, while limited, must still be sufficient to ensure effective appellate review.

We review the magistrate's conclusions of law *de novo*. *Abbey v Campbell, Wyant & Cannon Foundry (On Remand)*, 194 Mich App 341, 351; 486 NW2d 131 (1992). Only those issues challenged by an appealing party may be considered. MCL 418.861a(11); *Cane v Michigan Beverage Company*, 240 Mich App 76, 80-81; 610 NW2d 269 (2000).

## INTRODUCTION

At the commencement of proceedings below, the parties agreed that the only issue to be decided was the appropriate rate of plaintiff's compensation. (Transcript at 4-5.) The magistrate wrote in her subsequent decision, "The sole issue before me is whether GM is entitled to reduce plaintiff's benefits based on Lofton."<sup>4</sup> (Magistrate's opinion at 17.)

On appeal, plaintiff's brief reiterated, "The parties stipulated that the sole issue at trial was whether or not the plaintiff had a residual wage earning capacity, and as such the defendant had the ability to reduce weekly workers compensation benefits." (Plaintiff's brief at 8.) Defendant's brief argued the magistrate's finding that plaintiff had a residual wage-earning capacity was supported by competent, material, and substantial evidence, and asked that the WDCAC affirm the magistrate's decision in its entirety. Thus, the only issue the parties raise before the WDCAC is whether, as required by MCL 418.861a(3), competent, material, and substantial evidence supports the magistrate's finding that plaintiff had a residual wage-earning capacity on January 1, 2017, and thereafter, which defendant could apply to reduce the rate of weekly wage loss benefits. As a result, our review is statutorily limited to that single issue. MCL 418.861a(11).

## FACTUAL BACKGROUND

Plaintiff sought treatment for right shoulder discomfort with Dr. Seif Saeed in May 2007. (Dr. Saeed deposition at 5-6.) Plaintiff returned to the doctor on September 8, 2009, reporting that he aggravated his condition after resuming heavy work. (*Id.* at 8.) He subsequently underwent surgery for right shoulder internal derangement. (*Id.* at 12-13.) Dr. Saeed indicated that plaintiff could only work if he avoided all use of his right shoulder and did not operate machinery. (*Id.* at 17.)

Dr. Nathan Gross saw plaintiff on November 30, 2011. (Dr. Gross deposition at 9.) The doctor indicated that plaintiff should not "have to place his right arm higher than shoulder level for repetitive time frames and not have to lift more than approximately ten pounds in isolation with the right arm." (*Id.* at 15.)

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<sup>4</sup> The full citation is *Lofton v AutoZone, Inc*, 482 Mich 1005; 756 NW2d 85 (2008). See, also, transcript at 4-5.

Dr. Paul LaClair examined plaintiff on April 26, 2012. (Dr. LaClair deposition at 5.) The doctor imposed permanent restrictions precluding lifting over 10 pounds with the right arm, repetitive reaching away from the body, and work with the right arm above shoulder level. (*Id.* at 11.)

Rehabilitation counselor John Stokes met with plaintiff in May 2013, and concluded that he could perform a wide range of unskilled jobs and a restricted range of semi-skilled jobs consistent with his qualifications, training, and functional capacities. (Mr. Stokes August 23, 2013, deposition at 11, 16.) Mr. Stokes conducted labor market research in June 2013, which revealed no available work that would have paid plaintiff his maximum pre-injury wages. (*Id.* at 22.) Mr. Stokes identified various lesser-paying job openings for positions that he stated plaintiff could perform. (*Id.* at 19-22.)

Plaintiff testified that he applied for all the jobs identified by Mr. Stokes when he was informed of them. (Transcript at 23.)<sup>5</sup> However, all positions had already been filled. (*Id.* at 20-23.) Plaintiff's then-voluntarily paid benefits were reduced from \$723.00 to \$461.66. (*Id.* at 17-18.)

Mr. Stokes updated his labor market research in 2014. (Mr. Stokes August 1, 2014, deposition at 4, 7.) Once again, he identified a number of jobs he testified were then available and within plaintiff's capacity to perform, although none paid wages in the same salary range as plaintiff's prior maximum wage jobs. (*Id.* at 8-12.) Plaintiff investigated but testified that all the jobs except one were already filled. (Transcript at 20-26.) He applied for that job but was not hired. (*Id.* at 28-29.)

Mr. Stokes again updated his research during October 2015. (Mr. Stokes November 30, 2015, deposition at 20.) However, by the time plaintiff was provided with Mr. Stokes's report, all jobs except one had been filled. (Transcript at 30-31.) Plaintiff applied for that job, but did not get it. (*Id.* at 29-30.)

Plaintiff testified that he continued looking for work and did not limit his applications to the sort of work he had performed for defendant. (Transcript at 32, 34.) He also submitted resumes to various online job placement websites. (*Id.* at 32, 60.) Plaintiff had several interviews, either in person or over the phone, and also received job leads by email. (*Id.* at 34.) He indicated that he applied for at least two or three jobs every day and would have taken any job within his restrictions. (*Id.* at 34, 36.)

Logs documenting plaintiff's job search efforts beginning in April 2013 were admitted as Plaintiff's Exhibit #8. The logs were separated by year, and the logs for 2013 through 2016 were

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<sup>5</sup> Apparently, plaintiff was not given any of Mr. Stokes' recommendations until well after they were made, but plaintiff immediately acted on new leads each time he was given some. (Transcript at 20, 23, 29, 31.)

printed in “landscape” format, horizontally on the page, with columns for name of the business where contact was made, position applied for, contact person, phone number, address, and result. The 2017 log was printed instead in “portrait” format, vertically on the page, which resulted in the cutting off of the address and result columns. (Plaintiff’s Exhibit #8.) Plaintiff explained, “That’s my fault. I tried to split it the other way. I’m just not that computer savvy.” (Transcript at 58.)

### ANALYSIS AND FINDINGS

In setting forth the issues to be decided, the magistrate correctly acknowledged the limited issue she was to adjudicate, writing:

The sole issue before me is whether GM is entitled to reduce plaintiff’s benefits based on Lofton. In Lofton v AutoZone Inc., 482 Mich 1005, 756 NW2d 85 (2008) the Court wrote:

“If it is found that the plaintiff is disabled under Section 301(4), but that the limitation of wage earning capacity is only partial, the magistrate shall compute wage loss benefits under Section 361(1), based upon what the plaintiff remains capable of earning.” (Magistrate’s opinion at 17.)

MCL 418.361(1), as it read at the time of plaintiff’s alleged injury,<sup>6</sup> required the computation of an injured employee’s benefit rate taking into account amounts the employee remained “able to earn.”

The magistrate went on to appropriately note that a claimant’s ability to earn was not to be evaluated in a vacuum:

A claimant may counter the Lofton case by mounting a vigorous job search. If the claimant establishes diligent but unsuccessful attempts at finding work, he or she can demonstrate that the jobs were not reasonably available to exercise that ability to earn wages. (Magistrate’s opinion at 17.)

This analysis properly acknowledges that the existence of a job must be coupled with a realistic opportunity for plaintiff to obtain that job, before it may be considered in the benefit computation.

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<sup>6</sup> The Act was amended in 2011, to alter the standards applicable to disability and partial disability determinations, among other things. 2011 PA 266. However, those amendments apply only to injuries on or after their December 19, 2011, effective date, MCL 418.891(4), and therefore have no applicability to this matter. As a result, this matter is being decided utilizing pre-amendment statutes and interpreting case law.

In *Stokes v Chrysler LLC*, 481 Mich 266, 277; 750 NW2d 129 (2008), the Supreme Court approved a standard that held that before suitable work that a claimant could still perform may be considered in the calculation of the benefit rate, that work must be obtainable. The *Stokes* Court thereafter established the final step of a claimant's prima facie showing of disability as follows:

Fourth, if the claimant is capable of performing any of the jobs identified, the claimant must show that he cannot obtain any of these jobs. The claimant must make a good-faith attempt to procure post-injury employment if there are jobs at the same salary or higher that he is qualified and trained to perform and the claimant's work-related injury does not preclude performance. (*Stokes*, 481 Mich at 283.)

*Stokes* dealt solely with a claimant's ability to perform and obtain work at his or her maximum wages.<sup>7</sup> However, the Supreme Court subsequently held that if a claimant was found to be only partially disabled, "the magistrate shall compute wage-loss benefits under MCL 418.361(1) on the basis of what the plaintiff remains capable of earning." *Lofton v AutoZone, Inc*, 482 Mich 1005; 756 NW2d 85 (2008).<sup>8</sup> The reference to MCL 418.361(1) in *Lofton* is prior to the statute's amendment by 2011 PA 266. What *Lofton* refers to as what a claimant remains "capable of earning" is what the statute refers to as what the claimant is "able to earn."

Cases decided after *Lofton* indicated that the availability of lesser-paying jobs that the employee is able to obtain must be taken into account before a partially disabled claimant's benefit rate may be computed. In *Harder v Castle Bluff Apartments*, 2010 Mich ACO #77, the MCAC held that no benefit reduction was appropriate where the claimant was capable of performing work following an injury, but was unable to obtain any. In *Kucharczyk v Chrysler LLC*, 2014 Mich ACO #26 at 6, the MCAC stated that, "before those available jobs serve to reduce plaintiffs benefit rate, the magistrate must assess whether the jobs were specifically available to plaintiff." In *Seyfried v Cassens Transport*, 2013 ACO #60 at 6, the MCAC held that "an unsuccessful job search premised upon a legally sufficient identification of plaintiff's residual wage earning capacity **will** satisfy *Lofton*." (Emphasis in original.) *Seyfried* "joined the WCAC [in *Harder*] in affirming the result reached by the magistrate of awarding a full benefit rate **in light of the plaintiff's inability to secure employment consistent with his residual wage earning capacity**." (*Id.* Emphasis in original.)

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<sup>7</sup> Technically, the step noted above is not applicable to this matter, because plaintiff had shown in the third step that his "work-related injury prevents him from performing . . . all of the jobs identified as within his qualifications and training that pay his maximum wages." *Stokes*, 481 Mich at 283. However, the concept that jobs must be obtainable is useful with regard to the partial disability analysis and whether a claimant is "able to earn" some lesser amount after a work-related injury. MCL 418.361(1).

<sup>8</sup> This is a reference to MCL 418.361(1), prior to amendment by 2011 PA 266.

The magistrate found that plaintiff was a credible witness at the hearing. (Magistrate opinion at 17.) Such a credibility determination is entitled to significant deference because the magistrate had the opportunity to view and judge plaintiff as he testified, *Isaac v Masco Corporation*, 2004 ACO #81 at 4, and we do not disturb the magistrate's observations in that regard.

The magistrate further found that plaintiff's job search from 2013 through 2016 was exemplary, supported by "one of the best job logs" she had seen:

In 2013 between April and December, he averaged 106 job inquiries/applications per month. In 2014, he averaged 88.58 job inquiries/applications per month. In 2015, he averaged 86.42 job inquiries/applications per month. In 2016, he averaged 93.33 job inquir[ies]/applications per month. Perhaps more importantly, the jobs he applied for varied and were well documented. Plaintiff documented the position, how contact was made (via phone or email) a phone number and address associated with the business and the result of his effort. He applied for labor positions, driving positions, positions with fast food entities and supervisory positions. (Magistrate opinion at 17.)

No party has challenged this analysis, and it is therefore conclusive upon us. MCL 418.861a(11); *Cane*, 240 Mich App at 80-81.

However, the magistrate found that plaintiff's job log from 2017 was "inadequate," because it did not include certain "salient details":

Plaintiff's job log in 2017 was inadequate in my opinion. Plaintiff's 2017 job log was lacking in salient details which were contained within the first four years of job logs. Plaintiff's job log no longer included an address or the result of his search. (Magistrate's decision at 18.)

The magistrate was referring to the fact that plaintiff's job logs prior to 2017 were printed in "landscape" format, while his 2017 log was printed in "portrait" format which cut off the last two columns (the potential employer's address and the result of the contact) that were present in prior years' logs:

Plaintiff has the opportunity to counter a Lofton reduction with a vigorous job search which he was able to do from April of 2013 through 2016. However, his documented job search in 2017 is insufficient. The time to present the proof of his job search was at Trial. Plaintiff clearly established an ability to do so for the first four years. What happened in 2017 is not clear, but it does not demonstrate that jobs were not reasonably available for him to exercise the ability to earn wages. (*Id.*)

As demonstrated by this analysis, the magistrate essentially found that plaintiff was entitled to less than full benefits because of a printing error. However, shortcomings in plaintiff's printing of his 2017 log do not equate with shortcomings in the underlying job search.

Plaintiff explained the shortcomings in the printing of his 2017 job log, noting that his niece had helped in the past (Transcript at 10, 18, 35-36, 42) and that he was simply not as "computer savvy" as she was. (Transcript at 57-58.) However, plaintiff's testimony, expressly found credible by the magistrate (and by us as well), indicates that he continued to apply for "probably 2 or 3 [jobs] a day, no less than 10 a week" in 2017 through the date of the hearing. (Transcript at 33.)<sup>9</sup> Plaintiff further stated that he did not narrow his search to jobs like those he had previously done, but instead sought various types of jobs. (*Id.*) This testimony is consistent with plaintiff's 2017 job log, which demonstrates a continuation of the same diligent search efforts found by the magistrate to be impressive ("one of the best logs I have seen"), in those prior years. (Magistrate's opinion at 17.) The omission of the last two columns (address of potential employer and result of contact) do not change that result, in that the reader can still more than adequately evaluate the breadth and depth of plaintiff's job search, and it is comparable to the efforts in prior years expressly found sufficient by the magistrate.<sup>10</sup>

A different situation would present itself had the magistrate concluded that plaintiff had not searched for jobs at all in 2017, that his diary of job searches during that year was not believable, or that the jobs listed did not exist. However, the magistrate reached none of these conclusions. Her finding that the 2017 job log was "inadequate" is based solely upon a comparison with prior logs, with no explanation as to why the differences were significant. A potential employer's address could presumably be ascertained given the disclosure of the employer's name and telephone number. The result of the contacts is clear from plaintiff's hearing testimony – he did not get the jobs. As a result, the 2017 log served its purpose.

The magistrate's focus upon the format of plaintiff's 2017 job log, with no additional consideration of his accompanying testimony, is simply not reasonable, even given our limited factual review standard. Again, we acknowledge that "'[s]ubstantial evidence' . . . may be substantially less than a preponderance." *Payne*, 444 Mich at 692. We further recognize the deference we owe to the findings of fact the magistrate has made, *Mudel*, 462 Mich at 704, and note, once more from *Payne*, 444 Mich at 692, that we do not displace the magistrate's findings simply because there is an alternative view of the evidence. However, applicable case law requires an adequate job search, not documentation of said search in any particular format. Plaintiff's testimony, as well as even the 2017 job log, demonstrate the continuation of the same job search

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<sup>9</sup> Plaintiff did indicate that he very briefly stopped looking for work when he believed that this matter had settled, but that he quickly resumed his search. (Transcript at 33.) The magistrate did not find this brief cessation to be significant, nor do we.

<sup>10</sup> At 85.3, jobs per month, the quantity of jobs plaintiff sought in 2017 was not markedly different than during 2013 through 2016.

efforts the magistrate found sufficient, if not exemplary, in prior years. The magistrate found plaintiff's testimony to be credible and did not state that his testimony as to his search efforts in 2017 was somehow less credible or inconsistent with the law. Instead, she simply failed to take that testimony into account.

The magistrate did not sufficiently explain why plaintiff's job search efforts were any less laudatory in 2017 than in prior years. Her focus solely upon the format of the 2017 log printout and not its substance, as well as her disregard of plaintiff's accompanying testimony regarding his ongoing job search, despite deeming it credible, leaves her conclusion without support by competent, material, and substantial evidence on the whole record. MCL 418.861a(3).

We conclude that a "reasoning mind"<sup>11</sup> could not accept a finding that is based on plaintiff's production of a job log in the wrong format as the result of a lack of computer sophistication, to the exclusion of everything else. Instead, this is a case in which we must accord different weight to the quality or quantity of evidence presented. *Mudel*, 462 Mich at 699-700. We consider not just the job log's format but also the substance of the log as well as plaintiff's accompanying testimony. We find that they inescapably lead to a different conclusion than that reached by the magistrate. Any other construction of the events described above simply cannot withstand scrutiny or pass the test of reasonableness.

The magistrate's conclusion that vocational consultant Stokes' presentation as to available jobs in 2015 could demonstrate a residual wage-earning capacity in 2017 is equally unreasonable and unsupported by substantial evidence. The magistrate wrote:

Therefore beginning in 2017, defendant is entitled to reduce plaintiff's rate based upon a residual wage earning capacity. John Stokes provided expert testimony regarding residual wage earning capacity. He testified plaintiff had a residual wage earning capacity of \$478.80 per week in 2015. That testimony was unrebutted. (Magistrate's opinion at 18; emphasis added.)

However, unrebutted testimony need not always be adopted. *Kido v Chrysler Corporation*, 1 Mich App 431; 136 NW2d 773 (1965). More importantly, Mr. Stokes' own testimony fundamentally undercuts the magistrate's reliance upon it to establish an amount plaintiff was "able to earn" in 2017, within the meaning of MCL 418.361(1).

Vocational counselor Stokes wrote three reports, the last of which was dated October 25, 2015. He was deposed three times, the last deposition taking place on November 30, 2015. Mr. Stokes testified that his findings were valid only during the time frame in which his underlying

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<sup>11</sup> *City of Romulus v Department of Environmental Quality*, 260 Mich App 54, 63; 678 NW2d 444 (2003). While this, and some other cases we have cited, are not worker's compensation cases, they are all premised upon Const (1963), art 6, sec 28, and a definition of "substantial evidence" that often appears in Michigan statutes.

research was conducted: “Now, depending upon the date, the residual wage earning capacity is different.” (*Id.* at 30.) He explained that labor market surveys were merely a “snapshot” of the existing labor market as it exists at the time of any given survey:

*Q.* You would agree that in terms of the labor market surveys, they’re essentially snapshots of the labor market? Meaning, that you can’t say with certainty if any of these jobs are still available now or when they actually became available. Is that a fair statement?

*A.* Yes. (*Id.* at 34.)

Stokes further indicated that the roster of available jobs changed over time:

*Q.* Your report of April 11, 2014, again, going back in time a little bit, identifies nine employers. And I note that they’re all different than the four employers that you found subsequent to that. Is that unusual or usual in - - of a finding in your line of work?

*A.* Well, these were a year older. You know, you really - - there is no rhyme or reason for it. You know, these were the jobs at that time that just happened to be available and within the Claimant’s restrictions. Sometimes they are repeated from one year to the next or from one month to the next. You know, it’s purely, you know, happenstance, you know, based on the fact that these were available in 2014, and the only thing I found in 2015 were the ones in my report in October. (*Id.* at 32-33.)

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*Q.* Okay. Now, in the October 22, 2015, labor market survey you only found three positions, none of which were the same as you had indicated in your previous labor market survey. I assume that’s because none of the previous jobs you indicate in the 2014 report were no longer available or you just did not find them, correct?

*A.* Correct. They may not have been available anymore, yes, or if I didn’t come across them. (*Id.* at 38-39.)

As demonstrated, Stokes’ own testimony does not support the magistrate’s finding that plaintiff’s wage-earning capacity in 2017 was established by Stokes’ findings as to the labor market as it stood in 2015, as the magistrate erroneously believed. In essence, Stokes himself rebutted the very findings the magistrate would make based upon his conclusions.

We note the Supreme Court's recognition that a lesser degree of deference is due a magistrate's assessment of testimony taken by deposition rather than presented live, because the magistrate is in no better position than a reviewing tribunal to assess that testimony:

[The WCAC<sup>12</sup>] next reviewed Weiss' claim that the magistrate's finding that her back injury had resolved itself was not supported by substantial evidence. It noted that while it was required ordinarily to defer to a magistrate's assessment of the testimony of live witnesses, this is not required when reviewing the testimony of experts who testify, as did the three physicians in this case, on deposition because then the magistrate is not in a better position than the WCAC to assess the evidence. (*Holden*, 439 Mich at 286.)

Our review of vocational consultant Stokes' deposition testimony *in its entirety* demonstrates a lack of support for the magistrate's limited assessment of that testimony. She failed to address testimony directly refuting the propriety of reliance on Mr. Stokes' findings in 2015 to demonstrate a residual wage-earning capacity two years later. We find that her reliance on Mr. Stokes' 2015 findings in isolation was not reasonable and was therefore not sufficiently supported, as required by MCL 418.861a(3).

This case is factually similar to *Vrooman v Ford Motor Company*, 2012 Mich ACO #90, in which a vocational expert identified jobs Ms. Vrooman could allegedly perform, after which she applied for each job but was not hired. The MCAC found that this scenario supported a finding that the claimant had conducted a good faith job search:

We find no error in the magistrate's interpretation or application of the disability and wage loss standards. As we have explained previously, the disability and wage loss concepts are very similar. The magistrate accepted portions of the vocational testimony from both experts to establish the jobs where plaintiff retained wage earning capacity. He then found that plaintiff attempted to obtain all the jobs the experts identified. Plaintiff's good faith job search motivated the magistrate to conclude that her disability and wage loss continued. This analysis follows *Stokes* and *Harder* as stated. (*Id.* at 10.)

The same result is appropriate here, particularly in light of Mr. Stokes' testimony that his findings were valid only at the time of his survey research and likely not *two years later* as the magistrate apparently believed.

The magistrate's contrary conclusion is therefore not supported by the testimony of Stokes or plaintiff, or by any other evidence. That being so, we have no alternative but to reverse the magistrate's reduction of plaintiff's rate in 2017 and thereafter, because it is unsupported by

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<sup>12</sup> Again, the WCAC was a predecessor of the WDCAC, and applied the same review standard, derived from MCL 418.861a, as does the WDCAC.



