2025 ACO #5

STATE OF MICHIGAN
WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

TAWNYA EHLEN,
PLAINTIFF,

V DOCKET #23-0006

RAM CONSTRUCTION SERVICES OF MICHIGAN AND
TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,
DEFENDANTS.

APPEAL FROM MAGISTRATE SEGEL.

MARK A. AIELLO FOR PLAINTIFF,
DANIAL J. HEBERT FOR DEFENDANTS.

OPINION

ROYAL, CHAIRPERSON

This matter came before the Workers' Disability Compensation Appeals Commission ("WDCAC")[1] on a timely claim for review from an order of Magistrate Lenny Segel mailed February 21, 2023, filed by defendants Ram Construction Services of Michigan ("Ram") and Travelers Indemnity Company of Connecticut, collectively referred to as "defendants." That order granted plaintiff Tawnya Ehlen an open award of benefits. Both plaintiff and defendants have filed briefs in support of their positions on appeal, which we have reviewed.

Plaintiff initiated these proceedings by filing an application for mediation or hearing in December 2019, alleging that her "20 year career in construction as a mason caused, aggravated and or accelerated disabling pathology in both shoulders, upper extremities, back, spine [and] all associated structures and sequelae." She claimed a single injury date, September 5, 2019, her last day of work with defendant Ram.

Plaintiff came to work for Ram in 1999 and testified that her work there was the highest paying and most physical of her life. (Trial transcript I at 23-24.) She began as a laborer, a position which required her to operate 60-pound jackhammers, as well as 30-pound jackhammers overhead.

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[1] This matter is being decided by a two-member panel pursuant to Paragraph 4(b) of Executive Order 2019-13, which states that "[t]he Workers' Disability Compensation Appeals Commission shall act by the vote of two or more members."

(*Id.* at 25.) She also used large grinders and other power tools, involving lots of vibration. (*Id.*) She lifted and carried up to 50 pounds, often carrying them up and down stairs. (*Id.*) After 15 years as a laborer, plaintiff became a mason, a job she primarily learned in the field. (*Id.* at 27.) As a mason, plaintiff lifted weights of up to 100 pounds, including bags of mortar, "black beauties," steel, and stone. (*Id.* at 27-28.)

Plaintiff related a long history of shoulder and back pain, which she stated was precipitated by "just the hard work."[2] (Trial transcript I at 31.) She never complained about these problems at work, stating, "I just needed to work so I pushed as hard as I could." (*Id.* at 33-34.)

Plaintiff underwent rotator cuff surgery on the right in 2011, during the annual winter layoff so that she would not miss work. (*Id.* at 32.) She subsequently returned to work at the same job, without restrictions. (*Id.* at 33.) In 2015, plaintiff began treatment with Dr. Slaim for right shoulder pain, and he in turn referred her to Dr. Mohammed Saad, an orthopedic surgeon who first saw plaintiff in December of 2017 and recommended further surgery. (*Id.* at 34-36.) Plaintiff had arthroscopic surgery in February 2018, again during the winter layoff. (*Id.* at 36; Dr. Saad deposition at 19.) The surgery revealed a full thickness rotator cuff tear with arthritic changes, and the doctor repaired the tear. (Dr. Saad deposition at 19). Plaintiff made a good recovery and went back to unrestricted work. (*Id.* at 20; trial transcript I at 37.) She continued to work through September 5, 2019. (Trial transcript I at 37.)

Plaintiff returned to Dr. Saad in November 2019, complaining of worsening right shoulder pain. (Dr. Saad deposition at 21.) The doctor performed a reverse total shoulder arthroplasty in January 2020. (*Id.* at 22-22.) He testified that ". . . there was significant worsening in Tawnya's arthritic change in the shoulder" between 2017 and 2020. (*Id.* at 27.) Dr. Saad further testified that he ". . . would say with a high degree of medical certainty that Tawnya's laboring job as described, yes, did cause and accelerate the shoulder pathology that we found in 2017 and in 2020 again." (*Id.* at 26.)

Plaintiff testified at the hearing that she was receiving Social Security disability benefits. (Trial transcript I at 45.) She was also working part-time for Door Dash, a job she noted was not physical and required no physical lifting. (*Id.* at 45.)

In an order and opinion mailed February 21, 2023, the magistrate found that plaintiff had proven work-related disability of her right shoulder only. The magistrate further noted that defendants were arguing that plaintiff had not given them timely notice of her disabling injury, as required by MCL 418.381(1). However, he found that defendants had failed to prove that they were prejudiced by any failure to provide that notice. The magistrate found that plaintiff was totally

[2] Although plaintiff testified to both shoulder *and* back problems, the magistrate found that only her right shoulder condition was compensable. Plaintiff did not appeal or cross-appeal to claim additional disability or disabilities, despite her initial allegations. As a result, the remainder of this opinion will focus solely upon her right shoulder problems. MCL 418.861a(11).

disabled and granted her an open award of benefits accordingly. Defendants were required to reimburse plaintiff's union for any treatment and disability payments made for her right shoulder. Defendants were granted credit for any post-injury wages earned by plaintiff.

Defendants appeal.

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). Findings of fact made by a magistrate are conclusive upon the WDCAC if supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3) and (4); *Mudel v Great Atlantic & Pacific Tea Company,* 462 Mich 691, 699-700; 614 NW2d 607 (2000). This standard requires that we examine the entire record, MCL 418.861a(4), and make a qualitative and quantitative review of the evidence. MCL 418.861a(13). If we determine a reasonable person would find the evidence is adequate to support the magistrate's findings, we must defer to the magistrate's judgment. *Mudel v Great Atlantic & Pacific Tea Company*, 462 Mich 691, 699-700; 614 NW2d 607 (2000).

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). We consider "only those specific findings of fact and conclusions 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).

Analysis

On appeal, defendants raise several issues: (1) that plaintiff did not provide timely notice and that they were prejudiced thereby, (2) that the magistrate's conclusions regarding plaintiff's job duties were not sufficiently supported by the evidence, (3) that plaintiff's disability was the result of expected consequences from nonwork-related issues, and (4) that the magistrate's findings of total disability and a corresponding exemption from a good-faith job search were unsupported by law and fact. We address each of these issues below.

A. Timely Notice and Lack of Prejudice

Pursuant to MCL 418.381(1), an injured employee "shall provide a notice of injury to the employer within 90 days after the happening of the injury, or within 90 days after the employee knew, or should have known, of the injury." The purpose of the notice requirement is to give the employer an opportunity to investigate an alleged injury while the facts remain accessible, and to allow the employer to provide skilled care to the injured employee to speed their recovery and

minimize the loss. *Norris v Chrysler Corporation,* 391 Mich 469, 474; 216 NW2d 783 (1974); *Nicholson v Lansing Board of Education*, 423 Mich 89, 94; 377 NW2d 292 (1985).

The magistrate looked only to the date of plaintiff's application to find that she had failed to give timely notice. (Magistrate's opinion at 45.) However, there are other ways to satisfy the requirement, including notice provided orally to a supervisor or foreman. *Norris, supra*. The magistrate's opinion correctly notes that Vincent Griffin, who was defendant's corporate safety director, testified that he learned that plaintiff was having back problems just a few days after she left work, but that he was not additionally informed of any shoulder difficulties. (Trial transcript I at 101-102, 116.) Plaintiff also testified that she informed her foreman, Robert Woods, of her issues, but her testimony was somewhat equivocal concerning whether she only mentioned her back or also included her shoulders. (*Id.* at 29, 75.) Consequently, it appears that plaintiff may not have given timely notice of her right shoulder problems.

However, the notice statute goes on to state that "[f]ailure to give such notice to the employer shall be excused unless the employer can prove that he or she was prejudiced by the failure to provide such notice." MCL 418.381(1). In *Williams v Chrysler Corporation (On Remand),* 209 Mich App 442; 531 NW2d 757 (1995), the Court of Appeals held that this language is not satisfied by "generalized conclusions of prejudice, which would hold in virtually any case. It could always be argued that a lack of prompt notice prevented an employer from conducting an immediate investigation, from quickly remedying a problem, or from promptly providing medical treatment. This cannot equate with prejudice, however." *Id.* at 447-448. Instead, the Court held "that a showing of prejudice unique to the facts and circumstances involved in a particular case is required for this language to be meaningful." *Id.* at 448. The Court further found that the question of prejudice is a question of fact. *Id.* at 448.

The magistrate found that defendants "were not prejudiced as a matter of law." (Magistrate's opinion at 45.) Defendants' argument to the contrary on appeal is based upon the testimony of safety director Griffin, who testified to the normal protocol he followed in the event of an injury: "I would be responsible for the investigation, the accident report, the drug test, the pictures. Those are the four standard things that go with every accident that there is." (Trial transcript I at 99.) Mr. Griffin testified that the lack of notice precluded his ability to carry out the standard investigation:

> We lost our opportunity to properly investigate. You want to get the witnesses that are on the job site, which may have been scattered. You lose the ability to do any drug testing. You lose the ability to take any picture of what may or may not have occurred on the job site at that time. (*Id.* at 102.)

However, in finding that defendants had not proven prejudice, the magistrate pointed out that there was no specific injury to investigate and that defendant could have adequately investigated in any event:

> The reasons given by Mr. Griffin as to why he thought he lost the opportunity to investigate the way he would normally do so, are not applicable in this case. He would have wanted to call witnesses that are no longer on the jobsite. However, there were no witnesses to an injury. He would have wanted to have taken pictures of the jobsite. However again there was no injury at the jobsite to take a picture of. He would have wanted her to take a drug test which really has nothing to do with an investigation of this case. He would have wanted to talk to the foreman and the superintendent. However, they wouldn't have any reason to get involved if there was no specific injury and they wouldn't add anything to his investigation because of that. Finally, he would have given all this information to the insurance company. However, he did that anyway. I just don't see any prejudice to the defendant based upon the facts of this case. (Magistrate's opinion at 45-46.)

We find that the magistrate's factual analysis is supported by competent, material, and substantial evidence so as to render it conclusive on appeal. MCL 418.861a(3). Given the fact that plaintiff sustained no specific injury, there was nothing to investigate. There has been absolutely no suggestion that drugs played any role in plaintiff's gradually progressing shoulder issues. Certainly, Mr. Griffin was aware, or could have made himself aware, that the jobs of laborer and mason required heavy lifting on a regular basis. In any event, this is precisely the type of evidence the *Williams* Court held "cannot equate with prejudice." 209 Mich App at 447.

Defendants additionally point out the emphasis Ram placed on safety, contending that Ram could have taken action to lessen the damage plaintiff suffered had it known that she was having problems. In that regard, Mr. Griffin testified that if he had known that plaintiff was having trouble performing her job over the years, he would have met with her to find a different job that she could do. He stated, "We would have made something work for her." (*Id.* at 100.) However, these vague assertions do not show "prejudice unique to the facts and circumstances involved in a particular case," as required by *Williams.* 209 Mich App at 448. Furthermore, if Ram could have found plaintiff a different job before she ultimately had to leave work, why did it make no effort to do so after she left? The record is bereft of any suggestion that Mr. Griffin or anyone else at Ram ever contacted plaintiff to find out whether her condition would permit her to do a different job. Without such evidence, defendants' arguments constitute "generalized conclusions of prejudice," insufficient under *Williams.*

Furthermore, defendants argument suggests that plaintiff not only had a duty to give notice within 90 days after her alleged injury date, but that she may also have had a duty to give notice even prior to that date. Defendants direct us to *Dunsmore v Nova, Incorporated,* 1999 Mich ACO #142, in that regard, suggesting that it "held that more notice may be necessary in the cases

involving cumulative trauma." We find no such indication in *Dunsmore*, which did not turn on the timing of the notice but instead dealt with its sufficiency. We further find no suggestion in the relevant statute, which imposes an obligation to give notice *after* an injury, but not any further obligation to give notice prior thereto.

We find that the magistrate's factual analysis as to this issue is supported by competent, material, and substantial evidence so as to render it conclusive on appeal. MCL 418.861a(3). We also find that the magistrate's analysis is legally sound. We affirm his findings as to the notice issue accordingly.

B. Findings Regarding Plaintiff's Job Duties

Defendant argues that the magistrate's findings regarding plaintiff's job duties are not supported by competent, material, and substantial evidence in the record, as required by MCL 418.861a(3). In that regard, the magistrate found as follows:

> As one of the only women working there, she worked as a laborer and a brick mason which were very strenuous jobs for a period of 20 years without any negative write-ups. . . . She testified that she had worked 20 years at Ram Construction and loved it. This despite the fact that her job duties were having to use a 60-pound jackhammer, and a 30-pound jackhammer overhead. She had to use large power washers, sand blasting pots, and did grinding with large grinders with a 10-inch blade which had a lot of vibration. She had to lift bags of mortar, cement, black beauty, brick and block, steel and rigging equipment. As a brick mason she would have to lift up to 100 pounds at the heaviest and had to lift an 80-pound "black beauty" which was something that had to do with sandblasting. (Magistrate's opinion at 39-40.)

Defendant does not challenge *any* of these factual findings, but instead contends that plaintiff failed to detail "how" she performed her job:

> In this case, she NEVER testified to "how" she would perform her job, including but not limited to lifting the bags of mortar and other materials. Did she carry them with one arm? Did she use an assistive device? Did she carry them overhead? Did she use both arms? Did she carry them on her shoulder? How often did she work overhead on a daily basis? How many times per day did she lift the material or use the jack hammers or other power tools? She never testified to the frequency of any of these activities at the time of trial. Her testimony on the details of "how" she did her job are completely lacking and cannot be presumed by the fact finder as being the cause of her shoulder pathology. (Defendant's brief at 10.)

We do not agree that this degree of specificity is required.

While plaintiff may not have explained in excruciating detail the way in which she performed her job, she did testify that as a laborer she used 60-pound jackhammers, and also worked overhead with 30-pound jackhammers. (Trial transcript I at 25.) She also used large grinders to grind brick out of walls. (*Id.*) Plaintiff operated "a lot of power tools," which involved "[a] lot of vibration." (*Id.*) As a mason, plaintiff performed "[a] lot of heavy lifting of weights," sometimes up and down stairs. (*Id.* at 25-26.) She lifted and carried bags of materials weighing up to 100 pounds. (*Id.* at 27.)

It takes no expertise to conclude that someone who is lifting and carrying heavy weights, including 100-pound bags of materials, is using her shoulders, whether she is balancing those bags on her shoulders, carrying them with her arms, or even using an assistive device. The shoulders are integral to the entire process. Nor is it likely that plaintiff could accomplish this task using only her left arm and shoulder. It is also obvious to anyone who has ever seen a jackhammer in use that the shoulders are critical to the operation. Common sense dictates that the shoulders would be absolutely essential when the jackhammer is being used for overhead work. Operating grinders and power tools would also require the use of the shoulders, as would use of other vibrating power tools. There is simply no way this work would possibly be accomplished without significant involvement of the shoulders.

"It is well known that factfinders may and should use their own common sense and everyday experience in evaluating evidence." *People v Simon*, 189 Mich App 565, 567–568; 473 NW2d 785 (1991). That being so, the magistrate could appropriately utilize common sense and experience to find that plaintiff's work involved the extensive use of her shoulders, and we affirm his findings in that regard as sufficiently supported by the requisite competent, material, and substantial evidence. MCL 418.861a(3).

C. Work Relationship of Right Shoulder Pathology.

Defendants' third argument begins with the premise that "[t]he Magistrate did not find the plaintiff's 2011, 2017 or 2018 right shoulder issues to be work-related, so the 2019 pathology cannot be work-related based upon Dr. Saad's testimony." (Defendants' brief at 12.) (The magistrate relied upon Dr. Saad's opinions as to causation.) However, the ensuing argument fails to recognize two important facts.

First, plaintiff did not claim injuries on those earlier dates but instead alleged a "last day of work" injury date that encompassed all work-related injuries and issues that preceded it. Section 301(1) of the Worker's Disability Compensation Act ("Act") states as follows: "Time of injury or date of injury as used in this act in the case of a disease or in the case of *an injury not attributable to a single event* is the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death." MCL 418.301(1); emphasis added. As a result, the magistrate was not required to find that plaintiff's prior shoulder problems

were or were not work-related, but instead was obliged to determine whether a last day of work injury was appropriate due to the *cumulative* effect of prior events. *Gibbs v Keebler Company,* 56 Mich App 690, 693-696; 224 NW2d 698 (1974).[3]

Second, even if that were not the case, an injury may be established if work activities aggravate or accelerate a pre-existing condition to the point of disability. The Act sets forth the following causation standard: "A personal injury under this act is compensable if work causes, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury." MCL 418.301(1).[4] This language does not require the demonstration of a *new* injury, but instead may be satisfied by a pathological change in a pre-existing condition. *Fahr v General Motors Corporation,* 478 Mich 922; 733 NW2d 22 (2007).

With this background in mind, we find that the magistrate's factual causation findings are supported by the requisite evidence. In that regard, the magistrate wrote as follows:

> Dr. Saad testified that he would say with a high degree of medical certainty that Tawnya's laboring job as described did cause and accelerate the shoulder pathology that he found in 2017 and 2020 again. He was asked what was medically distinguishable between 2017 and 2020 and he responded that there was significant worsening in Tawnya's arthritic change in her shoulder. He further testified that Tawnya is a right-handed dominant female in an extreme heavy laboring type position, so it is reasonable to believe that her injuries can be caused by repetitive and overuse of her shoulder. On cross-examination Dr. Saad further explained that the arthritis that he diagnosed was the early beginnings of rotator cuff arthropathy, this being a degenerative condition not related to age or function or degeneration but due to an injury to the rotator cuff that caused the shoulder to ride higher and develop arthritic changes. He reinforced his opinion by indicating that this type of arthritis is not age related but injury related. The injuries caused the humeral head to ride higher because there's no function of the rotator cuff depressing the humeral head, which leads to arthritic changes. These are very different changes. Rotator cuff arthropathy arthritis is very different from other arthritis. This arthropathy developed from a loss of function of her rotator cuff because of the injury to the cuff. Dr. Saad also testified that arthritis is not an age-related degenerative process in his opinion. He further explained that the literature has shown us and research studies have shown us why arthritis develops in patients like Tawnya. We know that definitively according to Dr. Saad. Dr. Saad then

[3] Although *Gibbs* had to do with determining the employer liable for benefits, that determination was based upon the establishment of the correct injury date.

[4] Defendant cites *Rakestraw v General Dynamics Land Systems, Incorporated,* 469 Mich 220; 666 NW2d 199 (2003), as the controlling standard. That case has essentially been codified by amendments passed in 2011. 2011 PA 266.

> explained that in a patient with a rotator cuff tear who developed arthritic changes with signs that Tawnya has, a decrease in acromiohumeral distance with development of arthritis after a rotator cuff tear, we can actually see the development of arthritis, a very specific arthritis that's called rotator cuff arthropathy. This is completely secondary to a rotator cuff tear in an ongoing rotator cuff tear where a humeral head rides higher.
>
> Dr. Saad was asked if Tawnya Ehlen's work activities as a brick mason contributed to the change in pathology, and he testified that he thought they did. He further testified that Tawnya was super young to develop this and you can actually see the development of in two years, she had a drastic change in the two years that we x-rayed her between the first surgery of February 20, 2018 and second surgery of January 14, 2020. So he testified that he believed that the type of job, the type of injuries, the repetitive injury to the shoulder, the recurrent trauma to the shoulder worsened that condition at a much faster rate than would be expected in anybody different than Tawnya.
>
> I find Dr. Saad's testimony totally convincing, and I believe it proves Tawnya Ehlen's case. (Magistrate's opinion at 41-42.)

This is an accurate description of Dr. Saad's testimony. The doctor testified to a "significant change" in plaintiff's condition between her 2018 surgery and when he saw her again in 2020. (Dr. Saad deposition at 23.) He further stated, "I would say with a high degree of medical certainty that Tawnya's laboring job as described, yes, did cause and accelerate the shoulder pathology that we found in 2017 and in 2020 again." (*Id.* at 27.) The magistrate adopted this testimony as the most credible, and we defer to that choice as reasonable. *Isaac v Masco Corporation*, 2004 Mich ACO #81 at 4. That testimony more than adequately supports the magistrate's finding that plaintiff's employment through her last day of work contributed to her ultimate right shoulder disability. MCL 418.861a(3).

The magistrate's legal analysis is also correct, incorporating both the "not attributable to a single event" analysis and the "medically distinguishable" standard from MCL 418.301(1):

> I further find that the date of September 5, 2019 is held to be the date of injury in this case as under Section 418.301 (1), "time of injury or date of injury as used in the Act in the case of a disease or in the case of an injury not attributable to a single event is the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability". I find that the constant strenuous activities performed as a laborer and a brick mason caused Tawnya Ehlen's right shoulder disability and more importantly her work caused, contributed to, and aggravated pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to her injury on September 5, 2019. (Magistrate's opinion at 44.)

As a result, we find that the magistrate's causation analysis is both factually supported and legally correct.

Defendants, however, assert that plaintiff "NEVER testified to her employment activities as being more substantial to other activities including the non-work-related 2017 treatment and 2018 surgery for the right shoulder." (Defendants' brief at 16.) This is not a correct statement of plaintiff's burden, and instead appears to be an invocation of the "significant manner" standard applicable to, *inter alia*, conditions of the aging process: "Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions and degenerative arthritis, are compensable if contributed to or aggravated or accelerated by the employment in a significant manner." MCL 418.301(2). However, the magistrate did not find that plaintiff's condition was one of the aging process, nor do defendants make that argument in their brief, and the "significant manner" standard therefore does not apply.

Additionally, defendants write:

> The plaintiff's need for her shoulder replacement was due to her 2011 and 2017-2018 non-work-related surgeries. If she never had those personal surgeries, she would have never needed the shoulder replacement. To hold an employer responsible for the expected consequences of a non-work related condition is not supported by the Act and benefits should not have been awarded to the plaintiff. (Defendants' brief at 17.)

This assertion conflicts with the following language from *Kostamo v Marquette Iron Mining Company*, 405 Mich 105, 119; 274 NW2d 411 (1979):

> While a heart attack may be inevitable in the sense that the victim will some day have a heart attack, such a statement begs the question whether job stress caused the attack to occur when it did or aggravated the attack and the extent of damage. Although workers' compensation is not payable for the ordinary diseases and infirmities of life, it is payable for work-related acceleration and aggravation of such diseases and infirmities.
>
> Doctors look for the etiological or medical cause; lawyers look for the legal cause. Generalities, such as "inevitable". which may express no more than the medical view of causation, do not assist a trier of fact or reviewing court in deciding whether there is legal causation such that compensation is payable.

While *Kostamo* involved a claim of heart-based disability, its reasoning is equally applicable to this case. The fact that disability may have been inevitable does not preclude a finding that said disability is work-related if work aggravated or accelerated the condition to cause it.

This magistrate's causation analysis is correct, and we therefore affirm it.

D. Disability and Job Search.

Defendants' fourth and final argument initially challenges the magistrate's determination that plaintiff was totally disabled. This issue is the result of some perhaps inartful language in the Act distinguishing between the two statuses, which it defines as follows:

> A disability is total if the employee is unable to earn in any job paying maximum wages in work suitable to the employee's qualifications and training. A disability is partial if the employee retains a wage earning capacity at a pay level less than his or her maximum wages in work suitable to his or her qualifications and training. The establishment of disability does not create a presumption of wage loss. (MCL 418.301(4)(a).)

"Total" disability is defined as an inability to earn maximum wages, which would seem to suggest that a claimant who could still earn wages, but not *maximum* wages, would be totally disabled. In fact, this was the magistrate's finding: "Thus, I find that since the employee Tawnya Ehlen is not capable of performing any of the jobs within her qualifications and training that pay the maximum wages, that she is totally disabled." (Magistrate's opinion at 44.)[5] However, because plaintiff was arguably capable of earning less than maximum wages post-injury given her employment with Door Dash, she might also fit the definition of "partial" disability as retaining the capacity to earn lesser wages.[6] Concerning this statutory language, commentators have written, "These definitions are less than helpful because they are not mutually exclusive. One can be unable to perform any maximum wage jobs (total disability) but still be able to perform lesser paying jobs (partial disability)."[7]

Accordingly, we must look to other portions of the Act concerning the same subject matter to determine plaintiff's actual status. Statutes relating to the same subject matter, or *in pari materia,*

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[5] Because defendant has not challenged the magistrate's finding that no work is available to plaintiff suitable to his qualifications and training paying the maximum wage, that finding is not before us for consideration and is instead final. MCL 418.861a(11); *Cane v Michigan Beverage Company*, 240 Mich App 76, 80-81; 610 NW2d 269 (2000).)

[6] We do not find that plaintiff's work with Door Dash established a post-injury wage-earning capacity, but instead simply point out that it *could* have, necessitating further consideration.

[7] Welch, Royal & MacDonald, *Worker's Compensation in Michigan* §7.9 <https://www.icle.org/modules/books/chapter.aspx?lib=workerscomp&book=2022558010&chapter=7> (accessed December 16, 2024).

must be read together. *Ross v Modern Mirror & Glass Company,* 268 Mich App 558, 563; 710 NW2d 59 (2005).

Section 301(7) provides for payment of full benefits to those claimants found to be totally disabled. It makes no provision for a reduction for an injured employee who retains a wage earning capacity or who is actually earning wages post-injury. As a result, this provision is inconsistent with the magistrate's order, because he *did* grant defendants credit for post-injury wages plaintiff might earn. (Magistrate's order.)

This leads us to MCL 418.301(8), which indicates that the rate of a partially disabled individual is to be computed taking into account his or her post-injury wage earning capacity:

> If a personal injury arising out of the course of employment causes partial 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 difference between the injured employee's after-tax average weekly wage before the personal injury and the employee's wage earning capacity after the personal injury, but not more than the maximum weekly rate determined under section 355.

This language clearly mandates that a post-injury wage earning capacity be accounted for in the benefit computation, and therefore further delineates the distinction between totally and partially disabled claimants. If a claimant possesses a post-injury wage earning capacity, they are partially disabled whether or not they can perform any jobs paying their maximum wages.

Because he deemed plaintiff to be totally disabled, the magistrate did not consider the possibility of a post-injury wage earning capacity and the effect any such capacity might have on her entitlement to benefits. The record contains evidence from two vocational counselors, James Fuller and Michael Rosko, who both opined that plaintiff might be able to earn wages despite her injury (albeit not *maximum* wages). (James Fuller deposition at 23, 29; Michael Rosko deposition at 14-15.) A remand on the issue is therefore necessary.

The magistrate's opinion is a part of the record, MCL 418.847(2), and a remand is authorized when the record is not complete: "The commission or a panel of the commission may remand a matter to a worker's compensation 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). See also *Garner v General Motors Company*, 2019 Mich ACO #32 at 5; *Razo v G M & Sons, Incorporated*, 2020 Mich ACO #8 at 12. Finding such insufficiency in this case, we remand this case to the Board of Magistrates to complete the disability analysis and to issue a supplemental opinion.

On remand, the assigned magistrate must determine whether plaintiff's disability is total or partial, and, if partial, whether she has a post-injury wage earning capacity. If plaintiff is found

to have such a capacity, the magistrate must decide what that capacity is. The magistrate must render findings as to whether plaintiff sought work that was "reasonably available to" her, and whether she has made good faith job searches. MCL 418.301(4)(b); *Lavrack v General Motors Company,* 2021 Mich ACO #8 at 4-5. The magistrate must then calculate the appropriate weekly benefit rate, considering the provisions of MCL 418.301(7) and (8), MCL 418.301(4)(c), and MCL 418.371(1) which describe formulas for calculating weekly wage loss benefits. We voice no preference for any particular result or conclusion. We retain jurisdiction.[8]

Conclusion

For the reasons noted above, the magistrate's order is affirmed in part and modified in part, and the matter is remanded to the Board of Magistrates to complete the analysis in accordance with the attached opinion. The record may not be re-opened, the parties having had an opportunity to present proofs on all extant issues during the original hearing.

Commissioner McMillan concurs.

Daryl Royal Chairperson

Duncan A. McMillan Commissioner

[8] As this is not a final determination of the appeal and because we retain jurisdiction, MCL 418.862(1) and (2) remain applicable in this matter and defendants must continue to pay "70% benefits" and reasonable and necessary medical expenses previously ordered by the magistrate during the remand." *Walton v Nexteer Automotive Corporation,* 2023 Mich ACO #4 at 13.

STATE OF MICHIGAN
WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

TAWNYA EHLEN,
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V DOCKET #23-0006

RAM CONSTRUCTION SERVICES OF MICHIGAN AND
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This matter came before the Workers' Disability Compensation Appeals Commission ("WDCAC")[1] on a timely claim for review from an order of Magistrate Lenny Segel mailed February 21, 2023, filed by defendants Ram Construction Services of Michigan and Travelers Indemnity Company of Connecticut. That order granted plaintiff Tawnya Ehlen an open award of benefits. The WDCAC has considered the record and counsels' briefs and concludes that the magistrate's order should be affirmed in part and reversed in part, and the matter should be remanded to the Board of Magistrates to complete the disability analysis in accordance with the attached opinion. Therefore,

IT IS ORDERED that Magistrate Segel's order, mailed February 21, 2023, is AFFIRMED in part and this matter is REMANDED to the Board of Magistrates to complete the required disability analysis in accordance with the attached opinion. On remand, no further proofs shall be permitted, but the magistrate may hear the parties and receive further briefs and arguments. 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 following remand.

We retain jurisdiction.[2]

Daryl Royal Chairperson

Duncan A. McMillan Commissioner

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[1] This matter is being decided by a two-member panel pursuant to Paragraph 4(b) of Executive Order 2019-13, which states that "[t]he Workers' Disability Compensation Appeals Commission shall act by the vote of two or more members."

[2] As this is not a final determination of the appeal and because we retain jurisdiction, MCL 418.862(1) and (2) remain applicable in this matter and defendants must continue to pay "70% benefits and reasonable and necessary medical expenses previously ordered by the magistrate during the remand." *Walton v Nexteer Automotive Corporation,* 2023 Mich ACO #4 at 13.