2023 ACO #8

STATE OF MICHIGAN
WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

CHRISTOPHER KOLLINGER,
PLAINTIFF,

V DOCKET #23-0018

MILLER BROACH, INCORPORATED AND
PATRIOT GENERAL INSURANCE COMPANY,
DEFENDANTS,

AND

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,
APPELLANT.

APPEAL FROM MAGISTRATE GORCHOW

FRANCESCO L. PARTIPILO FOR PLAINTIFF,
RANDALL L. MACARTHUR FOR DEFENDANTS,
WILLIAM J. PREDHOMME, II, FOR APPELLANT.

OPINION *EN BANC*

ROYAL, CHAIRPERSON

This matter comes before the Workers' Disability Compensation Appeals Commission (WDCAC) on a timely claim for review filed by the Michigan Unemployment Insurance Agency (UIA) from Magistrate Murray A. Gorchow's April 3, 2023, order denying the UIA's Motion to Quash Defendant's Subpoena Demanding Production of Records, and finding the UIA in contempt for refusing to produce the records in question. Because the chairperson, the author of this opinion, has determined that this case may establish a precedent, this matter is being reviewed and decided by the entire commission, and this opinion and attached order are rendered *en banc*, pursuant to MCL 418.274(3) of the Worker's Disability Compensation Act (WDCA).[1]

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[1] With the exception of cases in which a commissioner is disqualified, *all* matters reviewed and decided by the current WDCAC are decided by the "entire commission," in that there are three commissioners and cases are decided by three-member panels. Executive Order No. 2019-13. However, we expressly designate this opinion and order as *en banc* to eliminate any doubt as to their precedential effect.

In this case, plaintiff filed an application for mediation or hearing, alleging a disabling injury arising out of and in the course of his employment. During the course of the ensuing litigation, defendants[2] issued a subpoena to the UIA, requiring the production of …

> ANY AND ALL UNEMPLOYMENT INSURANCE AGENCY RECORDS REGARDING THE ABOVE-REFERENCED PLAINTIFF, INCLUDING BUT NOT LIMITED TO ALL UNEMPLOYMENT APPLICATIONS, UNEMPLOYMENT BENEFITS PAID, UNEMPLOYMENT DECISIONS, DETERMINATIONS, ORDERS, APPEALS, AND EVIDENCE INCLUDING BUT NOT LIMITED TO CLAIMANT AND EMPLOYER COMMUNICATIONS, STATEMENTS, TRANSCRIPTS OR RECORDINGS OF HEARINGS.

The subpoena was signed by defendants' attorney on September 1, 2022, as permitted by MCL 418.853. That provision states, in pertinent part, as follows: "A subpoena signed by an attorney of record in the action has the force and effect of an order signed by the worker's compensation magistrate or arbitrator associated with the hearing."

The UIA filed a motion to quash defendants' subpoena. A hearing on that motion was held on March 29, 2023. In an order and opinion mailed from the Workers' Disability Compensation Agency (Agency) on April 17, 2023, the magistrate denied the UIA'S motion to quash.

The UIA appeals from that determination.

Standard of Review

Findings of fact made by a magistrate are conclusive upon the WDCAC if supported by competent, material, and substantial evidence on the whole record. Substantial evidence is that which, considering the whole record, a reasonable mind would accept as adequate to justify the conclusion. MCL 418.861a(3) and (4). 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). Matters of statutory construction constitute questions of law, subject to *de novo* review. *Maier v General Telephone Company of Michigan*, 247 Mich App 655, 659-660; 637 NW2d 263 (2001); *Shinholster v Annapolis Hospital*, 471 Mich 540, 548; 685 NW2d 275 (2004). "In construing administrative rules, courts apply principles of statutory construction." *Detroit Base Coalition for the Human Rights of the Handicapped v Department of Social Services*, 431 Mich 172, 185; 428 NW2d 335 (1988). We consider "only those specific findings of fact and conclusions

[2] "Defendants" in this case are employer Miller Broach, Incorporated, and its insurer, Patriot General Insurance Company. There is an identity of interest between these entities and they are represented by the same attorneys. We refer to them as "defendants."

of law that the parties have requested be reviewed." MCL 418.861a(11); *Cane v Michigan Beverage Company*, 240 Mich App 76, 80-81; 610 NW2d 269 (2000).

UIA's Status

As a preliminary matter, we note that the UIA has portrayed itself as a "non-party" in its pleadings filed with the WDCAC. This is incorrect. Subpoenas may "extend beyond parties to all potential witnesses . . . and . . . a wide range of witnesses are often called upon to provide records and testimony necessary to support the positions of the parties." *Woodford v Grand River Printing, Incorporated*, 2015 Mich ACO #12 at 2. As a result, the mere receipt of the subpoena did not make the UIA a party.

However, the Agency necessarily acquires jurisdiction over the recipient of a subpoena if a motion to enforce the subpoena is filed and served upon the recipient of the subpoena or the recipient files a motion to dispute the subpoena, and the recipient therefore becomes a party for the purpose of contesting the dictates of the subpoenas (if not already a party).[3] *Pittman v Rothenberger Company, Incorporated*, 2020 Mich ACO #21 at 6. Fundamental due process requires that the recipient of a subpoena be accorded notice and an opportunity to be heard. *Klco v Dynamic Training Corporation*, 192 Mich App 39, 42–43; 480 NW2d 596 (1991). As a result, the Agency acquired jurisdiction over the UIA once it filed a motion to quash the subpoena, as it was required to do by R 418.89(7) and *Bradley v Colonial Mold, Incorporated*, 2022 Mich ACO #7, to consider challenges to the subpoena or motions to enforce it. The UIA remains a party on appeal for that purpose.

If none of this were the case, the UIA would not be permitted to file an appeal in this matter. MCL 418.851 concludes with the following statement: "Unless a claim for review is filed *by a party* within 30 days, the order shall stand as the order of the bureau." (Emphasis added.) In *Al-Husaini v S & D Seafood & Fish, Incorporated*, 2011 Mich ACO #29 at 7-8, our predecessor, the Workers' Compensation Appellate Commission, wrote…

> …only certain entities may seek to appeal a magistrate's order: they must have been a **party** to the proceeding before the magistrate. Said otherwise, non-parties do not have an administrative remedy from an order entered by the magistrate no matter how disappointed with the result they might be. (Emphasis in original.)

We further note that the UIA's interest in the outcome of this case extends no further than the parameters of the subpoena, whether it will be required to comply, and the consequences for noncompliance. The UIA has no interest in findings as to whether the plaintiff sustained work-related injuries, whether he is disabled as a result, or any other finding that the magistrate might

[3] Although not the case in this matter, a subpoena might be directed to one who is already a party.

render in this case. As a result, the UIA's involvement as a party goes no further than the enforcement of, or disputes regarding, the subpoena.

Analysis of Applicable Authorities

The obligations of the UIA to disclose information are determined by reference to MCL 421.11(b), a part of the Michigan Employment Security Act (MESA) under which the UIA operates. In interpreting MCL 421.11(b), "[w]e must 'examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme.' In doing so, we 'consider the entire text, in view of its structure and of the physical and logical relation of its many parts.' " *Ally Financial Inc v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018). Accordingly "[w]e assume that every word has some meaning and, as far as possible, give effect to every sentence, phrase, clause, and word, avoiding a construction that would render any part of the statute surplusage or nugatory." *Tuscola County Board of Commissioners v Tuscola County Apportionment Commission,* 262 Mich App 421, 426; 686 NW2d 495 (2004). See also *Baker v General Motors Corporation,* 409 Mich 639, 665; 297 NW2d 387 (1980) ("Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible.") "The cardinal rule of statutory construction is to discern and give effect to the intent of the Legislature." *Murphy v Michigan Bell Telephone Company,* 447 Mich 93, 98; 523 NW2d 310 (1994). Construction begins with its plain language which, if unambiguous, must be applied as written. *Id.*; *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000).

The argument presented by the UIA essentially points to the parts of the MESA that encourage confidentiality and ignores the provisions that permit disclosure when, as here, demanded. Although MCL 421.11(b)(1) does state that the records of the UIA "are confidential and must not be disclosed or open to public inspection," there are exceptions, as MCL 421.11(b)(1) continues with the statutory mandate that all of the information held by the UIA that might affect a claim for workers' compensation must be available to interested parties, whether or not the UIA is a party to the action:

> Information in the unemployment agency's possession that might affect a claim for worker's disability compensation under the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941, must be available to interested parties as defined in R 421.201 of the Michigan Administrative Code, regardless of whether the unemployment agency is a party to an action or proceeding arising under that act.

The Legislature commands that "[i]nformation in the unemployment agency's possession that might affect a claim for worker's disability compensation . . . *must* be available to all interested parties. . ." This language requires the availability of *any* information that *might* – not would, but might – affect a workers' compensation claim, with no qualifiers as to the sort of information contemplated. In addition, the Legislature stated that the information "*must* be available." (Emphasis added.) "The term 'must' indicates that something is mandatory." *Vyletel-Rivard v*

Rivard, 286 Mich App 13, 25; 777 NW2d 722 (2009). This is clear and unambiguous. To the extent that the UIA would impose undue restrictions upon what information must be provided, we find they are unsupported by this clear statutory directive.

This leaves the question of to whom the information must be disclosed, resolved by a determination of who qualifies as "interested parties." The statute itself does not define this term, but instead directs the reader to "R 421.201 of the Michigan Administrative Code." As a result, that administrative rule must be consulted to determine who or what is included in the class of "interested parties." The rule in question, R 421.201(1) (Rule 201), begins with the following broad and inclusive definition:

> "The term 'interested party' as used in the act or these rules, means anyone whose statutory rights or obligations might be affected by the outcome or disposition of the determination, redetermination, or decision."

This language makes clear that an interested party can be *anyone* whose rights or obligations might be affected. Words in a statute "must be interpreted on the basis of their ordinary meaning and the context in which they are used." *Bartalsky v Osborn*, 337 Mich App 378, 387; 977 NW2d 574 (2021). "We may consult dictionary definitions to give words their common and ordinary meaning." *Spectrum Health Hospitals v Farm Bureau Mutual Insurance Company of Michigan*, 492 Mich 503, 515; 821 NW2d 117 (2012). The meaning of the word "anyone" is clear. Should there be any doubt, Merriam-Webster defines the word "anyone" as "any person at all." *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/anyone> (accessed September 18, 2023). The UIA's restrictive interpretation runs contrary to the plain meaning of "anyone," and we reject it accordingly.

As noted, the first sentence of Rule 201(1) clearly sets forth a broad definition of "interested party." The remainder of the rule subsequently narrows that definition, but only as to parties to an unemployment benefit determination. Each subsection sets forth a class of "interested parties" *solely in the context of an unemployment compensation claim or proceeding*:

> (1) . . . *A claimant for unemployment benefits* is not an interested party to a redetermination of charges or to an appeal relating to a redetermination of charges.
>
> * * *
>
> (2) The agency is an interested party *in any appeal before a referee, the board of review, or in any judicial action* involving an order or decision of the board of review or a referee.
>
> (3) An employer or employing entity in this or another state is an interested party *in connection with a claim for benefits* if the employer's or employing entity's account has been charged. . ." (R 421.201(1)-(3); emphasis added.)

Quite obviously, each of these provisions limits the definition of "interested party" solely with regard to unemployment compensation claims. Any other reading of the statute, particularly that of the UIA, would completely write out of the rule the language appearing before these three limiters, defining an "interested party" as "*anyone* whose statutory rights or obligations might be affected by the outcome" of the unemployment claim. (Emphasis added.) The statute does *not* limit the noted statutory rights or obligations to those that might arise under the MESA. In fact, the overriding statute expressly refers to claims arising "under the worker's disability compensation act of 1969" – and not just under the MESA. MCL 421.11((b)(1)(i).

The UIA's construction of the rule essentially overrides the principal that information that might affect the rights and obligations of a party to a worker's compensation claim must be disclosed. It seizes upon isolated provisions without regard to the statutory scheme as a whole. The only construction that effectuates all words and phrases of both the statute and the rule is one in which information which might affect rights and obligations relative to a workers' compensation claim is made available in cases beyond an unemployment compensation action – including this case.

As a result, the UIA's contention that "[t]here is no provision in [Rule 201] that defines an interested party as one pursuing or defending a worker's compensation claim" (UIA brief at 10) misses the point. Rule 201 is written broadly enough to include an employer responding to an unemployment compensation claim and a workers' compensation claim, both from the same employee, as an "interested party." As a result, information in the UIA's possession that might affect a claim for workers' compensation must be available to the employer. MCL 421.11(b)(1)(i). There are no time constraints in the MESA; and the fact that an unemployment compensation claim might have been concluded previously does not mean that the definition of the employer as "interested party" is no longer effective with regard to a current workers' compensation claim.

The UIA also argues that "[g]enerally, information, if any, in the [UIA's] files regarding claimants is deemed confidential under MCL 421.11(b)(1)(iii). . ." The UIA further contends that, pursuant to that subsection, disclosure outside an unemployment action is limited to (1) cases in which the UIA is a party or (2) the information is sought for use in prosecuting fraud in certain enumerated public benefits programs (but not workers' compensation). (UIA brief at 7-8.) This argument conveniently disregards the first clause of the cited statute: "*Except as provided in this act.* . .' MCL 421.11(b)(1)(iii) (emphasis added). This prefatory clause makes it clear that the provisions of that subsection are *not* absolute, but are instead subject to exceptions provided elsewhere. As previously pointed out above, one of those exceptions is contained in MCL 421.11(b)(1)(i), which clearly states that "[i]nformation in the unemployment agency's possession that might affect a worker's disability compensation claim . . . must be available to interested parties . . ." Once more, the UIA emphasizes certain portions of the statutory scheme, while ignoring others, an impermissible interpretation. *Ally Financial Inc,* 502 Mich 484 at 493.

In addition, the language in question was incorporated into the statute with the enactment of 1995 PA 25. This language was not in existence during the time when the cases that the UIA references to support its contention regarding the courts' validation of the confidentiality aspects of § 11(b)(1)(iii) of MESA were adjudicated -- *Herman Brothers Pet Supply, Incorporated v National Labor Relations Board*, 360 F2d 176 (CA 6, 1966), *Storey v Meijer Incorporated*, 431 Mich 368; 429 NW2d 169 (1988), and *Wojciechowski v General Motors Corporation*, 151 Mich App 399; 390 NW2d 727 (1986). Each of these cases predates the amendment to MESA that added language concerning worker's compensation claims to MCL 421.11(b)(1)(i) – the very provision at issue in this matter. Decisions rendered prior to the 1995 amendment obviously could not have accounted for that addition. Consequently, the authorities cited by the UIA are irrelevant to the resolution of this matter.

The UIA further complains that defendants' record request is "overly b[roa]d and burdensome. . ." (UIA's brief at 5.) However, it has failed to explain how that is the case. The UIA concedes that some information within its file would be relevant to a workers' compensation claim:

> The [UIA] does not dispute the relevance of unemployment benefit payments where the Worker's Disability Compensation Act provides for a reduction in benefits or set off for unemployment benefits received. MCL 418.358. (UIA's brief at 5.)[4]

The UIA additionally argues that defendants have not demonstrated how any other information it might possess would be relevant:

> However, [defendant] Miller has failed to clearly articulate why or how Kollinger's entire unemployment file is relevant to the workers' compensation proceeding. (UIA brief at 5.)

It is not obvious that the recipient of a subpoena, who is not a party to the underlying case, is permitted to object to the relevancy of the information sought. One not a party to the underlying case is unlikely to know whether the information being sought is relevant. In this case, we can appreciate that some information sought by the subpoena could be relevant in that it "might affect a claim for worker's disability compensation" benefits, MCL 421.11(b)(1)(i), because, for example, both statutory schemes address a search for work. The MESA, in MCL 421.28(1)(a), requires that a claimant be "actively engaged in seeking work," while the WDCA, in MCL 418.301(5)(d), refers to "a good-faith attempt to procure post-injury employment." As a result, information in the unemployment compensation record may make the fact of a search for employment "more probable or less probable." MRE 401. Such information also relates to the employee's credibility and, as such, "is always relevant." *People v Spaulding*, 332 Mich App 638,

[4] We note that even this information, which the UIA acknowledges might affect a claim for workers' compensation, would not be available if we were to adopt its argument in this case.

660; 957 NW2d 843 (2020). We explained this in our previous opinion in *Robinson v Sundance Beverage Company*, 2022 ACO #11 at 9, where we wrote:

> There are several reasons why information held by the UIA might affect the rights of a claimant seeking workers' compensation benefits, the obligations of a defendant to a claim, or the rights of any other party to a workers' compensation case. In order to qualify for unemployment benefits, a claimant "must report at an employment office, must register for work, must be available to perform suitable full-time work, and must seek work…" MCL 421.28(1)(a). Information regarding some or all of these elements would frequently be contained in unemployment records and obviously might affect a workers' compensation claim. As a result, the UIA's suggestion that such information need not be disclosed would write out of the controlling statute its provision that information "that might affect a claim for worker's disability compensation" *must* be made available. MCL 421.11(b)(1)(i).

Defendants have cited this language in their appellate brief (at page 6), and therefore *have* articulated the potential relevance of the UIA file to this matter. What remains unarticulated is any rebuttal to this reasoning.

The UIA further argues that we should consider "whether the burden or expense of the proposed discovery outweighs its likely benefit," citing MCR 2.302(B)(1). (UIA brief at 6.) However, the court rules are not applicable here, MCR 1.103; *Bradley*, 2022 Mich ACO #7 at 12, n30, citing cases, and the UIA has offered us absolutely no information upon which to base such a determination. The UIA has not explained how production would be a significant burden. Instead, it offers only the following vague and nonspecific claim: "In this case, the [UIA] would be required to review and reproduce an unemployment file spanning an unspecific amount of time (the subpoena does not have a date restriction), much of which would be irrelevant to issues related to this matter." (UIA brief at 6.) Defendants have explained why they view their request as more than a "fishing expedition." The UIA has not provided the other side of the story, in that it has provided no actual justification for its contention that production would be a burden or unduly expensive.

The WDCAC finds that the UIA records sought in this matter are not exempt from disclosure, and that defendants are entitled to the materials they have requested. Any contrary result would ignore clear language in the statute stating that "[i]nformation in the unemployment agency's possession that might affect a claim for worker's disability compensation under the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941, must be available to interested parties…" MCL 421.11(b)(1)(i). It would also disregard language in R 421.201(1) stating, "The term 'interested party' as used in the act or these rules, means anyone whose statutory rights or obligations might be affected by the outcome or disposition of the determination, redetermination, or decision." The UIA's citation to isolated portions of the statute or rule in disregard of the language as a whole frustrates the legislature's intent, contrary to the objective of statutory construction. "The cardinal rule of statutory construction is to discern and

give effect to the intent of the Legislature." *Murphy*, 447 Mich 93 at 98; *Ally Financial Inc,* 502 Mich 484 at 493. The UIA must comply with defendants' subpoena.

Contempt of Court

The magistrate found that the UIA's refusal to honor the subpoena issued by defendants constituted contempt. We reverse.

Pursuant to MCL 418.853, "Any witness who refuses to obey a subpoena, who refuses to be sworn or testify, or who fails to produce any papers, books, or documents touching any matter under investigation or any witness, party, or attorney who is guilty of any contempt while in attendance at any hearing held under this act may be punished as for contempt of court." In reviewing this provision, the Court of Appeals wrote, "Although § 853 of the Worker's Disability Compensation Act gives a magistrate power to punish contempt of court, as in other civil cases, certain rules apply and certain procedures must be followed." *In re Contempt of Robertson*, 209 Mich App 433, 437; 531 NW2d 763 (1995). Accordingly, the *Robinson* Court concluded that general rules for civil contempt apply in workers' compensation matters.

Separate rules apply depending upon whether contempt is committed outside the presence of the magistrate or within his/her immediate view and presence. *Id*. While defendants contend that the UIA's non-compliance should be considered to have occurred in the magistrate's presence, we find that the noncompliance occurred outside the magistrate's presence, because he had no personal knowledge of the steps taken by the UIA in response to the subpoena. *Id.* at 440-441; *In re Wood*, 82 Mich 75, 82; 45 NW 1113 (1890) ("The immediate view and presence does not extend beyond the range of vision of the judge, and the term applies only to such contempts as are committed in the face of the court.").

For alleged contempt occurring outside the view and presence of the magistrate, proceedings must be initiated "on a proper showing on ex parte motion supported by affidavit." MCR 3.606(A), made applicable by *In re Contempt of Robertson,* 209 Mich App at 438–439. In this case, defendants filed no such motion or affidavits. Where this procedure has not been followed, courts have held that a finding of contempt is inappropriate. See *In re Rosender*, 39 Mich App 62, 63; 197 NW2d 132 (1972); *In re Nathan*, 99 Mich App 492, 495; 297 NW2d 646 (1980).

Waiver of this principle is possible: "The Michigan Supreme Court has held that an alleged contemner's voluntary appearance in court to defend against contempt charges waived the procedural irregularities that occurred in initiating proceedings where no affidavit was filed. *In re Huff*, 352 Mich 402; 91 NW2d 613 (1958)." *In re Nathan*, 99 Mich App at 494. While defendants did notify the UIA of their desire to seek a contempt finding in their response to the UIA's motion to quash, they filed no separate motion. As a result, the UIA appeared at the hearing not to defend against contempt charges but instead to prosecute its own motion to quash. We therefore find that contempt proceedings were not properly initiated in this matter, and the magistrate lacked authority to find contempt.

Even if that were not the case, we would not find the UIA in contempt in this matter. In *Robinson,* 2022 ACO #11, we found contempt where the UIA had neither filed a motion to quash the defendants' subpoena nor sought a hearing in that regard, but instead simply refused to provide the materials requested. In the instant case, by contrast, the UIA has promptly taken appropriate action to dispute the subpoena. We do not find contempt. The magistrate's finding of contempt is reversed.

Conclusion

The WDCAC finds that the UIA must produce the materials requested by defendants pursuant to their subpoena and affirm the magistrate in that regard. However, we reverse the magistrate's finding holding the UIA in contempt.

Daryl Royal	Chairperson
Granner S. Ries	Commissioner
Duncan A. McMillan	Commissioner

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

CHRISTOPHER KOLLINGER,
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MILLER BROACH, INCORPORATED AND
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ORDER

This matter comes before the Workers' Disability Compensation Appeals Commission (WDCAC) on a timely claim for review filed by the Michigan Unemployment Insurance Agency (UIA) from Magistrate Murray A. Gorchow's April 3, 2023, order denying the UIA's Motion to Quash Defendant's Subpoena Demanding Production of Records and finding the UIA in contempt for refusing to produce the records in question. Because the chairperson, the author of this opinion, has determined that this case may establish a precedent, this matter is being reviewed and decided by the entire commission, and this order and attached opinion are being rendered *en banc*. MCL 418.274(3).

The WDCAC has considered the record and briefs filed on behalf of the UIA and defendants and concludes that the magistrate's order should be affirmed in part and reversed in part. Therefore,

IT IS ORDERED that the magistrate's finding that the UIA is required to comply with defendants' subpoena is AFFIRMED.

IT IS FURTHER ORDERED that the magistrate's finding that the UIA is in contempt of court is REVERSED.

We return this case to the Board of Magistrates for further proceedings consistent with this order.

This is a final order. No appeals pend.

Daryl Royal	Chairperson
Granner S. Ries	Commissioner
Duncan A. McMillan	Commissioner