2022 ACO #13

STATE OF MICHIGAN
WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

RAMON RAZO,
PLAINTIFF,

And

BLUE CROSS & BLUE SHIELD OF MICHIGAN,
INTERVENING PLAINTIFF,

V DOCKET #21-0016

G M & SONS, INCORPORATED AND
CINCINNATI CASUALTY COMPANY,
DEFENDANTS.

APPEAL FROM MAGISTRATE GRUNEWALD.

MARK A. AIELLO FOR PLAINTIFF,
GARY L. SCHMALZRIED FOR INTERVENING PLAINTIFF,
MARK D. WILLIAMS FOR DEFENDANTS.

OPINION

MCMILLAN, COMMISSIONER

PROCEDURAL HISTORY AND ISSUE PRESENTED

This matter came before the Workers' Disability Compensation Appeals Commission ("WDCAC") on a claim for review timely filed by defendants G M & Sons, Incorporated ("G M") and its insurer, Cincinnati Casualty Company,[1] from an opinion and order issued by Magistrate David Grunewald and mailed October 25, 2021. The magistrate's opinion and order were written in response to an order of remand, *Razo v G M & Sons, Incorporated*, 2020 Mich ACO #8, issued by the WDCAC on March 18, 2020. That order directed the magistrate to address defendants' argument that plaintiff's claim for wage loss benefits during the months of December through

[1] An identity of interest exists between defendant-employer G M and defendant-insurer Cincinnati Casualty Company, and, accordingly, we refer to them as defendants.

March --- the purported "off season" for the work plaintiff, Ramon Razo, performed as a cement worker --- should have been denied based on the second sentence of MCL 418.301(4)(c).

The prior procedural history of this case is described in *Razo*, 2020 Mich ACO #8 at 1-2. Briefly restated, plaintiff alleged he sustained a specific event injury and cumulative trauma arising from activities associated with pouring and installing cement. He alleged this activity caused, aggravated, and/or accelerated disabling spinal pathology and pain that impaired his maximum wage-earning capacity. Blue Cross & Blue Shield of Michigan intervened to recoup benefits it paid for treatment of plaintiff's work injury. In an opinion and order, *Razo v G M & Sons, Inc*., mailed April 11, 2018, Magistrate Jane S. Colombo found plaintiff sustained injuries to his low back and affecting his left lower extremity, but not to his neck, that arose out of and in the course of his employment. She found injury dates of November 10 and November 18 of 2015. She ordered defendants to pay for reasonable and necessary medical treatment related to the work injuries and to pay wage loss benefits from November 19, 2015, until further order.

Defendants timely filed a claim for review with the Michigan Compensation Appellate Commission (MCAC).[2] Defendants' appellants brief asserted a single issue, "DOES THE SECOND SENTENCE OF MCL 418.301(4)(C) APPLY?"[3] Defendants argued it does and the magistrate erred by failing to consider and apply it. Plaintiff did not file a claim for review or a cross claim for review.

In their appeal defendants did not dispute the magistrate's findings that plaintiff sustained work-related injuries to his back that affected his left lower extremity and caused disability. Defendants did not dispute the magistrate's conclusions that defendants are responsible to pay reasonable, necessary and work injury related medical expenses "pertaining to his low back and

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[2] Pursuant to Executive Order 2019-13, effective August 11, 2019, the MCAC was abolished. The authorities, powers, duties, functions and responsibilities of the MCAC were transferred to the WDCAC.

[3] MCL 418.301(4) was enacted as part of the amendments to the Worker's Disability Compensation Act, MCL 418.101, *et seq.*, that the Michigan Legislature enacted in 2011 PA 266, effective December 19, 2011. 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." MCL 418.301(4)(c) provides the following statutory language, including the sentence to which defendants refer, with our emphasis:

> (c) "Wage loss" means the amount of wages lost due to a disability. *The employee shall establish a connection between the disability and reduced wages in establishing the wage loss*. 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. A partially disabled employee who establishes a good faith effort to procure work but cannot obtain work within his or her wage earning capacity is entitled to weekly benefits under subsection (7) as if totally disabled.

left lower extremity," and that G M's job offer to drive a pick-up truck "does not constitute a bona fide offer of reasonable employment." (Magistrate Colombo's 2018 opinion at 21-23.) Defendants did not dispute the magistrate's award of wage loss benefits during the months of April through November of each year following his injury dates. MCL 418.861a(11); *Cane v Michigan Beverage Company,* 240 Mich App 76, 80-81; 610 NW2d 269 (2000).

Defendants did argue that the magistrate's 2018 opinion should have addressed how the second sentence of MCL 418.301(4)(c) applied to plaintiff's claim for wage loss benefits during the months of December through March. The WDCAC concluded this is an issue that must first be addressed by the magistrate, and it was not. The award of wage loss benefits during those contested months was reversed and the case was remanded to the magistrate to address this issue and to make findings based on the existing evidentiary record. The WDCAC did not retain jurisdiction. *Razo*, 2020 Mich ACO #8.

Magistrate Colombo issued an opinion entitled "Opinion Order on Remand," *Razo v G M & Sons, Inc.*, mailed February 2, 2021. Despite the title, Magistrate Colombo did not issue an order along with the opinion, but defendants filed a timely claim for review. However, because the WDCAC did not retain jurisdiction and the magistrate did not issue an order, the WDCAC lacked jurisdiction to proceed on defendants' claim for review. *Robertson v DaimlerChrysler Corporation*, 2010 Mich ACO #89 at 2; see MCL 418.847(2); MCL 418.851; MCL 418.859a(1). A tribunal speaks through its orders, not its opinions. See, *e.g.*, *Kadri v Ford Motor Company,* 134 Mich App 138, 141; 350 NW2d 763 (1984). Therefore, the WDCAC dismissed defendants' claim for review.[4] With no order resolving the matter before the Board of Magistrates, the matter remained pending there and the Workers' Disability Compensation Agency ("Agency") file was returned to complete the remand proceeding.

The case was then assigned to Magistrate David Grunewald. In an opinion and order, *Razo v G M & Sons, Inc.,* mailed October 25, 2021, Magistrate Grunewald "adopted and incorporated" Magistrate Colombo's 2021 opinion on remand. By doing so, he made her opinion part of the "whole record" the WDCAC must examine, MCL 418.861a(4), to assess Magistrate Grunewald's "reasoning for [his] order including any findings of fact and conclusions of law." MCL 418.847(2).

Magistrate Grunewald's opinion on remand at 1 succinctly stated . . .

> . . . The Opinion of the prior magistrate entitled Opinion and Order on Remand was mailed February 2, 2021 and is adopted and incorporated herein. It addresses the issue raised in the original Remand, makes Findings of Fact and arrives at Conclusions of Law, as well as establishing her ultimate finding that plaintiff had established a work-related injury and compensable disability and was entitled to

[4] "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void." *Fox v Board of Regents of the University of Michigan*, 375 Mich 238, 242; 134 NW2d 146 (1965).

> full Workers' Disability Compensation benefits on an ongoing basis until further order of the court.[5]

His order requires defendants to pay wage loss benefits from "November 19, 2015, through February 6, 2018" and continuing "until further order." This order held plaintiff was entitled to receive full wage loss benefits during all months of the year following his injuries, including December through March.

Defendants timely filed a claim for review. We affirm in part, reverse in part, modify in part, and remand the matter to the magistrate to make findings and conclusions necessary to complete the original remand order.

STANDARD OF REVIEW

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 861a(3) ("substantial evidence means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion"). If the magistrate's fact findings are supported by requisite evidence, we defer to the magistrate's judgment, *Mudel v Great Atlantic & Pacific Tea Company,* 462 Mich 691, 699-700; 614 NW2d 607 (2000), including "credibility determination(s)" and "choice of which medical expert opinion or opinions to adopt" if the choice "is reasonable." *Isaac v Masco Corporation*, 2004 Mich ACO #81 at 4; *Jamison v General Foods Corporation*, 1997 Mich ACO #598 at 5-7. The WDCAC may substitute its own findings of fact for those of the magistrate if it accords different weight to the quality or quantity of evidence in the record. *Mudel*, 462 Mich at 699-700. "The WCAC enjoys statutory authority to make independent findings of fact, regarding issues that have been addressed or overlooked by the magistrate, as long as the record is sufficient for administrative review and does not prevent the WCAC from reasonably exercising its reviewing function without resort to speculation." *Mudel*,

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[5] Magistrate Grunewald's opinion on remand also includes the following:

> Her findings of fact include findings that after the injury the plaintiff was totally unable to work at his usual work, and further that due to lack of treatment was unable to work at any jobs until he obtained appropriate medical treatment.
>
> She found further that after plaintiff received the appropriate medical treatment and established restrictions through his doctors he made a good faith job search and was unable to find any work within his limited wage earning capacity, thereby entitling him to wage loss benefits as if totally disabled. (Magistrate Grunewald's opinion on remand at 1-2.)

462 Mich at 730. The WDCAC may remand the matter to "a . . . magistrate for purposes of supplying a complete record if it is determined that the record is insufficient for purposes of review." MCL 418.861a(12).

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). A magistrate's conclusions of law are "subject to reversal if it is 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." *Cane v Michigan Beverage Company*, 240 Mich App 76, 80-81; 610 NW2d 269 (2000).

FACTS

Magistrate Colombo's 2018 opinion, beginning on page 3 and running through page 17, summarized witness testimony, exhibits and procedural history prior to the January 22, 2018, trial date. The parties did not argue this summary was inaccurate and the WDCAC adopted it as its own, per MCL 418.861a(10), subject to findings made in the WDCAC opinion, *Razo*, 2020 Mich ACO #8 at 3. The WDCAC also included a summary of the factual background to enhance the reader's understanding of defendants' appeal. *Id*. at 3-7. We include the following summary to assist the reader to better understand defendants' appeal.

G M hired plaintiff in 2012. Plaintiff poured concrete, moved cement from a truck to the pour site, used a "come-along" to move concrete, and carried and laid forms weighing between 30 and 100 pounds. Plaintiff did a lot of pushing and pulling. He performed this job seven to eight months per year between spring and late fall. When temperatures were too cold to lay cement, he stopped performing this work and applied for and collected unemployment benefits. He registered with Michigan Works!.[6] He testified that one off-season he plowed snow two days, but usually he did not perform paid work during the off-season. (Magistrate Colombo's 2018 opinion at 3-4; trial transcript at 43-45, 105-107.) He testified he thought Michigan Works! looked for jobs for him and he was obliged to accept a job if a job was found for him. (Trial transcript at 107-109.)

Plaintiff testified that while pushing concrete on November 10, 2015, he felt a crack and pain in his back. He felt low back pain that radiated into his left leg; he felt pain in his toes and numbness in his leg. He reported the pain onset to his supervisor and worked a few more days. (Magistrate Colombo's 2018 opinion at 4-5.) On November 19, 2015, plaintiff's family physician diagnosed low back pain and took him off work for one week. (*Id.* at 7-8.)

[6] This is required by MCL 421.28(1)(a) & (10) to collect benefits under the Michigan Employment Security Act. MCL 421.1 *et. seq*.

Following medical examinations at Concentra Clinic between November 25, 2015, and January 15, 2016, Concentra examiners opined that plaintiff's medical condition, resulting from his work injury, rendered him unable to perform any work. (*Id.* at 8-9; plaintiff's trial exhibit #2.)

On April 14, 2016, plaintiff saw Lucia Zamorano, M.D., a neurosurgeon. She diagnosed a left sided disc herniation at L5-S1 with an extruded disc and S1 nerve root compression. (*Id.* at 13-16.) On July 13, 2016, she performed a discectomy, hemi-laminectomy, medial facetectomy and fusion at the L5-S1 level on the left side of plaintiff's back to decompress the S1 nerve root. (*Id.* at 17-22; Dr. Zamorano deposition exhibit 2, July 13, 2016, operative report.) When she saw plaintiff on September 28, 2016, his back pain had improved; he still reported left leg and foot numbness. He had not begun physical therapy. (Dr. Zamorano deposition at 43-44.) Dr. Zamorano last saw plaintiff on July 7, 2017. (*Id.* at 25-26, 41.) In response to a hypothetical question describing plaintiff's activities as a cement worker, Dr. Zamorano opined he could not return to that type of work at the time of her September 12, 2017, deposition. (*Id.* at 28-31.) She related the pathology she diagnosed and treated to his work activities. (*Id.* at 31, 42.)

Philip Mayer, M.D., board certified orthopedic surgeon, examined plaintiff at defendants' request on October 20, 2016, and reviewed more records on November 8, 2016, and May 30, 2017. (Dr. Mayer deposition at 24-25, 69.) He agreed lumbar MRI films show pre-surgery evidence of an extruded left paracentral disc herniation that slightly displaced the left S1 nerve root (Dr. Mayer deposition at 52-53, 72, 82-84, 111-112, 115-116, 124,) but "[at] the time of the record review in May 2017, he placed no restrictions on plaintiff's work activities." (Magistrate Colombo's 2018 opinion at 16; see Dr. Mayer deposition at 79, 85-86, 96.)

Robert Krasnick, M.D., board certified in physical medicine and rehabilitation, examined plaintiff once, on January 6, 2017, at the request of plaintiff's attorney. (Dr. Krasnick deposition at 6, 35-36.) He thought plaintiff injured his back and neck at work on November 10, 2015, that plaintiff had a lumbar L5-S1 disc herniation, a lumbar laminectomy, residual back and left leg pain, and a cervical disc herniation. He recommended physical therapy, pain medication and possibly a TENS unit for back and leg pain. He opined plaintiff was not able to work in his job laying cement, but he could work in a sedentary job with a sit/stand option. He said plaintiff should not bend, lift, twist, or do overhead work. He recommended weight restrictions of 5 to 10 pounds. (*Id*. at 15-19, 21-22, 29-30, 33-34.)

In her 2018 opinion, Magistrate Colombo wrote plaintiff was not totally disabled after he began to heal following his July 2016 surgery. In her 2018 opinion she wrote:

> Despite a less than optimal result from his surgery, plaintiff has demonstrated he is not totally disabled. He drives, walks short distances, and performs some activities around his house. He also spends one hour per week as a greeter at Michigan Works in exchange for assistance from the state. In the

> vocational report he prepared, Mr. Fuller[7] opined, after review of medical records, restrictions and an interview with plaintiff, that his employment options were limited to an unskilled sedentary job with a sit/stand option, and limited lifting and bending. He found 137 jobs that fit that profile, but admitted he did not take the physical restrictions, language difficulty or medications into account in this search. (Magistrate Colombo's 2018 opinion at 21; see recitation, *id*. at 13; James Fuller deposition, plaintiff's trial exhibit 6 at 8, 11-12, 16, 19.)

Mr. Fuller (see note 7) opined that no jobs were available to plaintiff that would pay his pre-injury maximum wage. Considering plaintiff's medical restrictions, use of narcotic pain medications, no computer skills, and limited education, work experiences, transferable skills, and facility with the English language, Mr. Fuller opined plaintiff might, at best, earn minimum wage in sedentary unskilled labor. (James Fuller deposition at 19-22, 24-25, 27-28.)

Defendants' vocational expert, Guy Hostetler, M.A., CRC, met with plaintiff on July 27, 2017.[8] In her fact findings, Magistrate Colombo wrote that Mr. Hostetler…

> ... was able to identify several jobs, notably booth cashier, machine operator, bench assembler and quality inspector, that would fit within a sedentary job with a sit/stand option description, and plaintiff's physical abilities. Wages ranged from $8.61 to $12.09 per hour, though some jobs were part time. (Magistrate Colombo's 2018 opinion at 21; see Guy Hostetler deposition at 20-21, 27-28.)

The magistrate's recitation noted, "[p]laintiff has not tried to return to work, stating he does not feel well enough to work his prior job. He has received no job offer from defendant since his last day of work." (Magistrate Colombo's 2018 opinion at 5; trial transcript at 67-68.) Her recitation also describes plaintiff's job search efforts elsewhere:

> Post-surgery, sometime in 2017, plaintiff started looking for work; he identified Kroger, Meijer, parking lots and factories as places where he has inquired about jobs. He testified the factory applications were for hi-lo driver. Some places gave him applications, while others said they had no work for him. He testified that he personally visited prospective employers, taking his job logs with him, and asked a person from the company to fill in the information to create a record of his applications. He showed Dr. Krasnick's report and restrictions to prospective

[7] Plaintiff's vocational examiner, James Fuller, M.A., CRC, met with plaintiff on February 15, 2017. (James Fuller deposition at 5.)

[8] Trial transcript at 101; Guy Hostetler deposition at 8, 26, approximately a year after plaintiff's back surgery.

employers. One of the jobs was stocker, which he testified he could not do, but applied for it anyway.

> The job log, five pages of hand-written information without page numbers or dates, was admitted as Exhibit #9.[9] One page was completed after the vocational exam [presumably with Mr. Hostetler], and some of the information was given to the vocational rehabilitation evaluator. He has not looked for work, or submitted any applications in 2018, and admitted he did not follow up with any of the employers after he submitted an application. (Magistrate Colombo's 2018 opinion at 5; trial transcript at 68-72, 98-103.)

The magistrate's recitation said Mr. Hostetler's report "referenced a statement by plaintiff that he started looking for work in February or March 2017, notably in stores, factories, oil change places, anything in the area." (Magistrate Colombo's 2018 opinion at 16.) Plaintiff also testified he began looking for work in 2017 and he last looked for work about two months before the January 22, 2018, hearing. (Trial transcript at 69-70, 100-103.)

ANALYSIS AND APPLICATION OF LAW

The original brief of defendants raised a specific and narrow legal issue concerning whether the second sentence of MCL 418.301(4)(c) applied to plaintiff's claim to wage loss benefits during the "off-season" months of December through March.[10] Defendants argued it did apply and the magistrate erred by not addressing how it affected plaintiff's entitlement to wage loss benefits during the "off-season" months. The WDCAC found the magistrate should have considered this sentence and should have assessed, as required by this sentence in the statute, whether plaintiff established a connection between his disability and reduced wages during the contested months.[11] The WDCAC, in *Razo,* 2020 Mich ACO #8, remanded the matter to the magistrate to perform this function.

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[9] The job log is plaintiff's trial exhibit #8. Plaintiff testified he asked the people he talked to when he applied for work to make the entries in the log because he cannot write in the English language. (Trial transcript at 69-72, 98-100.)

[10] Defendants did not challenge the award of wage loss benefits ordered to be paid during the months of April through November. No argument concerning plaintiff's entitlement to those benefits is preserved for review. MCL 418.861a(11); *Cane*, 240 Mich App at 80-81. After remand it is apparent this is no longer an issue. *Guss v Ford Motor Co*., 275 Mich 30, 34; 265 NW2d 515 (1936). The WDCAC has no authority to grant a rehearing or decide that issue differently than it did when *Razo,* 2020 Mich ACO #8, was issued. *Guss*, 275 Mich at 34.

[11] The WDCAC has *de novo* authority to review whether a magistrate correctly applied the law. *Abbey*, 194 Mich App at 351. The magistrate is authorized to initially make findings of fact.

Magistrate Grunewald's opinion and order provides that he "adopted and incorporated" the opinion, findings of fact, and conclusions of law described in the 2021 opinion of Magistrate Colombo. However, Magistrate Grunewald also made findings of fact. Therefore, our analysis addresses the findings and conclusions he adopted and incorporated as well as his findings discussed above in the Procedural History. See note 5 and accompanying text.

I

Following remand, defendants first argue that Magistrate Grunewald's opinion and order, adopting Magistrate Colombo's 2021 opinion on remand, did not follow the WDCAC's remand order. Defendants argue Magistrate Colombo wrote that the issue before her on remand was whether the second sentence of MCL 418.301(4)(c) even applied, whereas the WDCAC, in *Razo*, 2020 Mich ACO #8, ruled that it did apply and remanded the matter to the magistrate to decide whether plaintiff established a connection between his disability and reduced wages during the months of December through March. We agree in part and disagree in part.

Our prior opinion confirmed that the legislature's insertion of the word "shall" in the second sentence of MCL 418.301(4)(c) made the requirement that plaintiff "establish a connection between his disability and reduced wages" a mandatory part of plaintiff's burden of proving "wage loss." *Razo*, 2020 Mich ACO #8 at 8, note 9; see also *Bradley v Colonial Mold, Incorporated*, 2022 Mich ACO #7 at 7, note 15.

However, we reject defendants' argument that the magistrates, on remand, failed to recognize that plaintiff must prove, with a preponderance of the evidence, MCL 418.851; *Aquilina v General Motors Corporation*, 403 Mich 206, 210-212; 267 NW2d 923 (1978), both disability *and* wage loss. The magistrates' 2021 opinions indicate they recognized that wage loss had to be addressed in addition to disability. They had no choice but to do so because the findings in the 2018 opinion and order, that plaintiff proved work-related injury *and disability*, were not issues defendants preserved in their original appeal brief, MCL 418.861a(11); *Cane*, 240 Mich App 76, 80-81; *Vorac v Memorial Medical Center of West Michigan*, 2010 Mich ACO #25 at 12 and 13, nor were they issues the WDCAC gave the magistrate authority to alter on remand. *Guss v Ford Motor Co*., 275 Mich 30, 34; 265 NW2d 515 (1936); *Guthrie v FATA Automation, Incorporated*, 2005 Mich ACO #176 at 15.

II

Defendants argue that the following statement in Magistrate Colombo's 2021 opinion on remand constitutes reversible error. In her recitation she wrote:

> Plaintiff established a connection between his disabling back injury and wage loss due to his disability by producing unrebutted testimony that defendants failed to approve proper medical treatment to address plaintiff's injury and failed

> to pay wage loss benefits when plaintiff was denied unemployment benefits. (Magistrate Colombo's 2021 opinion on remand at 3.)

Magistrate Grunewald "adopted and incorporated" this into his opinion and utilized it to create the order from which defendants appeal.

A

Defendants argue that the magistrate erred when "Magistrate Columbo cited the denial of plaintiff's unemployment benefits as evidence of the connection between disability and wage loss. . . during the off-season."[12] The magistrates offered no basis to find non-receipt of benefits under the Michigan Employment Security Act (MESA), MCL 421.1, *et. seq*., is relevant to the issue on remand concerning plaintiff's entitlement to wage loss benefits under the Act. In this record, neither of the 2021 magistrates' opinions nor the magistrate's 2018 opinion, see pp. 22-23, cite any legal authority, statute or case law that support a conclusion that plaintiff's inability to collect unemployment benefits is probative of his duty to establish wage loss as defined in MCL 418.301(4)(c). There is not a match between the relevant field of labor in unemployment compensation matters and workers' compensation matters: "suitable *full-time* work" of a defined character in MCL 421.28 is not work "suitable to his or her qualifications and training" in MCL 418.301(4)(a). As a result, utilizing a conclusion from the (non-)receipt of unemployment compensation benefits to assess whether an employee is entitled to receive workers' compensation benefits is very difficult in the most detailed of circumstances, even though an *amount* of unemployment compensation benefits paid or payable does diminish, because of MCL 418.358, the *amount* of workers' compensation benefits payable. However, MCL 418.358 does not refer to unemployment compensation benefits as being wages earned by working.

Without more analysis and authority than the magistrates (or plaintiff) have offered here, we are unable to conclude failure to collect unemployment benefits (see note 12) provides a legally

[12] Defendants' brief after remand at page 11. Defendants observe that Magistrate Columbo wrote in her February 2, 2021, opinion at 3, that "plaintiff was denied unemployment benefits." However, there is no *evidence* that plaintiff was *denied* unemployment compensation benefits. Plaintiff testified that since his injuries in November of 2015 he has received only cash assistance and Medicaid from the State. (Trial transcript at 37.) The 2018 magistrate opinion at 23, states, "(h)is 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." The "inability to collect" finding appears to arise from a recognition that to receive unemployment compensation benefits, as plaintiff observes at page 3 of his January 2022 appellate brief and with our citations, the applicant must be "[a]ble and available … to perform suitable full-time work of a character that the individual is qualified to perform by past experience or training," MCL 421.28(c), and the applicant must continue to be "actively engaged in seeking work," "register for work," and "be available to perform suitable full-time work." MCL 421.28(1)(a).

sufficient basis to establish "a connection" between plaintiff's disability and reduced wages. However, this determination is not outcome determinative for the issue defendants preserved in their appeal, MCL 418.861a(11), *Cane*, *Vorac*, as discussed below.

B

Defendants also argue that before the magistrate issued the 2018 opinion and order requiring defendants to pay benefits, defendants retained the right to withhold benefits while they *disputed* plaintiff's claim that he was entitled to receive them. Defendants argue they were not legally obliged to pay disputed benefits before they became subject to an order. In this record we do not find reason to disagree with defendants' argument that not voluntarily paying disputed benefits is not probative for the issue defendants preserved in their appeal, that is, whether plaintiff proved "a connection" between his disability and reduced wages. However, this argument is also not outcome determinative.

C

On the other hand, plaintiff's lack of treatment for his work-induced back injury until he had surgery, regardless of the reason for the delay, is probative in establishing "a connection" between his disability and reduced wages until he received appropriate treatment. The findings Magistrate Grunewald made and adopted established that --- for the period of time between plaintiff's work injuries in November 2015 and the time plaintiff began healing after his July 2016 back surgery --- plaintiff incurred reduced wages as he was unable, because of his work injury induced disability, to perform any work suitable to his qualifications and training. Magistrate Grunewald found "plaintiff was totally unable to work at his usual work, and further that due to lack of treatment was unable to work at any jobs until he obtained appropriate medical treatment."[13] These legally sufficient findings establish that the disability caused plaintiff to incur reduced wages. No work suitable to plaintiff's qualifications, training, and medical restrictions imposed by the work injury was reasonably available to him before his back surgery in July 2016.[14]

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[13] Magistrate Grunewald's opinion on remand at 1, quoted in note 5, above. *See also*, Magistrate Colombo 2021 opinion on remand at 3, and Magistrate Colombo 2018 opinion at 18.

[14] To correct a misperception, see defendants' brief on remand, at 13, the magistrate's finding that plaintiff was not totally disabled meant that *after plaintiff sufficiently healed following his back surgery* plaintiff was no longer medically impaired from performing all work suitable to his qualifications and training. In *Razo*, 2020 Mich ACO #8 at 12-13, the WDCAC reversed the award of wage loss benefits for the off-season months, and directed the magistrate, on remand, to make additional findings the statute deems necessary to determine whether plaintiff established a connection between disability and reduced wages during those months. Further, premised upon plaintiff's good faith job search after he sufficiently healed, a finding supported by the record as discussed below, the amount of plaintiff's wage loss benefits is calculated "as if totally disabled," MCL 418.301(4)(c), last sentence, if there is wage loss.

The 2021 magistrate opinions and orders and the 2018 opinion and order include findings that plaintiff was not physically able, because of his work-related disability, to perform labor that would allow him to avoid a reduction in wages prior to his surgery. The recitation of evidence in Magistrate Colombo's 2021 opinion on remand at 2, states, "(a)fter the injury in November 2015, plaintiff's back and leg symptoms prevented him from working his regular job." In her "Findings of Fact," Magistrate Colombo also found plaintiff's work-related medical restrictions and symptoms also made him "unable to find a job that paid maximum wages and was *within his physical capacity to perform*."[15] The magistrate's recitation of evidence said plaintiff "continued to exhibit disabling symptoms extending into his leg, including pain and numbness, until he underwent discectomy, fusion and other surgery July 13, 2016, including decompressing the S1 nerve root." *Id*. Magistrate Grunewald's opinion on remand at 1-2, see note 5, adopted this finding:

> Her findings of fact include findings that after the injury the plaintiff was totally unable to work at his usual work, and further that due to lack of treatment was unable to work at *any jobs* until he obtained appropriate medical treatment. (Emphasis added.)

The inclusion of the phrase "due to" in this sentence shows the magistrate found "a connection" between the disability and reduced wages prior to his back surgery. While plaintiff was unable to obtain treatment to relieve his work-related disability, he established a continuing connection between the disability and reduced wages. Magistrate Grunewald appreciated that he had to assess whether there was "a connection" and made that finding. The "due to" phrase also responds to the requirement of the first sentence of MCL 418.301(4)(c).

This connection continued through January 6, 2017, when Dr. Krasnick evaluated plaintiff. Between the time Concentra doctors took plaintiff off work and Dr. Krasnick evaluated plaintiff no doctor opined plaintiff might be able to perform work to avoid "reduced wages." Dr. Krasnick opined that after plaintiff had sufficiently healed following his surgery, he may be able to work, but, as of the January 6, 2017, evaluation, only in a sedentary job with a sit/stand option and where he did not have to bend, lift, twist, do overhead work, or lift weights more than 5 to 10 pounds. (Dr. Krasnick deposition at 15-19, 21-22, 29-30, 33-34.) No vocational or medical expert testified that plaintiff could have earned any wages prior to Dr. Krasnick's evaluation. When vocational examiner James Fuller met with plaintiff on February 15, 2017, Mr. Fuller opined that considering plaintiff's medical restrictions, use of narcotic pain medications, no computer skills, and limited education, work experiences, transferable skills, and facility with the English language, plaintiff's capacity to earn wages even then was limited to sedentary unskilled labor, where, if he could find it, would provide, at best, minimum wage. (James Fuller deposition at 19-22, 24-25, 27-28.) These findings and testimony are legally sufficient to establish a connection between plaintiff's disability and reduced wages from the time of his November 2015 injuries through the time Dr. Krasnick evaluated him in January 2017. During that period, no work suitable to his qualifications and

[15] Magistrate Colombo's 2021 opinion on remand at 3, emphasis added.

training was available to plaintiff in which he could avoid reduced wages. Therefore, we do not alter that part of the magistrate's order requiring defendants to pay plaintiff full weekly wage loss benefits prior to his evaluation by Dr. Krasnick on January 6, 2017.

D

However, neither magistrate made findings that addressed whether "a connection" existed between plaintiff's disability and reduced wages during the months of December through March *after* plaintiff's back surgery and Dr. Krasnick's subsequent evaluation on January 6, 2017. This omission makes another remand necessary to have the findings made which will fully resolve the first remand order. MCL 418.861a(12).

The magistrates found that plaintiff made good-faith efforts to search for ("procure") work following his back surgery. This finding is an important part of the analysis but, on this record, the magistrates have not offered sufficient analysis to allow the parties and a reviewing tribunal to understand the weight and role the job search played in deciding whether plaintiff established "a connection" between his disability and reduced wages that (1) the second sentence of MCL 418.301(4)(c) requires and that (2) is defendants' only preserved issue.

As part of the analysis of wage loss and the calculation of weekly wage loss benefits, the magistrate will likely consider whether the employee made a good-faith job search. The third sentence of MCL 418.301(4)(c) provides, "(w)age 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." The fourth sentence clearly indicates the legislature intended that "(a) partially disabled employee who establishes a good-faith effort to procure work but cannot obtain work within his or her wage earning capacity is entitled to weekly benefits under subsection (7) as if totally disabled." In turn, the calculation of the amount of wage loss benefits for an injured employee who is treated "as if totally disabled" because of his good faith job searches (see Magistrate Grunewald's opinion on remand at 1-2), and has "wage loss," does not include a reduction in weekly benefits for a residual wage-earning capacity. With our emphasis, the MCL 418.301(7) weekly wage loss calculation for the employee whose injury "causes total disability *and* wage loss" relies solely upon the employee's "after-tax average weekly wage" at the time of injury.[16]

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[16] MCL 418.301(7) provides:

> If a personal injury arising out of the course of employment causes total disability and wage loss and the employee is entitled to wage loss benefits, the employer shall pay or cause to be paid to the injured employee as provided in this section weekly compensation equal to 80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate determined under section 355. Compensation shall be paid for the duration of the disability.

The phrase "at the time of injury" is not included in MCL 418.301(7). However, an employee's "after tax average weekly wage" is calculated in MCL 418.371(2) as the "weekly wage earned by

At this stage of the litigation, we must reject the argument in defendants' brief on remand that the magistrates' good faith job search finding should be reversed. Defendants argued that the magistrate should have considered the lack of specificity in the job search log, the lack of information describing the time periods in which plaintiff made his job searches, and whether he acted in such a manner as to dissuade a prospective employer from hiring him. Here, Magistrate Colombo's remand opinion described the factors she relied upon to make the good faith job search finding. She wrote the following:

> I find plaintiff made a good faith effort to find employment within his restrictions. The job log reflects inquiries to different employers and different jobs that plaintiff felt he could perform. Plaintiff testified he considered several types of employment. He credibly referenced the types of jobs he was seeking, jobs he could perform within the post-operative restrictions as he continued to heal from the surgery. Plaintiff's medical restrictions and symptoms foreclosed not just his former job, but he was unable to find a job that paid maximum wages and was within his physical capacity to perform. (Magistrate Colombo's 2021 opinion on remand at 3.)

Magistrate Colombo's 2018 opinion at 5, also included her recitation of plaintiff's job search efforts in 2017. See note 9 above, and accompanying text. Because competent, material, and substantial evidence on the whole record exists to support these findings, and we defer to them pursuant to MCL 418.861a(3), we do not disturb Magistrate Grunewald's adoption and incorporation of this finding in his order.

In another case or in a different record, an assessment of whether the employee made a good faith job search may take into account the number of job searches or applications, who made the searches, how the searches were conducted, when the searches were made, the types of jobs sought, the results of the searches, follow up, whether evidence supports a finding that the lack of successfully finding a job is connected to the disability rather than a factor or factors unrelated to the disability, evidence that the employee intended to retire and leave the labor force, whether or not a work-related injury occurred, *Sington v Chrysler Corporation*, 467 Mich 144, 160-161; 648 NW2d 624 (2002), evidence the employee intentionally or knowingly avoided work otherwise reasonably available to him or her, or engaged in any act after the injury that the employee knew would cause a forfeiture of credentials or license needed to legally perform work otherwise reasonably available to that employee. An appropriate analysis should provide the parties and a reviewing tribunal with a magistrate's findings describing the credibility and weight the magistrate found to exist in relation to those factors that the magistrate deemed relevant.

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the employee *at the time of the employee's injury*" (emphasis added) and is transformed into an "after-tax average weekly wage" by MCL 418.313(1).

MCL 418.301(4)(c) defines "wage loss" as "the amount of wages lost due to a disability." In demonstrating wage loss, the second sentence of MCL 418.301(4)(c) requires the fact finder to determine whether "a connection" exists "between the disability and reduced wages." As discussed above, before reaching the last sentence of MCL 418.301(4)(c) the magistrate must have found that plaintiff "establish[ed] a connection between the disability and reduced wages" to satisfy the second sentence of MCL 418.301(4)(c). This is an essential (indeed, mandated) step that was overlooked in the magistrate's analysis for the period of time after January 6, 2017, when it was found that plaintiff was no longer "*unable to work* at any jobs" but, as his condition improved from surgery, he was still "unable to *find* any work within his limited wage earning capacity." (Magistrate Grunewald's 2021 opinion at 1-2, emphasis added.)

Here, neither magistrate provided an analysis that described whether, and, if so, how, plaintiff proved what the second sentence of MCL 418.301(4)(c) demands exist, for the period of time in the "off season" months from December through March of each calendar year[17] after January 6, 2017, and what role, if any, his good faith job search played in making this determination. Each case has different factors a magistrate may deem relevant including the weight and significance the magistrate ascribes to the conflicting evidence. However, the magistrate must provide the parties and any reviewing tribunal an analysis that reveals the path taken through the evidence. *Woody v Cello-Foil Products (After Remand),* 450 Mich 588, 597; 546 NW2d 226 (1996). What should not be overlooked in an analysis addressing the second sentence of MCL 418.301(4)(c) is consideration of whether work suitable to the employee's qualifications, training, and medical restrictions was reasonably available to the employee, see generally, *Markle v Nexteer Automotive Corporation,* 2022 Mich ACO #5 at 21, note 38, and how the employee's wage loss is connected to the employee's disability.

More analysis must be provided by the magistrate to complete the original remand order. MCL 418.861a(12). On remand, we direct the magistrate to make this assessment required by the second sentence of MCL 418.301(4)(c) for the months of December through March that accrue after January 6, 2017, as defendants did not ask the WDCAC to alter the award of wage loss benefits for the other eight months of each year. MCL 418.861a(11); *Cane*.

III

The original appeal brief of defendants argued that plaintiff failed to prove a connection between his disability and reduced wages during the off-season months because he never worked during those months before his injuries and was content to receive unemployment benefits during those periods. In effect, defendants argued plaintiff separated himself from the labor force during those months prior to his injury and would continue to do so whether or not he had an injury. Following remand, defendants cited rulings in unpublished decisions of the Michigan Court of

[17] See Magistrate Colombo's 2018 opinion at 22-23, where she defines the relevant period from "Plaintiff was a seasonal worker, from April through November roughly, depending on the weather."

Appeals: *Raybon v DP Fox Football Holdings LLC*, Michigan Court of Appeals Docket No. 268634 (released July 17, 2007) and *Reece v Event Staffing*, Michigan Court of Appeals Docket No. 284451 (released July 30, 2009). These cases involved claims of professional football players injured in the course of their employment with the Grand Rapids Rampage in the Arena Football League. In each case the magistrate and the Workers' Compensation Appellate Commission ("WCAC")[18] rejected the employer's argument that it should not have to pay wage loss benefits that extended beyond the normal arena football season. *Raybon v D.P. Fox Football Holdings, LLC*, 2006 Mich ACO #27 at 7; *Reece v Event Staffing, Incorporated*, 2008 Mich ACO # 40 at 9. The Court of Appeals reversed the WCAC in each case and remanded the matters to the magistrate. In *Raybon,* the Court of Appeals ordered the magistrate "to determine what portion of plaintiff's lost wages in the closed awards, if any, was caused by the end of the football-playing season rather than by plaintiff's disability. The magistrate should then adjust the closed awards of benefits accordingly." *Raybon,* Court of Appeals slip opinion at 3-4; *Reece,* Court of Appeals slip opinion at 2 (same). The Court offered no direction or authority to assist the magistrate in making such adjustments.

Defendants' argument has no application in this case. Factually, Magistrate Colombo's recitation of evidence in her opinion following remand refers to testimony indicating plaintiff did not separate himself from the labor force during the off-season months before his injuries.[19] In her findings of fact she found he "made a good faith effort to find employment within his restrictions" after his injuries and surgery. (Magistrate Colombo's 2021 opinion on remand at 2-3.) The Court of Appeals opinions in *Raybon* and *Reece,* being unpublished, are "not precedentially binding under the rule of stare decisis," MCR 7.215(C); *Stine v Continental Casualty Company,* 419 Mich 89, 95, note 2; 349 NW2d 127 (1984). However, while not considered precedent, *Stine* recites that these opinions may be given respectful consideration. However, this is not possible here because

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[18] The predecessor appellate body to the MCAC and WDCAC.

[19] Magistrate Colombo noted plaintiff testified that during the "off season" he remained a member of the Laborers' Union, paid union dues, performed small jobs, and by registering with Michigan Works! knew he was obliged to accept offered jobs. (Magistrate Colombo's opinion on remand at 2-3; see Magistrate Colombo's 2018 opinion at 3-4; trial transcript 36-37, 45.) The magistrate's recitation in the February 2, 2021, opinion, indicated:

> Prior to the 2015 injury, plaintiff testified, he looked for work during the "off season," and recalled working at several small jobs for short periods. He testified he thought Michigan Works! looked for jobs for him; he had to accept a job if offered. (Magistrate Colombo's 2021 opinion on remand at 2.)

Plaintiff testified that he plowed snow two days during at least one off season period before his work injury. (Trial transcript at 44-45, 107.) He testified that by registering with Michigan Works!, "Yes, I looked for work. That's why I go and register at Michigan Works." (*Id*. at 107-108.) He testified that he understood Michigan Works! looked for jobs for him and he was obliged to accept such jobs if offered. (*Id*. at 109; see note 6, above.

these cases were decided before the Michigan Legislature enacted 2011 PA 266. These cases did not (could not) include an analysis of MCL 418.301(4)(c), which is applicable to plaintiff, but not in *Raybon* or *Reece*.[20] There is not a close enough match amongst *Raybon/Reece* (and *Epson v Event Staffing, Incorporated*, 2009 Mich ACO #152)[21] and the statute to make these cases useful here.

In a much older case, *Cundiff v Chrysler Corp.*, 293 Mich 404; 292 NW2d 348 (1940), a factory worker injured his back at work on November 23, 1937, but continued to work by avoiding

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[20] *Garner v General Motors Company*, 2019 Mich ACO #32 at 5 ("… the Legislature modified the definition of disability and wage loss in 2011 PA 266 and 2012 PA 83. It is clearly recited in what is now codified as MCL 418.891(4) that the new standards enacted in 2011 PA 266 apply to injury dates [on or] after December 19, 2011.") See note 3.

[21] In *Raybon*, at 3, the Court of Appeals wrote, with our emphasis:

> Following *Haske*, *Sington*, and *Sweatt*, *supra*, we agree with defendants that plaintiff's loss of wages must be attributable to his *work-related injuries* rather than to the end of the football season and that he cannot receive wage loss benefits for time in the off season when he would not otherwise be earning wages.

Earlier on the page, the Court of Appeals pulled from *Haske v Transport Leasing*, 455 Mich 628; 566 NW2d 896 (1997), to recite that "[u]nemployment or reduced wages *must be causally linked to work-related injury*" (the *Raybon* Court's emphasis) and *Sington*, 467 Mich at 160-161, and *Sweatt v Dep't of Corrections*, 468 Mich 172, 187-188 n 11, 190-191 n 13; 661 NW2d 201 (2003), to conclude that claimant Raybon "must still show that his work-related *injury* caused his current loss of wage-earning capacity." (Emphasis added.) Later, in *Raybon*, at 3-4, the Court of Appeals wrote, with our emphasis, to "remand the case to the magistrate to determine what portion of plaintiff's lost wages in the closed awards, if any, was caused by the end of the football-playing season rather than by plaintiff's *disability*." In *Reece*, at 2, the Court of Appeals pulled from *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 8-9; 760 NW2d 586 (2008), *lv den*, 483 Mich 900 (2009), to conclude that the employee "must demonstrate a clear connection between wage loss and work-related *injury*." (Emphasis added.) In *Epson v Event Staffing, Incorporated*, 2009 Mich ACO #152, at 27, the WCAC wrote, with our emphasis, that "[t]he first is whether the plaintiff is required to establish a work-related/*injury-related* wage loss. We agree that he must." All of this was mooted by: (I) the ruling in *Stokes*, 481 Mich at 281, that expanded the field of labor against which disability was measured to beyond playing football because "[a] claimant must do more than demonstrate that his work-related injury prevents him from performing a previous job. *Sington, supra* at 161" and (II) the legislature wrote on the subject for arguably the first time in 2011 PA 266 to assert that the employee must demonstrate wage loss, which "means the amount of wages lost due to a *disability*." MCL 418.301(4)(c). (Emphasis added.) "Disability" is undoubtedly different than "injury." *Leskinen v Employment Security Commission*, 398 Mich 501, 508-509; 247 NW2d 808 (1976). This says that one cannot apply the *Raybon/Reece/Epson* framework to cases, as is this case, subject to MCL 418.301(4)(c).

heavy lifting until May 15, 1938, when he was laid off because of a union seniority rule. Because he continued to feel pain, he sought a medical evaluation, where it was discovered he sustained a work-incurred injury. The employer appealed an award for total disability for a period of time through October 31, 1938, when Mr. Cundiff was called back to work. The employer argued he was not entitled to wage loss benefits because he would not have earned wages during the time he was found to be totally disabled by his back condition because he was laid off because of the union seniority rule. The Supreme Court rejected that argument. The Court wrote:

> Defendant says in its brief that "plaintiff lost no time whatever from his employment with defendant except such as was made necessary by the rules of seniority." The fact that lack of work would nevertheless have kept plaintiff idle during the period of disability does not impair the right to compensation. It is enough that the department found there was in fact total disability and that he could not do the work he was employed to do at the time of the accident. (*Cundiff*, 293 Mich at 408.)

Cundiff is not a seasonal employment case. Also, it, too, does not analyze the statutory provisions that apply in the case at bar, 2011 PA 266, and precedes, by decades, enactment of 1987 PA 200, where the legislature first defined 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." *Cundiff* does, however, demonstrate that an employee with a disability related to a work injury, but who would not have earned wages in any event for a non-work-related reason (a layoff in *Cundiff*), may receive workers' compensation benefits if he otherwise demonstrates what the statute requires. *Cundiff* is, as a result, one case of many[22] where the identification of an *additional* reason, not related to the work injury, for the inability to locate work "does not impair the right to compensation." *Id.* at 293 Mich 408. However, if *the* reason for the inability to locate work is not work-related, the proofs fail plaintiff's burden on this issue. See, generally, *Markle,* 2022 Mich ACO #5 at 24-26.

In *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1; 760 NW2d 586 (2008), *lv den*, 483 Mich 900 (2009), the Court of Appeals addressed the claim of a Mexican national, with a visa to work in the United States, who was injured while training to become a millwright. Following his injury, his employer provided Mr. Romero full pay for doing odd jobs until his work visa ended. He returned to Mexico as a result, *Id*, at 12-13, for his work injury resulted in his being "unable to keep working."[23] The employer insisted that the wage loss was not due to the work injury but,

[22] See the cases collected in *Dennis v Waterland Trucking Service Incorporated*, 2007 Mich ACO #124 at 17-18.

[23] *Id.* at 3, 7. The extent of Mr. Romero's medical impairment is not clear, but no claim of partial disability was presented or analyzed.

rather, to the ending of his visa to work in the United States. The Court of Appeals disagreed. The Court wrote:

> Defendants characterize plaintiff as the functional equivalent of a retiree, asserting that plaintiff "can 'never work again' until he obtains another visa that would allow him to work again in this country. Like the retiree in *Sington's* example, plaintiff has no wages to replace in the United States." But, this case is factually distinguishable from the illustration in *Sington*. In that illustration, the employee was injured just before retirement. *Id*. at 160. He had no intention of ever working again, and even in the absence of the injury he would not have earned further wages. *Id*. at 160-161. In this case, plaintiff was 21 years old when he was injured and was training for a future job as a millwright. Hardwoods was training plaintiff with the intent to employ him as a millwright in Mexico. But, because of his injury, plaintiff is now unable to work as a millwright in the United States or Mexico. While defendants are correct that plaintiff cannot legally work in the United States without a valid visa, plaintiff could have earned wages as a millwright in Mexico had the injury not occurred. Therefore, contrary to defendants' assertion, there is a causal connection between plaintiff's work-related injury and wage loss. (*Romero,* 280 Mich App at 9-10.)
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> * * *
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> As we previously explained, plaintiff could have worked as a millwright in Mexico had the injury not occurred. Therefore, plaintiff's wage loss is attributable to his work-related injury, not the expiration of his visa. (*Id*. at 10.)

Defendants have not shown that MCL 418.301(4)(c) contains language that prevents an employee from establishing the required "connection" simply because the employee's in-season employment and resultant wages are not reasonably available to the employee during the off-season. However, that conclusion does not relieve the employee of the statutorily required duty to "establish a connection between the disability and reduced wages" as discussed in parts I-II, above. Wage loss may be established by demonstrating a good-faith effort to obtain work which is unsuccessful in procuring work available to plaintiff that he is able to perform and there is "a connection" between the disability and the reduction in wages attendant to the lack of success. This question was not answered by the magistrates except for reference to factors which, after plaintiff recuperated from surgery (which is to say after January 6, 2017), are not accurate or relevant. As a result, a remand is required.

IV

Defendants also argue the following paragraph from Magistrate Colombo's 2021 opinion on remand at 3, created legal error:

> MCL 418.354, et seq, provides for offsets, reductions, or coordination of benefits to be utilized by the employer, and the parameters of that reduction in

> worker's compensation benefits, if applicable. Unless or until plaintiff has earnings in the nature of the situations set forth in Sect. 354, defendants are not entitled to unilaterally reduce plaintiff's entitlement to benefits under the WDCA.

Defendants expressed concern that this paragraph meant ...

> ... the magistrates interpret the act as permitting a reduction of benefits for a partially disabled plaintiff only if that plaintiff is receiving a benefit coordinateable under MCL 418.354. This analysis vitiates any distinction between the concepts of disability and wageloss. It also directly conflicts with MCL 418.301(8) which allows a reduction in weekly benefits for a partially disabled worker like plaintiff based upon that employee's post-injury residual wage earning capacity. (Defendants' brief after remand at 11.)

This record does not suggest that plaintiff recovered any benefit to which Section 354 applies. The trial transcript at 5, reads that "[t]he receipt of benefits subject to coordination was denied."

The magistrate's reference to "earnings in the nature of the situations set forth in Sect. 354" is a misnomer and is not relevant to the limited issue the magistrate was instructed to address on remand. *Guss*, 275 Mich at 34; *Guthrie*, 2005 Mich ACO #176 at 15. Defendants' carefully preserved appellate issue asked whether, based on the second sentence of MCL 418.301(4)(c), plaintiff proved "a connection" between the found disability and reduced wages during the months when cold temperatures precluded him from performing his regular job of laying and installing concrete. The types of benefits described in MCL 418.354 may allow employers to reduce the weekly wage loss benefits otherwise found to be due to an employee; *however*, such coordinated benefits are not "earnings" (or wages) relevant to determining whether the employee is entitled to receive wage loss benefits in the first instance. If Magistrate Colombo's analysis suggested that no differences exist between the provisions and purposes of MCL 418.301 and MCL 418.354, as defendants suggest, Magistrate Colombo erred.

MCL 418.301 provides statutory definitions necessary to determine an injured employee's *entitlement* to wage loss benefits, that is, disability, wage-earning capacity, wage loss, and weekly wage loss benefit calculations. MCL 418.354 describes types of benefits that can be applied to *coordinate* the *amount* of an identified-in-MCL 418.354-benefit with the *amount* of benefits the injured employee is entitled to receive based on provisions in MCL 418.301. Issues under MCL 418.354 do not arise under the MCL 418.301 analysis that is the subject of defendants' appeal and the remand and, in any event, MCL 418.354 issues have not arisen in this record to affect the calculation of benefits because there is no indication that plaintiff has received any benefit enumerated in MCL 418.354.

Because the reference to MCL 418.354 is irrelevant here and not within the scope of the remand, we strike and remove the paragraph from Magistrate Colombo's 2021 Findings of Fact and Conclusions of Law on remand which Magistrate Grunewald "adopted and incorporated" that

includes the statement that, "Unless or until plaintiff has earnings in the nature of the situations set forth in Sect. 354, defendants are not entitled to unilaterally reduce plaintiff's entitlement to benefits under the WDCA." (See Magistrate Colombo's 2021 opinion on remand at 3.)

If circumstances arise where defendants (or plaintiff) believe would justify an alteration in the benefit rate,[24] either party may file an application for hearing and present proofs on another record seeking to justify their position.

V

Because we retain jurisdiction for the purposes of (*inter alia*) drafting an order that incorporates the magistrate's findings on second remand with the prior proceedings and of considering any arguments the parties may wish to present after this remand, defendants' obligation under MCL 418.862 must be considered. Our retention of jurisdiction means that defendants' claim for review of the October 25, 2021, order is still pending.

Consistent with *Kohloff v Chrysler Group LLC*, 2016 Mich ACO #14, and *Bowden v General Motors Corporation*, 2013 Mich ACO #62, and *Williamson v General Motors LLC*, 2012 Mich ACO #94, defendants are required to pay at least 70% of the ordered benefit rate ordered by the magistrate because "[a] claim for review filed pursuant to section 859a, 861, or 864(11) does not operate as a stay of payment to the claimant of 70% of the weekly benefit required by the terms of the award of the worker's compensation magistrate or arbitrator." MCL 418.862(1). This 70% benefit rate is required for the period of time between April and November of each year as there is no order excusing defendants from the obligation to pay weekly benefits during this period and the claim for review is pending. Conversely, there is no order which requires defendants to pay weekly benefits for the period between December and March of each year, as our order consistent with this opinion modifies the conclusion rendered by the magistrates and requires further analysis. As a result, the "[p]ayment … shall continue … for a shorter period if specified in the award." MCL 418.862(1), second sentence. We make this ruling to address "shifting and competing interests of fairness" in a "unique statutory scheme that does not contemplate … numerous remands"[25] with the recognition that the parties, in essence, have an order in hand that requires benefits to be paid between April and November of each year and no order in hand that properly addresses the benefits to be paid between December and March of each year.

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[24] By way of examples and not of limitation, defendants might believe that plaintiff's wage-earning capacity after the instant record was closed has changed or plaintiff has received earnings or has recovered from his medical impairment. Plaintiff might believe his condition has deteriorated. *White v Michigan Consolidated Gas Company*, 352 Mich 201; 89 NW2d 439 (1958). Plaintiff might receive an "alternative benefit" which arguably impacts the rate. *Smitter v Thornapple Township*, 494 Mich 121, 153; 833 NW2d 875 (2013).

[25] *Williamson*, 2012 Mich ACO #94 at 5.

MCL 418.862(2) is also applicable here, as defendants' claim for review still pends, but its application is not dependent upon any facts the parties have raised or we have discussed.

Our retention of jurisdiction also allows either party to file a motion with the WDCAC (not the magistrate) to revisit the issue of defendants' obligation under MCL 418.862(1). See, *Williamson*, 2012 Mich ACO #94 at 6.

Conclusion

Magistrate Grunewald's order on remand, including the opinion he adopted and incorporated from Magistrate Colombo's 2021 opinion on remand, establish plaintiff incurred "reduced wages" after his work injury that have "a connection" to his work-related disability during the months of December 2015 through March 2016 and from December 2016 through plaintiff's evaluation by Dr. Krasnick on January 6, 2017. The facts changed after January 6, 2017, and the magistrates' opinions did not account for this, as after that date, plaintiff was no longer unable to work and so it is necessary to remand the matter to have the magistrate determine whether plaintiff established "a connection", as required by the second sentence of MCL 418.301(4)(c), existed during the months of December through March after January 6, 2017.

Commissioner Ries concurs.

Duncan A. McMillan Commissioner

Granner S. Ries Commissioner

Chairperson Daryl Royal did not participate.

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

RAMON RAZO,
PLAINTIFF,

And

BLUE CROSS & BLUE SHIELD OF MICHIGAN,
INTERVENING PLAINTIFF,

V DOCKET #21-0016

G M & SONS, INCORPORATED AND
CINCINNATI CASUALTY COMPANY,
DEFENDANTS.

This cause came before the Workers' Disability Compensation Appeals Commission ("WDCAC") on a claim for review filed by defendants from Magistrate David Grunewald's opinion and order on remand, mailed October 25, 2021. The magistrate's opinion and order follow from the remand order the WDCAC issued in *Razo v G M & Sons, Incorporated*, 2020 Mich ACO #8. The WDCAC order instructed the magistrate to determine whether plaintiff established a connection between his disability and reduced wages during the months of December through March following plaintiff's injury to comply with the second sentence of MCL 418.301(4)(c). The WDCAC has considered the record and counsels' briefs and concluded that the magistrate's order mailed October 25, 2021, partially complied with the remand order and that the order of Magistrate Grunewald should be affirmed in part, reversed in part, modified in part, and remanded to the magistrate to complete the analysis required by the original remand order, in accord with the attached WDCAC opinion. Therefore,

IT IS ORDERED that Magistrate Grunewald's order, mailed October 25, 2021, is affirmed in part, reversed in part, modified in part, and remanded to the magistrate to complete the analysis required by the original remand order, in accordance with the attached WDCAC opinion; and

IT IS FURTHER ORDERED that this case is remanded to the magistrate for resolution of the remaining issue identified in the attached WDCAC opinion, but we retain jurisdiction as set forth in the attached opinion. On remand, no further proofs shall be presented, but the magistrate may hear the parties and receive further briefs and arguments from the parties. Because we retain jurisdiction, the magistrate should issue a supplemental opinion only and not an additional green

sheet order. Defendants are directed to notify the WDCAC upon receipt of the magistrate's opinion on this remand. Brief filing requirements will then be issued to counsel soon thereafter.

We retain jurisdiction.

Duncan A. McMillan Commissioner

Granner S. Ries Commissioner

Chairperson Daryl Royal did not participate.