2025 ACO #9

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

INTRODUCTION

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' specific argument that after Magistrate Jane S. Colombo, in an opinion and order mailed April 11, 2018, found plaintiff, Ramon Razo ("plaintiff") to be only partially disabled after January 6, 2017, plaintiff's claim for wage loss benefits during months of December through March -- the purported

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[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.

"off season" for the work he performed as a cement worker for G M -- should have been denied based on the second sentence of MCL 418.301(4)(c). That sentence provides: "(t)he employee shall establish a connection between the disability and reduced wages in establishing the wage loss."

STANDARD OF REVIEW

The Worker's Disability Compensation Act ("Act") requires the WDCAC, as it did the Michigan Compensation Appellate Commission ("MCAC"), to evaluate both the magistrate's "specific findings of fact or conclusions of law that the parties have requested be reviewed." MCL 418.861a(11).

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 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*, 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).

In contrast to the deference owed to the magistrate's supported findings of fact, questions of law involved in a magistrate's opinion are reviewed under a de novo standard. *Abbey v Campbell, Wyant & Cannon Foundry (On Remand)*, 194 Mich App 341; 486 NW2d 131 (1992). A prior MCAC panel wrote: "The standard of review to be utilized by the Commission in reviewing the magistrate's statements of law and its application to the facts is de novo. *Abbey v Campbell, Wyant & Cannon Foundry (On Remand*), 194 Mich App 341; 486 NW2d 131 (1992)."[2]

[2] *Parra v State of Michigan*, 2017 Mich ACO #23 at 3, citing *Abbey*.

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). In *Abbey*, 194 Mich App at 347, the Michigan Court of Appeals wrote . . .

> . . . in interpreting statutes, the primary rule is to determine and effectuate the Legislature's intent. To do this, the statute should be given a reasonable construction, considering the purpose of the statute and the object to be accomplished. [*Nelligan v Gibson Insulation Company*, 193 Mich App 274,] at 280 [; 483 NW2d 460 (1992).] An act should be read in its entirety, so that the meaning given to one section is harmonious with that given to other sections and to avoid absurd consequences. *Id.* Because of the WCAC's expertise, its decision is given due deference.

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).

PROCEDURAL HISTORY AND ISSUE PRESENTED

The *prio*r procedural, factual and analysis history of this case is *extensively* described in *Razo*, 2020 Mich ACO #8, and in *Razo v GM & Sons*, *Incorporated*, 2022 Mich ACO #13. We refer the reader to those opinions and include, here, a synopsis of the history and record for this opinion and order.

The 2020 opinion, *Razo*, 2020 Mich ACO #8, described the procedural history leading to the first appeal to the WDCAC:

> Plaintiff, Ramon Razo, filed an Application for Mediation or Hearing- Form 104A, seeking benefits under the Michigan Worker's Disability Compensation Act (Act), MCL 418.101 *et. seq.*, from his employer, defendant G M & Sons, Incorporated. Plaintiff alleged a specific event injury and cumulative trauma arising from pouring cement sidewalks and performing activities associated with installing cement over many years. He alleged this activity caused, aggravated, and/or accelerated disabling spinal pathology. He alleged low back and neck pain impaired his maximum wage-earning capacity. Blue Cross & Blue Shield of Michigan intervened to recoup benefits it paid for treatment of plaintiff's alleged work injury.
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> In an opinion and order, mailed April 11, 2018, Magistrate Jane S. Colombo found plaintiff sustained personal injuries, to his low back and affecting his left lower extremity, that arose out of and in the course of his employment on November 10, 2015, and November 18, 2015. The magistrate found plaintiff did not prove a

> work-related neck injury. She ordered defendants to pay wage loss benefits of $652.56 per week from November 19, 2015, and until further order. She also ordered defendants to pay for medical treatment expenses, per MCL 418.315, for the work injury. (*Razo*, 2020 Mich ACO #8 at 1-2, footnotes omitted; see *Razo*, 2022 Mich ACO #13 at 2.)

Defendants filed a Claim for Review and appellants' brief with the MCAC.[3]

Defendants' brief to the MCAC asserted a single issue: "Does The Second Sentence Of MCL 418.301(4)(c) Apply?" Defendants asserted this sentence does apply and the magistrate erred by failing to apply it. All of the sentences in MCL 418.301(4)(c), with our emphasis of the second sentence included, provide as follows:

> (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.

MCL 418.301(7), describing wage replacement benefits for total disability, provides:

> (7) 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.

Defendants argued that plaintiff failed to establish a necessary[4] *connection* between his (now undisputed) work injury induced lower back and left leg disability and *wage loss* during four

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

[4] Although *how* plaintiff demonstrates "wage loss" is a matter of discretion, that plaintiff *must* in some way demonstrate "wage loss" is mandatory: wage loss benefits are only paid if the "personal injury … causes … wage loss." This is set forth in MCL 418. 301(7) (total disability) or MCL 416.301(8) (partial disability) with the ellipsis here also including other mandatory

months, December through March - the "off season" for pouring concrete (out of doors in Michigan) of each year after Magistrate Colombo found plaintiff was no longer *totally* disabled, that is, after January 6, 2017. Plaintiff's timely filed appellee's brief argued that plaintiff satisfied MCL 418.301(4) and that defendants failed to preserve a challenge to the magistrate's analysis. Plaintiff did not file an appeal or cross appeal. (*Razo*, 2020 Mich ACO #8 at 2.) In an opinion and order issued by the WDCAC on March 18, 2020, the WDCAC affirmed Magistrate Colombo's opinion and order in part, reversed it in part, and remanded it in part. The WDCAC did not retain jurisdiction during this first remand. (*Id.*)

In *Razo,* 2020 Mich ACO #8 at 7, and *Razo*, 2022 Mich ACO #13 at 2-3, the WDCAC also noted issues not challenged and therefore not preserved for our review in defendants' appeal. 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*, 240 Mich App 76, 80-81. In *Razo*, 2022 Mich ACO #13 at 2-3, the WDCAC wrote:

> 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 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).

Plaintiff did not appeal the magistrate's finding that plaintiff did not prove his neck condition was related to his work nor the magistrate's finding that plaintiff was not totally disabled after January 6, 2017. MCL 418.861a(11); *Cane*, 240 Mich App 76, 80-81.

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provisions not relevant here. The mandatory aspect is as written in MCL 48.301(4)(c) where it is established that "[t]he employee *shall* establish a connection between the disability and reduced wages in establishing the wage loss." (Emphasis added.) "Shall" represents a legislative mandate. *McAvoy v H B Sherman Company*, 401 Mich 419, 446; 258 NW2d 14 (1977) (The word "shall clearly means that (something) is mandatory or imperative.").

In *Razo*, 2020 Mich ACO #8 at 7, and in *Razo,* 2022 Mich ACO #13 at 3-4, the WDCAC described the issue defendants did raise and the course of that issue on remand before Magistrate Colombo, and on further remand, before Magistrate David Grunewald:

> 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.
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> 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.

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[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).

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 . . .
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> > . . . 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 full Workers' Disability Compensation benefits on an ongoing basis until further order of the court. [Footnote omitted.]
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> 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. (*Razo,* 2022 Mich ACO #13 at 2-4.)

In a footnote, *id.* at 4, n 5, the WDCAC recognized that Magistrate Grunewald's opinion on remand at 1-2, noted Magistrate Colombo found that until plaintiff received "appropriate medical treatment," after his injury date "plaintiff was totally unable to work at his usual work, and . . . was unable to work at any jobs." Magistrate Grunewald also noted 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." (*Id.* at 4, n 5.) Defendants filed a claim for review of Magistrate Grunewald's opinion and order.

In an opinion and order mailed September 9, 2022, *Razo v GM & Sons*, *Incorporated*, 2022 Mich ACO #13, the WDCAC affirmed in part, reversed in part, and again remanded the matter to the Board of Magistrates to make findings and conclusions necessary to complete the original remand order. That order instructed the Board of Magistrates to assess whether plaintiff met his burden of "establish(ing) a connection between the [work related] disability and reduced wages," as defendants argued was required by the second sentence of MCL 418.301(4)(c).

The WDCAC did not disturb prior Board of Magistrate findings that plaintiff proved he suffered work-related injuries to his back and disability arising from same. The WDCAC did not disturb that part of the Board of Magistrates' findings that plaintiff was entitled to receive work-injury related medical benefits and weekly wage loss benefits the magistrate awarded between November 19, 2015, and January 6, 2017, nor did the WDCAC disturb the award of wage loss benefits awarded for the months of April through November of each year after January 6, 2017.

The WDCAC found and again held that the first two magistrates, on remand, failed to *address* defendants' specific argument. In the 2022 order the WDCAC instructed the magistrate,

on remand, to enter an opinion, but not a new order, addressing "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." (*Id.* at 22.) The WDCAC retained jurisdiction during this second remand. (*Id*. at 21-22, and accompanying Order.)

On remand, in an opinion mailed April 30, 2024, Magistrate William W. Watkinson, Jr. found that plaintiff failed to meet his burden of establishing "a connection" between his work related "disability and reduced wages" during the months of December through March after January 6, 2017. The matter now returns to the WDCAC on retained jurisdiction.

BACKGROUND FACTS

The factual summaries the WDCAC presented in its 2022 opinion, *Razo*, 2022 Mich ACO #13, and in *Razo*, 2020 Mich ACO #8, remain appropriate for this opinion following entry of Magistrate Watkinson's 2024 opinion on remand, and are adopted herein. We provide the following summary and analysis to explain the rationale for this third WDCAC opinion and order.

Before plaintiff began working for G M he worked in a variety of jobs, including work on farm fields, in factories (assembling products), in construction, and in restaurants. Plaintiff's trial exhibit 7, WC-Form 105, lists jobs plaintiff did over his lifetime in Mexico and in the United States. (Trial transcript at 46-48.)

Plaintiff had injuries before he worked for G M. He testified that in 1994 he injured his hands; he received medical treatment and workers' disability compensation benefits. (*Id*. at 84-86.) He testified that on May 15, 2006, he felt pain in his leg, for a couple of days; he testified the pain resolved and he returned to work. (*Id*. at 56.) Plaintiff's trial exhibit 1, records of Family Care Medical Center ("Family Care"), indicate that, on May 15, 2006, plaintiff reported he woke up the prior morning feeling pain in his left low back and left leg, along with occasional numbness and tightness. Plaintiff testified he saw Dr. Sahir Cittan. (*Id*. at 87.)[5]

G M hired plaintiff in June of 2012. (*Id*. at 105; see trial exhibit C.) Plaintiff testified that he had no language problems while working for G M. (Trial transcript at 86-87.) Plaintiff's work for G M involved pouring concrete. He used a "come-along" to pull and push concrete on the ground. (*Id*. at 40-43.) He sometimes used a shovel to push concrete down a chute if the concrete stuck to the chute. The heaviest weights he lifted were forms used to control where the concrete rests as it dries. He testified that some forms weighed close to 100 pounds. Other forms weighed 30 to 40 pounds. (*Id*. at 41-43.) During the seasonal period for pouring cement, April through

[5] Plaintiff testified that he has been seeing Dr. Cittan for more than 10 years and has no language problems with Dr. Cittan. Plaintiff added that a nurse in Dr. Cittan's office helps if he does not understand something. (Trial transcript at 86-87.)

November,[6] plaintiff worked at least 8 hours a day, mostly 10 hours and sometimes 10 to 15 hours a day. (*Id*. at 43-44, 105-106.) He earned $25.69 an hour. (*Id*. at 39.)

Plaintiff testified that during the "off-season," when concrete could not be poured outdoors, December through March, he went to Michigan Works! and collected unemployment benefits. (*Id*. at 43-44, 106.) He testified as follows:

> Q November. Now, when the season ends, what would you typically do for -- what would you do when the -- when the -- when that cement season ended, the concrete season ended?
>
> A You go to Michigan Works for unemployment.
>
> Q For unemployment?
>
> A Yeah.
>
> Q Okay. Now, would you ever look for work during the off season from cement as a member of the Laborers' Union?
>
> A No.
>
> Q No. Would you --
>
> A Looking for work there at Michigan Works. They never called me.
>
> Q They never called you?
>
> A No.
>
> Q So when you -- when you filed -- you filed for --
>
> A When I filed my unemployment, yes.
>
> Q And you're required to do that, correct?

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[6] Plaintiff's 2012 paychecks were dated from June of 2012 through November 23. His 2013 paychecks were dated from May 3 through December 6. His 2014 paychecks were dated from May through December 5. His 2015 paychecks were dated from May 1 through November 27. (*Id*. at 105-106; defendants' trial exhibit C.)

A Yes. We got [inaudible]

Q Okay. Did you ever take any jobs during the off seasons?

A No.

Q No?

A A couple of times -- a couple of times I -- like two days plowing snow, you know, one season. (*Id*. at 44-45; see *id*. at 106.)

Plaintiff testified that he made enough money working for G M during the eight-month concrete pouring season, along with unemployment benefits during the "off season", to support himself so that he did not have to work during the "off season" months. Plaintiff did not remember if or where he may have looked for work or filled out any job applications during the "off season" months in the four years (2012 to 2015) he worked for G M. (*Id*. at 107-108.) When asked if he looked for work during these four "off season" months he responded that he would have to work "if they" (Michigan Works!) found a job for him, but he was not actively going places to look for a job or submitting job applications during those months. (*Id*. at 108-109.) He testified that he maintained his union status during the "off-season" months. (*Id*. at 45.)

Plaintiff testified that he stopped working in November of 2015 because of pain in his back. He testified that on November 10, 2015, he was pushing concrete when he felt a crack and pain in his back. (*Id*. at 49, 51.) He continued working that day and for two more days. He testified that he reported he felt this pain to his partners and to his boss, Augusto Alvarez. (*Id*. at 51-53.)

On November 19, 2015, he went to Family Care. He testified that Dr. Cittan examined him and gave him pain pills. (*Id*. at 54-55, 87-90.) Family Care records, trial exhibit 1, indicate he reported low back and left sided hip pain radiating down his left leg for 3 days without a history of incurring an injury. This record stated plaintiff should be off work for one week. Plaintiff disagreed with Dr. Cittan's chart that recorded plaintiff reported he did not have an injury; plaintiff testified that he reported he heard a crack in his back while he was working.[7] Plaintiff testified that after he saw Dr. Cittan, he gave a paper (restriction slip) to G M's office; the next week G M, by Ricky Gallegos, sent him to G M's medical clinic, Concentra. (*Id*. at 57-58, 88-90.) Plaintiff testified that he never worked again (*id*. at 90) although G M offered him work driving a pickup truck. He testified he tried to do this job, but because of back pain he went home. (*Id*. at 59, 90.)

[7] Magistrate Colombo found the doctor's note that "plaintiff denied an injury is not persuasive given the consistent description of the onset of symptoms, and plaintiff's poor command of English language." (Magistrate Colombo's April 11, 2018, opinion at 20.)

Between November 25, 2015, and January 15, 2016, plaintiff continued treating at Concentra. (*Id*. at 59; plaintiff's trial exhibit 2.) Plaintiff testified that someone at Concentra gave him pain medication, issued restrictions and arranged for him to receive physical therapy (which he did receive for five sessions).[8] (*Id*. at 57-59; plaintiff's trial exhibits 1 and 2.) Plaintiff testified he was told to avoid pulling or pushing more than 10 pounds and to avoid bending over too much. (Trial transcript at 58, 90.) Concentra medical records, trial exhibit 2, report he can work, but should avoid lifting, pushing or pulling weights of more than 10 pounds and that he "(m)ay bend occasionally." Plaintiff testified he received a pain medication injection at Beaumont Oakwood Hospital emergency room, which trial exhibit 3 indicates occurred on November 28, 2015, and from Dr. Cittan. (Trial transcript at 60-61; trial exhibit 3.)

A doctor at Concentra ordered an MRI scan, but defendants refused to pay for it. Later, on December 15, 2015, plaintiff obtained an MRI scan that Blue Cross Blue Shield paid for; the scan report stated plaintiff had an "extruded disc herniation" at the L5-S1 level that had contact with the "left S1 nerve root." (Trial transcript at 60; trial exhibit 2.)

In April of 2016, plaintiff saw Lucia Zamorano, M.D. Plaintiff testified that Dr. Zamorano ordered an MRI and told him he needed surgery. Plaintiff testified he did not want surgery at that time; he testified that his low back pain was present, but he was feeling better and his leg pain had resolved. (Trial transcript at 63-65, 91-95.) He testified that his pain later (by June) worsened (*id*. at 63-64, 93-94) and he then decided he wanted surgery which Dr. Zamorano performed in July of 2016. After Dr. Zamorano removed his incision staples he did not see her again. He testified that his Blue Cross Blue Shield policy was ending, he then received Medicaid, and Dr. Zamorano did not accept Medicaid. He testified that he did not receive further treatment, although he is still taking medications. (*Id*. at 63-65, 95.) He testified that since his surgery he "didn't feel good to go back" to work. (*Id*. at 67.)

However, plaintiff testified he looked for work in the year 2017. (*Id*. at 68-70, 100-101.) He testified that he applied for work at places such as Kroger, Meijer and Walmart stores, parking lots and factories where he thought he might be able to try to drive something. He testified that some places gave him applications and others told him they have no jobs available. (*Id*. at 68.) He testified that he went to the offices of prospective employers (*id*. at 104) and asked if the prospective employer had any positions available for him, including "like driving a hi-lo." He testified he did not think he could be a good stocker but applied for such a position anyway. (*Id*. at 99-100.) Plaintiff introduced his five-page job log as trial exhibit 8. (*Id*. at 115.) He testified someone (unnamed) at each of the locations where he looked for work filled out the information in this log because plaintiff does not write in English. (*Id*. at 67-68, 71-72, 97-98.) He testified that he told each prospective employer that he needed them to fill out his log information to support

[8] A December 9, 2015, record of Family Care states he continued to have left leg pain and was receiving physical therapy. (Plaintiff's trial exhibit 1.)

his workers' disability compensation claim and presented each prospective employer with Dr. Robert Krasnick's "paperwork" indicating he required restrictions. (*Id*. at 98, 100.) Defendants' attorney pointed out the logs do not contain any dates indicating when plaintiff approached any prospective employer. (*Id*. at 98-99.) The job logs described positions such as cashiering and laborer jobs, while others do not describe a job position. (*Id*. at 99.)

Plaintiff showed his job logs to Mr. Guy A. Hostetler, defendants' vocational expert witness, when plaintiff met with Mr. Hostetler (*id*. at 99) on July 27, 2017. (Guy Hostetler deposition at 8.) Plaintiff testified that one page listed jobs he looked for after he met with Mr. Hostetler. The last location was a parking lot, "U.S. Park." (Trial transcript at 101-103; see trial exhibit 8.)

At the trial held on January 22, 2018, plaintiff testified that he has not looked for work in the year 2018. (*Id*. at 70.) He testified that he last looked for work "like two months" before the January hearing. He did not receive any follow-up written responses from any of the prospective employers he contacted. After making some applications he saw someone throwing it away even before he left the premises. (*Id*. at 103-104.) He also testified that he did not follow up with any of the prospective employers to find out what happened with his applications. (*Id*. at 109-110.)[9]

Plaintiff testified that he did not think there was much he could do at the time of trial. He testified that his comfort level for lifting things is 10 pounds. He thought he could walk about a block and a half. He testified that if he exceeds this level, he feels more pain and has to stop before

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[9] Magistrate Colombo's 2018 opinion described plaintiff's post-injury job search efforts as follows:

> 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 employers. One of the jobs was stocker, which he testified he could not do, but applied for it anyway.
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> The job log, five pages of hand-written information without page numbers or dates was admitted as Exhibit #9. [correction: actually exhibit 8] One page was completed after the vocational exam, 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.)

resuming walking. He testified he feels more pain in his legs and back while sitting in a chair and, after ten or fifteen minutes, likes to change positions. He thought he could stand comfortably for about nine minutes. (*Id*. at 72-74.) He testified that he has been using a cane (non-prescribed) since he had surgery when he travels outside of his house. (*Id*. at 74.) Plaintiff testified that he cannot do any of the jobs he used to do. He testified he feels pain even when he does little things at home, such as changing oil in his car or cooking on a grill. He testified that he does not feel bad doing tasks such as sweeping in his garage. (*Id*. at 48-49, 75-76.) He testified that the pain he feels is in his back, that it radiates down his left leg, and he feels numbness or tingling down his leg to his toes. (*Id*. at 62-63.) He testified he feels pain if he tries to walk normally up his church stairs (about 8 steps). He testified he can drive a vehicle; he drove from his home in Lincoln Park to the trial location. (*Id*. at 77, 110.) He testified that he feels pain when he drives, but the pain does not force him to stop driving; he shifts his sitting positions about every 10 minutes. He testified he changes positions all day and did so while testifying at trial. (*Id*. at 111-113.)

Plaintiff testified he also feels pain in his neck that began several months after he felt back pain. He testified he has not received treatment for this pain. (*Id*. at 65-67.)

Plaintiff testified that, on average, he takes about five Norco pills a month and Tylenol for pain in his back and neck. (*Id*. at 110-111.)

Plaintiff testified that he was not working because he did not "feel good" (*id*. at 77-78) and did not think any jobs existed that he could do. (*Id*. at 81.) He testified that because he cannot bend or do much, he could not do the work he did for G M or the jobs listed in the Form 105, trial exhibit 7, such as farm labor, busboy, or solar panel installer; he testified these jobs required an ability to physically exert at a 100 percent level. (*Id*. at 78.) He testified that, to receive cash assistance and Medicaid, he is required to spend one hour per week at the Michigan Works! office in Lincoln Park where he sits in a chair and hands out forms to people. (*Id*. at 79-81.)

Plaintiff called, as his witness, Polycarpio Llanas (*id*. at 115-118), an employee of G M who worked as a "cementer" or "finisher." Mr. Llanas worked on the same crew as plaintiff. After plaintiff set the cement Mr. Llamas followed behind and finished it. (*Id*. at 119-121, 124.) He testified that around November 10, 2015, he saw plaintiff lift a ramp (referred to as a curb) and pull cement with the "come-along" when plaintiff made a motion with his hand and a facial expression of pain. Mr. Llamas testified that plaintiff continued working that day and maybe four or five more days, but not in his usual manner. He recalled plaintiff complained and told their boss, Augusto, that plaintiff hurt himself. (*Id*. at 121-125.)

Defendants called Ricky Gallegos, the executive superintendent for G M, to testify. (*Id*. at 125-127.) Mr. Gallegos testified that he was not plaintiff's direct supervisor, but if something came up, plaintiff's foreman, Augusto, would talk to Mr. Gallegos. Mr. Gallegos testified that when plaintiff presented him with a restriction slip they discussed a pickup truck driving job with plaintiff's same rate of pay. Mr. Gallegos testified that this job was never revoked and this job offer

remained in effect; but he had no personal knowledge that this job offer was reiterated to plaintiff after plaintiff submitted his work restriction slip to G M's office or whether plaintiff tried to drive a truck after his injury. (*Id*. at 127-131.)

Deposition Testimony of Lucia Zamorano, M.D.

Lucia Zamorano, M.D., certified in neurological surgery by the American Board of Neurological and Orthopedic Surgery, performs back surgeries and is a clinical professor at Oakland University. (Dr. Zamorano deposition exhibit 1 at 20; Dr. Zamorano deposition at 5-9.) Dr. Zamorano began treating plaintiff on April 14, 2016, performed surgery on plaintiff's low back on July 13, 2016, and last saw plaintiff on July 7, 2017. (Dr. Zamorano deposition exhibit 2, operative report; Dr. Zamorano deposition at 10-11, 17-22, 28, 32, 38, 40.)

When Dr. Zamorano first saw plaintiff on April 14, 2016, he complained of low back pain radiating to his left leg and neck pain. Plaintiff reported that while he was pouring cement at work on November 10, 2015, he felt a "pop" in his spine followed by pain in his lower back and left leg. He reported he felt neck pain two months after he stopped working. (*Id*. at 11-12, 34, 38.) Dr. Zamorano testified that plaintiff's leg pain and numbness complaints were consistent with the S1 dermatome and some components of an L5 dermatome. She reviewed a report of plaintiff's December 15, 2015, MRI and ordered another MRI performed on April 14, 2016. She testified these MRI's indicated plaintiff had an extruded disc at L5-S1, more to the left side, and compression on the S1 and L5 nerve roots. She ordered an EMG, performed May 10, 2016, that was positive for a left S1 radiculopathy. (*Id*. at 13-15.) She opined plaintiff also had degenerative changes at L4-L5 and L5-S1 and a small disc (presumably extrusion) at L4-L5. She testified that the MRI she ordered also showed plaintiff had an extruded disc herniation in his neck at C3-C4 that occludes plaintiff's subarachnoid space without cord compression. (*Id*. at 14-16.)

Dr. Zamorano saw plaintiff again on May 13, 2016; his condition had no significant changes. They discussed surgery to remove disc herniations at the L5-S1 level and in his neck. (*Id*. at 15-17.) Dr. Zamorano saw plaintiff again on July 1, 2016, and July 7, 2016. She recommended low back and neck surgery; plaintiff decided to have low back surgery. (*Id*. at 17-18.)

On July 13, 2016, Dr. Zamorano performed surgery on plaintiff's low back; she performed, a partial hemilaminectomy on the left side of L5-S1, a partial and medial facetectomy, and an L5-S1 discectomy (removal of extruded disc components) to decompress and free the S1 nerve root. Dr. Zamorano testified that she also performed a posterolateral fusion to stabilize the surgical area by replacing bone tissue. She did not believe insertion of instrumentation was necessary. (*Id*. at 17-22, 28, 38, 40; Dr. Zamorano deposition exhibit 2, operative report.)

Dr. Zamorano saw plaintiff on September 28, 2016; his back pain had improved. He still had numbness in his left leg and foot and he reported pain in his neck and shoulder. She did not release plaintiff to perform the type of work he had been doing. (Dr. Zamorano deposition at 25.)

Dr. Zamorano last saw plaintiff on July 7, 2017. Plaintiff reported improvement in his low back pain, but he still felt left leg numbness. Plaintiff had some spasm, decreased range of motion and a positive straight leg raising test at 20 degrees on the left side, but his sensation and reflexes were normal. He also had tenderness and decreased motion in his neck. (*Id*. at 25-26, 40-41.)

In response to a hypothetical question summarizing plaintiff's history of work, pain complaints, and his MRI scan, Dr. Zamorano opined plaintiff cannot return to the type of work he had been doing. She related his pain and physical findings to "that incident" at work in November. (*Id*. at 28-31.) She opined the fusion she performed was due in part to degenerative changes and in part to his disc extrusion, which she related to plaintiff's work activity. (*Id*. at 41-42.)

Deposition Testimony of Robert Krasnick, M.D.

Robert Krasnick, M.D., evaluated plaintiff once, on January 6, 2017, at the request of plaintiff's attorney. (Dr. Krasnick deposition at 5-6, 35-38; Dr. Krasnick deposition exhibit 2.) Dr. Krasnick is Board Certified in Physical Medicine and Rehabilitation, with a subspecialty certification in pain medicine. (Dr. Krasnick deposition at 4-5, 39; Dr. Krasnick deposition exhibit 1.) He treats people who experience pain after surgery, but he does not perform surgeries. (Dr. Krasnick deposition at 6.)

Plaintiff reported he was injured while working as a laborer for G M; he laid concrete for sidewalks and driveways. Plaintiff reported that on November 10, 2015, he was using a cement rake to push and pull cement and bending over when he felt a pop or crack in his back and pain in the left side of his back and buttock. He reported that he worked that day and the next three or four days but felt increasing pain. He reported that the next week he felt severe pain in the left side of his back and buttock and in his left leg. (*Id*. at 7-9, 18.) He reported that his primary care doctor diagnosed a pinched nerve. G M sent him to Concentra where he received physical therapy. Plaintiff reported that an MRI he had in December 2015 revealed a disc herniation. His back pain gradually calmed down, but he began to feel neck pain. He reported that Dr. Zamorano ordered an MRI and recommended back and neck surgery. He reported that in July 2016, Dr. Zamorano performed a lumbar laminectomy and removed an extruded part of the L5-S1 disc to decompress the S1 nerve root. He reported that his back and leg felt better post-surgery. (*Id*. at 9-11, 23-25; Dr. Krasnick deposition exhibit 7, Dr. Zamorano's July 13, 2016, operative report.) Plaintiff told Dr. Krasnick that after his back surgery he felt 50% better, with less pain in his leg and he did not have intractable back pain. Plaintiff reported he still felt intermittent pain in his left leg and numbness and tingling in his left foot. (Dr. Krasnick deposition at 19.) Reports of post-surgery MRI and x-rays of plaintiff's lumbar spine were attached as Dr. Krasnick deposition exhibit #8.

At his January 6, 2017, examination, plaintiff reported pain in his neck radiating into his shoulders, upper back and arms. He reported his low back hurts with standing and walking while sitting offers relief from this pain. (*Id*. at 10, 17, 26.) He also reported intermittent pain in his left

leg and numbness and tingling in his left foot. (*Id*. at 10-11.) Dr. Krasnick reviewed reports of plaintiff's December 15, 2015, back MRI (Dr. Krasnick deposition exhibit 3) describing an extruded disc herniation at L5-S1 contacting the left S1 nerve root. (Dr. Krasnick deposition at 11, 20-22.) In his written report, Dr. Krasnick wrote that x-rays of the lumbar spine, according to the radiologist, showed plaintiff had a straightening of the lumbar lordosis, "degenerative disc disease with facet degenerative changes and spondylosis" (*id*. at 11, 26-27) and an April 14, 2016, MRI revealed a left sided herniated disc at L5-S1 pressing against the left S1 nerve root, a central herniated disc at L4-5, lumbar degenerative disc disease, spondylosis and facet degenerative changes. (*Id*. at 12, 21-22; Dr. Krasnick deposition exhibit 4.) On exam, plaintiff had reduced range of motion when bending forward and backward and reported tenderness at the lumbosacral junction. Plaintiff presented an antalgic (asymmetric) gait when walking on his left leg, an absent left ankle reflex and mild atrophy of his left calf. (Dr. Krasnick deposition at 14-15, 27-28.) Dr. Krasnick agreed lumbar endplate sclerotic changes revealed in plaintiff's April 14, 2016, x-rays more than likely existed before November 2015. (*Id*. at 38.) Dr. Krasnick opined that plaintiff had abnormalities in the S1 nerve root distribution of his left foot, a disc herniation at C3-C4, restricted side-to-side movement and reported pain and spasm in his neck, radiating into his upper back and shoulders. (*Id*. at 12-15, 23-24, 26, 28; Dr. Krasnick deposition exhibits 5, 6, 7 and 8.) Dr. Krasnick reported his following impressions:

1.) Injury to plaintiff's low back and neck while working with concrete on November 10, 2015;

2.) Lumbar disc herniation resulting in a lumbar laminectomy;

3.) Residual back and left leg pain secondary to a lumbar disc herniation;

4.) Cervical disc herniation with neck pain and upper extremity symptoms. (*Id*. at 15, 28-29.)

Dr. Krasnick opined that plaintiff's lumbar and cervical injuries resulted from his work injury on November 10, 2015. (*Id*. at 16, 30-31.)

Dr. Krasnick recommended physical therapy to strengthen plaintiff's back and leg, and a TENS unit. (*Id*. at 16-17, 29-30.) Dr. Krasnick opined plaintiff is not able to return to the job he had at G M, or to work as a laborer. However, Dr. Krasnick opined plaintiff could, as of his January 6, 2017, examination, perform a sedentary job with a sit-to-stand option, but he should refrain from bending, lifting, twisting, overhead work, and lifting over 5 to 10 pounds. (*Id*. at 17, 30, 40.) He opined plaintiff could not walk more than 20 to 30 minutes at a time. (*Id*. at 40.)

In response to a hypothetical question summarizing plaintiff's work at G M, laying cement in November 2015, when he felt the onset of his back pain, and his MRI scan, (*id*. at 30-34) Dr. Krasnick related plaintiff's pain and physical findings to "injuries sustained while performing

manual labor." (*Id*. at 33.) While Dr. Krasnick agreed a disc herniation with an extruded disc can result from degenerative changes, he opined that plaintiff's disc herniation and extrusion occurred with the November 10, 2015, event that prompted the onset of back and leg pain. (*Id*. at 41-42.)

Deposition Testimony of Philip Mayer, M.D.

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. (*Id.* at 52-53, 72, 82-84, 11-112, 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, 85-85, 96.) This testimony was not relied upon by any magistrate and defendants' vocational consultant thought Dr. Mayer's "opinion on plaintiff's ability to work was not clear." (Magistrate Colombo's 2018 opinion at 17.)

Deposition Testimony of James M. Fuller

At plaintiff's attorney's request, James Fuller, M.A., C.R.C., a rehabilitation/vocational specialist, met plaintiff on February 15, 2017, to assess plaintiff's wage-earning capacity (James Fuller deposition at 4-6; deposition exhibit 1), essentially to perform a *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008), evaluation. (*Id*. at 13-14, 22-23.) His February 17, 2017, written report was typed into the record and attached as Fuller deposition exhibit 2. (*Id*. at 6-12.)

Plaintiff reported he completed the 8th grade while living in Mexico, that he is fluent in Spanish, and that he spoke and understood about 50% of spoken English. Mr. Fuller understood that plaintiff does not read English. (*Id*. at 7-8, 10, 14-15.) Mr. Fuller wrote that plaintiff's work history is described on the WC Form 105A (plaintiffs trial exhibit 7). Mr. Fuller described jobs plaintiff has performed included dishwasher, bus boy, assembling and taking apart radiators, building desks, manufacturing concrete pipes, building manholes, "horticultural laborer, material handler, solar panel builder and construction laborer." Mr. Fuller wrote that these jobs were mostly unskilled and "range( ) from the medium to very heavy physical demand level." Mr. Fuller wrote that plaintiff's work as a construction laborer was an unskilled job with very heavy physical demands. He noted plaintiff also operated a "Hi-Lo", a semi-skilled job with a medium physical demand. (*Id*. at 8, 10-11, 21-22; see trial exhibit 7, WC-Form 105A, discussed in Fuller deposition at 13.) Mr. Fuller opined plaintiff was essentially an unskilled construction worker. (*Id*. at 15.)

Mr. Fuller described plaintiff's work for G M as pushing and pulling cement, working on sidewalks and driveways, and earning "$26 per hour" with overtime plus fringe benefits. (*Id*. at 7-8, 13, 23.) Mr. Fuller testified that the type of work plaintiff did is characterized in the DOT (Dictionary of Occupational Titles) as unskilled construction, heavy to less than heavy with no transferable skills. (*Id*. at 24-25.) Plaintiff was a member of Laborers Local 1191. (*Id*. at 10, 13.)

Plaintiff reported he felt the onset of symptoms while working in November of 2015, and Dr. Zamorano performed back surgery, a " 'left partial hemi-laminectomy with medical (sic) facectomy and resection of extruded disc and discectomy with decompression S1 nerve root and fusion L4-S1' " on July 13, 2016. (*Id*. at 7, 9.) Mr. Fuller understood plaintiff's diagnoses included " '(l)umbar herniated nucleus pulposus at L5-S1 with extruded disc contacting L, S1 nerve root bulging and thinning at L4-5" per an MRI dated December 15, 2015, a central herniated nucleus pulposus at L4-5, a herniated nucleus pulposus at C3-4, and degenerative disc disease. (*Id*. at 9.) Plaintiff told Mr. Fuller that he still feels pain all the time and it increases with activity, including walking. Plaintiff reported he takes medication, Percocet and Motrin, to relieve pain and uses a cane to walk. (*Id*. at 7, 9.) He reported he "need(s) to alternate between sitting, standing, walking, and reclining." (*Id*. at 9.)

Mr. Fuller noted that as of January 6, 2017, Dr. Krasnick opined that plaintiff was "not able to work as a laborer," but was able to work in "a sedentary job with a sit/stand option" and should avoid "bending, lifting, twisting or overhead work" and lifting weights over five to ten pounds. (*Id*. at 7-9.) Mr. Fuller added the following:

> Based on the restrictions of Dr. Krasnick, Mr. Razo cannot return to any of his former jobs and could, at best, perform unskilled sedentary physical demand work. There are only 137 such jobs listed in the Dictionary of Occupational Titles, many not in existence at this point in time, and others having never existed in the Southeast Michigan regional economy. Mr. Razo, in bench type inspection, sorting, packaging, and assembly jobs, could anticipate minimum wage earnings, not the $26 per hour that he earned at the date of injury. (*Id*. at 8.)

Mr. Fuller noted that Dr. Krasnick recommended plaintiff have physical therapy. Mr. Fuller noted that Dr. Mayer opined plaintiff did not need long term prophylactic restrictions but "a post-operative course of physical therapy" would be appropriate before plaintiff returns to "his normal activities." Plaintiff did not have post-surgery physical therapy. (*Id*. at 7, 9.)

Mr. Fuller made a labor market survey on Indeed.com based on Dr. Krasnick's restrictions. (*Id*. at 12, 18-19, 26-27; Fuller deposition exhibit 6.) Mr. Fuller opined plaintiff . . .

> . . . would be restricted to unskilled, sedentary physical demand work. With the additional barriers including limited English language communication skills, being prescribed (and taking as prescribed) Percocet which leaves him "dizzy, tired too," he would have difficulty securing and performing any work.
>
> If employment could be found in bench type assembly, inspection, or packaging (at a 5-10 pound lifting level with no need for continuous sitting or standing, but being able to alternate between the two), the work would pay minimum wage, certainly

not the $26 per hour with overtime and benefits as Mr. Razo was able to command at the date of injury. (*Id*. at 12.)

Mr. Fuller opined that plaintiff "is either unemployable or able to earn a minimum wage" based on his lack of transferable skills, limited English speaking skills, lack of a high school or GED diploma, use of prescribed narcotic pain medications, and restrictions imposed by Dr. Krasnick limiting plaintiff to sedentary physical demand work. (*Id*. at 12, 16, 20.) Given plaintiff's medical restrictions Mr. Fuller opined there are no jobs available to plaintiff that would pay him a wage "even close" to the wage he earned at G M. (*Id*. at 19-20.) Mr. Fuller opined that the maximum wage plaintiff might be able to earn post injury was "minimum wage, $8.90 to $9.00 an hour" (*id*. at 19-20, 22), or, on cross examination as much as $12.00 per hour. (*Id*. at 30.) Mr. Fuller testified that plaintiff's lack of a high school or GED diploma is often a barrier to securing even unskilled work. (*Id*. at 20-21.) He testified that in his survey, and with minor exceptions such as a greeter, or possibly a cashier with accommodation, he did not find any jobs he thought plaintiff could do given his restrictions. (*Id*. at 27-30.)

Deposition Testimony of Guy A. Hostetler

At the request of defendants, Guy A. Hostetler, MA, CRC, CDMS, certified vocational rehabilitation counselor (Guy Hostetler deposition at 4-7) met with plaintiff on July 27, 2017. Mr. Hostetler's written report was typed into his deposition transcript. (*Id*. at 7-26.) Plaintiff's daughter accompanied him as a "minor interpreter." Mr. Hostetler wrote that plaintiff speaks conversational English and possessed sufficient knowledge of English to secure employment, but "had a few problems." Plaintiff reported he was not proficient in writing or reading English. (*Id*. at 8, 30-31.) Plaintiff had a non-prescribed cane. (*Id*. at 8-9.) Mr. Hostetler wrote that the purpose of his report was "to reach objective findings" concerning plaintiff's "employability and ability to earn wages given his present qualifications, training and provided work restrictions." (*Id*. at 9, 29-30, 38.)

Plaintiff's education consisted of completing the eighth grade in Mexico. He did not have a GED. (*Id*. at 11, 32.) Plaintiff provided a history of working in physical labor as a construction laborer, assembler, farm laborer, and dishwasher. (*Id*. at 13-15, 33.) Mr. Hostetler noted that Mr. Fuller's report indicated plaintiff currently works 1 hour per week as a greeter at a Michigan Works! office. (*Id*. at 13-14, 30-31.) Mr. Hostetler provided a list of occupations identified on "O*NET" consistent with plaintiff's work history which he discussed with plaintiff. (*Id*. at 14-15, 37-38.)

Plaintiff reported that in 1993 he suffered partial amputation of fingers on his left hand (*id*. at 15), that he injured his "lower back, neck, feet, and shoulders" at work and last worked on November 10, 2015. Plaintiff reported he did not think he can work or do any part of his old job because of pain. (*Id*. at 15-16.) Plaintiff reported that at the time he last worked as a cement pourer, he earned $25.95 per hour, his maximum wage. (*Id*. at 38.) He reported that Dr. Zamorano issued

restrictions at the time she performed surgery on plaintiff. Plaintiff reported he is using the restrictions offered by Dr. Krasnick. (*Id*. at 16.)

Mr. Hostetler noted that as of January 6, 2017, Dr. Krasnick opined that plaintiff " 'is not able to work as a laborer' " but " 'he could work in a sedentary job with a sit/stand option. He would have to refrain from bending, lifting, twisting, overhead work. Weight restrictions would be 5-10 pounds.' " (*Id*. at 16, 22.) Mr. Hostetler was not sure if Dr. Mayer opined plaintiff could work without restrictions. (*Id*. at 22, 37.) Mr. Hostetler noted Mr. Fuller's February 17, 2017, report indicated Dr. Mayer, as of October 19, 2016, opined plaintiff should receive physical therapy before resuming normal activities. (*Id*. at 16, 37.)

Mr. Hostetler assessed plaintiff's transferable skills. (*Id*. at 19-21.) Mr. Hostetler provided a list of jobs he opined plaintiff had the skills to perform and that were within plaintiff's physical restrictions. He wrote that these jobs included parts inspector, assembler of small products, booth cashier, and host (greeter). (*Id*. at 20-22, 33.) Mr. Hostetler added that many of these jobs did not require extensive computer skills. (*Id*. at 32.) He opined plaintiff had skills to drive a hi-lo on a construction site, in a factory or in a yard. (*Id*. at 33-37.) Plaintiff reported he volunteered to be a greeter one hour a week at Michigan Works!. (*Id*. at 35.)

Mr. Hostetler conducted a labor market survey in the Detroit Metropolitan area for entry level sedentary jobs he thought were compatible with plaintiff's transferable skills and restrictions. (*Id*. at 23-25, 27-28, 30, 40.) He contacted the employers he listed. (*Id*. at 28, 43-44.) Mr. Hostetler opined that jobs paying between $9.00 and $12.00 per hour were available. (*Id*. at 25, 29, 38-39, 46.) He thought these jobs included positions as a greeter at Meijer, at $9.00 per hour, part-time to start; booth cashier at Standale Parking at $11.25 per hour; machine operator/assembler at DSG Staffing at $10.00 per hour; bench assembler at Shinola at $12.00 to $13.00 per hour; and entry-level PCB quality inspector at Excel Circuits LLC at $10.00 per hour (a seated position). (*Id*. at 23-25, 27, 35, 39-40; Hostetler deposition exhibits A and B.) He was uncertain whether some greeter positions required the greeter to engage persons entering and leaving the store and responding to surveillance alarms. (*Id*. at 41-42.) Mr. Hostetler opined that in his experience a high school or GED diploma or years of line assembly experience is not an absolute requirement for these jobs. (*Id*. at 45.) He found no jobs that paid the wages plaintiff earned working for G M. (*Id*. at 38, 46.)

Plaintiff reported that after his injury he started looking for work in "February or March of 2017." Plaintiff reported he looked for work in "(s)tores, factories, oil change places, anything in the area," (*id*. at 16) and as a fast-food crew member. Plaintiff reported he posted a resume online. Although plaintiff did not present Mr. Hostetler with a copy (*id*. at 28), Mr. Hostetler understood the majority of the resume was devoted to a statement regarding plaintiff's restrictions. Plaintiff told Mr. Hostetler that he did not think he was physically able to perform the jobs for which he applied. (*Id*. at 17.) At the time Mr. Hostetler met with plaintiff (July 27, 2017), plaintiff had a job search log with 31 entries. The log did not contain dates or names of contact persons. Mr. Hostetler

wrote that many of the entries lacked a description of the jobs plaintiff sought. Mr. Hostetler described the types of work noted in the job log as "Warehouse, Customer Service, Driver, Cashier, Crew Member, Retail Clerk, and Cashier Stock positions. Some of the entries indicate 'N/A' for position which is unclear." Mr. Hostetler wrote "(s)ome of these positions would exceed his physical restrictions." (*Id*. at 17-18, 28-29.) Plaintiff reported that when he handed prospective employers his resume, he also attached Dr. Krasnick's note describing his restrictions. Mr. Hostetler opined that if plaintiff approached an employer in this manner, no employer is going to hire him. (*Id*. at 18, 28-29, 39-40, 44.)

ANALYSIS AND APPLICATION OF LAW

Defendants argue that when plaintiff was found to be no longer *totally* disabled after January 6, 2017, plaintiff failed to prove "a connection" existed between his disability and wage loss during the months of December to March. Defendants point out that during the four years plaintiff worked for G M prior to his November 2015 work injury (see defendants' trial exhibit C), plaintiff performed no work except for two days when he performed snow plowing. Therefore, defendants essentially argue that any wage loss he incurred during those same four months after his work injury did not have "a connection" to his work-injury induced disability; instead, defendants argue his wage loss during those months was due to his decision to leave the labor force during the "off season" months for pouring concrete in Michigan.

Magistrates Colombo and Grunewald found plaintiff proved his work-related disability was compensable for all months of the years after plaintiff suffered his work injury in November of 2015, even after Magistrate Colombo found, as of January 6, 2017, plaintiff was only partially disabled. Defendants argue these magistrates did not address defendants' specific argument concerning the second sentence of MCL 418.301(4)(c). Their failure to do so prompted the WDCAC to reverse that part of their opinions and orders affecting plaintiff's eligibility for wage loss benefits during these four "off season" months after January 6, 2017, and to remand the matter to allow a magistrate to address this specific issue.

In the last remand opinion, *Razo*, 2022 Mich ACO#13, the WDCAC retained jurisdiction and instructed the magistrate to enter an opinion, but not an order, making findings addressing defendants' preserved issue. The WDCAC opinion included the following:

> 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. [Footnote omitted; but see above at page 4, footnote 4.]

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.

* * *

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. (*Razo*, 2022 Mich ACO #13 at 13-15.)

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[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."

The WDCAC remanded the matter again to allow the magistrate to complete the original remand order, MCL 418.861a(12), by assessing this record in relation to "the second sentence of MCL 418.301(4)(c)" for the months of December through March after January 6, 2017. (*Id*. at 15.)

In his opinion on remand, Magistrate Watkinson wrote the following:

The Commission has given some guidance as to the legal standard needed to analyze the second sentence of MCL 418.301(4)(c). The Commission stated that:

> "[w]age 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." *Id.* at 19.

Therefore, in order to be entitled to wage loss benefits during the months of December through March (after January 6, 2017), the Plaintiff must prove that he made a good faith effort to find employment during those months, and that his disability prevented him from obtaining employment.

The focus of the analysis turns to what actions Plaintiff made to obtain employment during the months in question, and whether those actions constituted a good faith effort. The evidence submitted at trial regarding Plaintiff's job search was Plaintiff's own testimony and Exhibit 8.

Plaintiff testified at the trial about his job search. The trial was held on January 22, 2018, and therefore, his testimony only covers job search activity prior to that date. Plaintiff testified that he looked for work with various employers after his last date of work with G M & Sons, Incorporated. He further testified that his job search efforts were recorded in Exhibit 8. Plaintiff indicated that he applied for jobs in person with prospective employers, and that he had an employee of these prospective employers write down the name and address of their company, the position applied for, and the result of the encounter. The papers filled out by these individuals were collected and entered into evidence as Exhibit 8 (Trial Transcript pages 67-70).

Plaintiff testified that he only started looking for work in the year before the trial (Trial Transcript at 69). This was clarified on cross examination wherein Plaintiff admitted that he began looking for work in 2017 (Trial Transcript at 101). Plaintiff was not able to specify when he began to seek employment; nothing in the transcript points out the specific date (or even the specific month) the job search began. Plaintiff was able to state that he did not look for work in the three weeks of January 2018 that preceded the trial (Trial Transcript at 70). Plaintiff also testified that he provided Exhibit 8 to Guy Hostetler (Defendant's vocational expert) at a meeting that took place on July 27, 2017 (Trial Transcript at 99 and Exhibit B at 8). From this testimony, we can establish that the entries in Exhibit 8 were made sometime between January 1, 2017, and July 27, 2017. However, no further specificity as the to (sic) dates of the entries has been established by the testimony.

Exhibit 8 does not provide any specificity as to the dates of Plaintiff's job search activities. Exhibit 8 consists of five pages and each of these pages lists information about a potential employer. This document has entries from 37 potential employers. However, the entries are not dated. In fact, there are no dates listed anywhere on Exhibit 8. Plaintiff was questioned about the dates of the various

> entries, but he was not able to provide any additional information (Trial Transcript at 97-99).
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> Michigan law requires any individual making a claim for benefits under the Workers' Disability Compensation Act prove all elements of their claim by a preponderance of the evidence. *Aquilina v GMC*, 403 Mich 206, 211 (1978). Therefore, in the case at hand, it is the Plaintiff's burden to prove the connection between his disability and wage loss for the months of December through March after January 6, 2017.
>
> The factual record is unclear as to whether the Plaintiff conducted any job search activity during the Months of January, February, March, or December of 2017. Plaintiff was unable to testify to the exact dates he conducted his job search. Further, Exhibit 8 has no dates indicating when the various entries for the prospective employers were created. Thus, the record is devoid of the evidence Plaintiff would need to demonstrate that he made a good faith job search effort during the months at issue.
>
> Since there is no evidence that Plaintiff conducted job search activity during the months at issue, Plaintiff cannot meet his burden of proof that there is "a connection" between his disability and any wage loss during those months. (Magistrate Watkinson's Opinion on remand at 4-5.)

Magistrate Watkinson concluded, "(p)laintiff has not met his burden of proof to establish a connection between his disability and any wage loss incurred during the months of December through March after January 6, 2017." (*Id*. at 6.) The WDCAC has considered defendants' argument on appeal in light of the entire record, which now includes Magistrate Watkinson's findings on remand.

In their appeal, defendants do not challenge Magistrate Colombo's original finding that plaintiff suffered a back and left leg disability related to his work activity, pouring and laying cement, in November of 2015. Defendants do not argue that plaintiff's disability does not have "a connection" to his wage loss during the months of April through November. The medical testimony was sufficient to establish that plaintiff's work injury at G M resulted in pathology involving an L5-S1 disc extrusion contacting plaintiff's S-1 nerve root causing radiculopathy and the loss of plaintiff's ability to earn wages in the types of physical labor he performed prior to his work injury. Based on his conditions when Dr. Zamorano evaluated plaintiff, she opined plaintiff cannot return to the type of work he had been doing because of pain and physical findings she related to "that incident" at work in November of 2015. (Dr. Zamorano deposition at 28-31.) She also opined the fusion she performed was due in part to plaintiff's work activity. (*Id*. at 41-42.) Dr. Krasnick opined that the continuing restrictions he opined appropriate after January 6, 2017, sedentary with sit/stand, lifting and bending and walking restrictions, were connected to plaintiff's work activity

in November 2015. In response to a hypothetical question summarizing plaintiff's history of work laying cement in November 2015, when he felt the onset of his back pain, and his MRI scan (Dr. Krasnick deposition at 30-34), Dr. Krasnick related plaintiff's pain and physical findings to "injuries sustained while performing manual labor." (*Id*. at 33.) While Dr. Krasnick agreed a disc herniation can result from degenerative changes, he opined plaintiff's disc extrusion occurred with the November 10, 2015, event that prompted the onset of back and leg pain. (*Id*. at 41-42.)

On the last remand, Magistrate Watkinson concluded that plaintiff failed to establish the required "connection" between his disability and wage loss, second sentence of MCL 418.301(4)(c), during the four "off season" months of each year after January 6, 2017. He based this conclusion on his finding that plaintiff's 37 job log entries were not accompanied by entries of dates establishing that plaintiff looked for jobs during the months of November through March. Having examined plaintiff's job logs we do not disturb the finding that the job logs do not contain dates. However, in this record we do not find this finding sufficient to support the legal conclusion that plaintiff failed to establish "a connection" between his work-injury related lower back and left leg disability and wage loss during the four months in question.

Defendants argue that plaintiff failed to prove "a connection", as required by MCL 418.301(4)(c), between his disability and wage loss during the "off season" months because plaintiff removed himself from the labor force during the "off season" months for pouring concrete during the (four) years he worked for G M. Defendants' argument fails for several reasons.

First, once plaintiff recovered sufficiently from his back surgery to prompt Dr. Krasnick to opine he was physically able to perform sedentary work with weight restrictions and a sit/stand option, after January 6, 2017, plaintiff did approach employers to find work. The employers and positions listed in plaintiff's job logs (37 job searches in 2017)[10] describe employments that are year-round and not limited to seasonal employment. This list indicates that plaintiff did not limit his post-injury job searches to work that could only be performed between the months of April and November. Plaintiff reported he looked for work in "(s)tores, factories, oil change places, anything in the area," (Hostetler deposition at 16) warehouses, customer service, driver, cashier, and as a fast-food crew member. (*Id*. at 28.) Trial exhibit 8, these job logs, offer evidence that plaintiff approached employers and sought jobs that could be performed year-round, including the four months of December through March. This evidence shows plaintiff did not, post injury, limit his job search efforts to work that could only be performed eight months a year.

[10] Two entries indicate plaintiff approached one prospective employer, an "oil change center" in Allen Park twice, once before plaintiff met with Mr. Hostetler in July of 2017 and once after he met with Mr. Hostetler. (See Hostetler deposition at 17-18.)

Second, the incentive to search for jobs that are performed during all months of the year arose from termination of the reason plaintiff testified he did not search for jobs during the "off season" months of the four years he worked for G M. Plaintiff testified he did not search for work during the off-season months of these four years because he earned enough money during the other eight months of those years to support himself when supplemented by unemployment benefits. Plaintiff recognized that if the unemployment office found a job for him during the months he received unemployment benefits, he had to accept the job or forfeit unemployment benefits. Once he became disabled, he no longer earned the high level of wages that permitted him to avoid having to work during the "off season" months. The rationale for not looking for work outside of the cement pouring season months during the years he worked for G M no longer existed.

Third, Magistrate Watkinson's reliance on plaintiff's job log not containing the dates he approached prospective employers does not, on this record, preclude a finding of the required "connection" between plaintiff's disability and wage loss. Plaintiff testified that he cannot read and write in English. He was dependent on the people he contacted to fill out the information contained in the job logs. His inability to read English impaired his ability to fully understand that he could have asked them to insert dates to better support his burden of proving he made good-faith job searches. However, even this deficiency was mollified on this record by plaintiff's report to Mr. Hostetler that after his injury he started looking for work in "February or March of 2017" (Hostetler deposition at 16) which are two of the months that defendants challenged as having "a connection" between plaintiff's disability and wage loss.

Fourth, the statutory language discusses how plaintiff's burden of proving "(w)age loss *may* be established, *among other methods*."[11] The testimony of Mr. Fuller and Mr. Hostetler, provide sufficient evidence of an "other method" of demonstrating "a connection." They both opined that, given plaintiff's low back and left leg physical restrictions, per Dr. Krasnick, arising from his November 2015 work injury and resulting disability, plaintiff could not earn his prior wage level, and, therefore, demonstrated "a connection" between plaintiff's disability and some level of wage loss.

The vocational consultants opined that plaintiff "is either unemployable or able to earn a minimum wage."[12] Mr. Fuller reported no jobs available to plaintiff, with his work-related imposed medical restrictions, that would provide a wage to plaintiff "even close" to the wage he earned at

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[11] Third sentence of MCL 418.301(4)(c), emphasis added. "May," of course, signifies permission and is not a mandate. *Murphy v Ameritech*, 221 Mich App 591, 600; 561 NW2d 875 (1997); lv den, 456 Mich 917 (1998). Thus, while the obligation to show wage loss as the term is defined, is mandatory, see n. 4, above, how one does so has a measure of discretion.

[12] Fuller deposition at 12, 16 and 20. The information in this paragraph is described in greater detail at pages 16-20, above.

the time of his injury at G M. (*Id*. at 19-20.) Similarly, Mr. Hostetler sought jobs he thought compatible with plaintiff's transferable skills and work-related medical restrictions. (Hostetler deposition at 23-25, 27-28, 30, 40, 43-44.) No jobs were found paying wages similar to those plaintiff earned while working for G M. (*Id*. at 38, 46.)

The record provides no reason to believe that any additional job search by plaintiff would alter the conclusion that, because of his work-related disability, there are no jobs available to plaintiff that will replace all of the wages plaintiff lost as a result of his work-related injury. As a result, plaintiff has sustained a wage loss. The Legislature's use of the indefinite "*a connection*" in MCL 418.301(4)(c), rather than "*the connection*," must be respected. *Paige v City of Sterling Heights*, 476 Mich 495, 507; 720 NW2d 219 (2006); *In re Costs and Attorney Fees*, 250 Mich App 89, 102;645 NW2d 697 (2002). It is appropriate to substitute the word "any" for the word "a" in the process of interpreting the indefinite article "a" for purposes of statutory construction. *Powers v Detroit Automobile Inter-Insurance Exchange*, 427 Mich 602, 633, n 9; 398 NW 411 (1986); *Detroit Edison Company v Celadon Trucking Company*, 248 Mich App 118, 122, n 9; 638 NW2d 169 (2001). "The indefinite article 'any' means 'one, some, or all indiscriminately of whatever quantity.' " *Maples v State of Michigan*, 507 Mich 461, 472; 968 NW2d 446 (2021). Thus, the statutory language signifies that the medical restrictions imposed by the work-related injury and resulting vocational opportunities must only be one of the reasons for the reduced wages and not the only reason, or even the most significant reason, and in this case the medical and vocational testimony confirms that plaintiff's disability is at least a cause of the wage loss such that plaintiff has demonstrated "a connection between the disability and reduced wages." MCL 418.301(4)(c).

It is significant in the analysis that the Act only inquires at this point as to the fact of "reduced wages" and does not, for example, quantify the amount of wage lost due to disability. Instead, MCL 418.301(7) sets the rate for total disability and MCL 418.301(8), applicable here, relies upon "the employee's wage earning after the personal injury" as the impact on the rate that would otherwise be payable. "Wage earning capacity" is defined as "the wages the employee earns or is capable of earning at a job reasonably available to that employee, whether or not wages are actually earned"[13] which is an overlapping but decidedly broader concept than what is relevant at this point: "wages lost due to a disability." MCL 418.301(4)(c).

When Magistrate Watkinson moved from how "[w]age loss *may* be established"[14] to the assertion that " … plaintiff *must* prove … ,"[15] his inquiry on remand moved from a discretionary

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[13] MCL 418.301(1)(b).

[14] *Razo*, 2022 Mich ACO #13 at 19, emphasis added. This was a quotation of a portion of MCL 418.301(4)(c) with the completion of the phrase (not quoted here) a later-on substitution of the definition of some of the terms in MCL 418.301(4)(c) borrowed from elsewhere in MCL 418.301(4).

[15] Magistrate Watkinson opinion at 4, emphasis added.

"may be established, among other methods" in MCL 418.301(4)(c) to selecting one method as the mandatory and inflexible criteria. He erred and, because the error altered plaintiff's burden of proof, his conclusion on second remand cannot inform the order we enter after second remand. In modifying the question on remand from 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,"[16] to whether plaintiff engaged in reasonable efforts at a job search during the off-season, Magistrate Watkinson changed the inquiry into whether plaintiff "made a good faith effort to find employment during those months." (Magistrate Watkinson opinion at 4.) His resulting "focus … [on] what actions *plaintiff made* to obtain employment during the months in question"[17] transferred a permissive "may" in the statute into a mandatory, exclusive, and limiting requirement. Thus, although Magistrate Watkinson's findings are not unreasonable, his findings are not legally sufficient and, thus, cannot sustain a result here that says plaintiff is not entitled to wage loss benefits in the so-called off-season because it was not recognized that plaintiff may prove wage loss due to the work-related disability by "other methods" and a job search is only one method by which "[w]age loss may be established." MCL 418.301(4)(c).

Finally, the last sentence of Section 301(4)(c) provides that a partially disabled employee who makes a good-faith job search, as we find (and Magistrate Colombo and Magistrate Grunewald found)[18] plaintiff established he did do, after incurring a work-related injury and disability, is eligible to receive the rate of weekly wage-loss benefits that the employee is entitled to receive under subsection (7) as if totally disabled. Therefore, based on this record during the four months of December through March after January 6, 2017, plaintiff is entitled to the wage-loss benefits as stipulated at the beginning of trial and as Magistrates Colombo and Grunewald found to be due and that were unchallenged by defendants on appeals for the months of April through November.

CONCLUSION

Our order accompanying this opinion will affirm Magistrate Grunewald's order. Previously, we entered an interlocutory order affirming in part, reversing in part, Magistrate Grunewald's order and remanding this matter for further consideration. This had the impact of excusing defendants' obligation under MCL 418.862(1) to pay 70% benefits during the off-season months. Now, with the benefit of the proceedings on remand and further briefing, it is apparent

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[16] *Razo*, 2022 Mich ACO #13 at 13.

[17] *Id*., emphasis added.

[18] Magistrate Watkinson found otherwise but for a period of time in the off season. We have discussed this elsewhere in terms of plaintiff's demonstration of a connection between his disability and his wage loss.

that Magistrate Grunewald's result is supported by the record as legally required in MCL 418.861a(3) and employs a proper standard of law. Accordingly, his order --- with our explanation included here --- must now be affirmed. The record medical evidence includes the opinions and testimony of Dr. Jennings and Dr. Krasnick who opined that plaintiff's work injury in November 2015, while working as a cement worker for G M, caused objective physical pathology and resulting symptoms in plaintiff's back and left lower extremity. These doctors credibly opined that plaintiff, post injury and post-surgery, can no longer engage himself in the heavy and non-sedentary type of work he performed prior to his work injury at G M.

In light of these medical findings, the vocational experts, Mr. Fuller and Mr. Hostetler, opined plaintiff was no longer able to obtain or perform this type of work, and either was unlikely to obtain work or would, if successful in finding work, be limited to earning minimum wages. Plaintiff presented evidence that he personally went to prospective employers in search of work. The type of work described in his job search log was year-round work, not work that would only be performed during the months of April through November. Plaintiff has accordingly met his burden of proving "a connection" between his work-related disability and reduced wages during the months of November through March sufficient to establish compensable wage loss. MCL 418.301(4)(c). This entitles plaintiff to receive the weekly wage loss benefits found to be due by Magistrate's Colombo and Grunewald on a year round basis that were unchallenged by defendants for the months of April through November.

Duncan A. McMillan Commissioner

Granner S. Ries Commissioner

Chairperson Daryl Royal did not participate.

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.

ORDER

This cause originally came before the Workers' Disability Compensation Appeals Commission ("WDCAC") on a claim for review filed by defendants, G M & Sons, Incorporated ("G M") and its insurer, Cincinnati Casualty Company[1] from Magistrate Jane S. Colombo's Order mailed April 11, 2018. The WDCAC, in *Razo v G M & Sons, Incorporated*, 2020 Mich ACO #8, affirmed the magistrate's order in part, reversed it in part, and remanded the matter in part. The WDCAC order concluded that the magistrate's April 21, 2018, order awarding wage loss benefits during the "off season" months after November and before April of each calendar year since the date of injury was not sufficiently explained and remanded the case with instructions for the magistrate, on remand, 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 did not retain jurisdiction during the first remand.

On remand, Magistrate Colombo issued an opinion on February 2, 2021, but no order. Defendants filed a claim for review from her opinion which the WDCAC dismissed as a claim for review may only be filed from an order, leaving the matter still pending before the Board of Magistrates. An opinion and order of Magistrate David Grunewald was subsequently issued on

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[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.

October 25, 2021. Defendants filed a claim for review from this order. After the WDCAC considered the record and the parties briefs, the WDCAC concluded that the magistrate's October 25, 2021, order had partially complied with the remand and that the order of Magistrate Grunewald was affirmed in part, reversed in part, modified in part, and the matter remanded to the magistrate to complete the analysis required by the original remand order. The WDCAC retained jurisdiction and therefore instructed the magistrate to issue an opinion, but not an order.

On remand, in an opinion but not an order, mailed April 30, 2024, Magistrate William W. Watkinson, Jr., addressed the limited issue presented to him on remand, and found that plaintiff failed to meet his burden of establishing "a connection" between his work related "disability and reduced wages" during the months of December through March after January 6, 2017.

The WDCAC, having retained jurisdiction, received supplemental briefs from the parties. The WDCAC has considered the record, counsels' briefs, the opinion and order of Magistrate Grunewald, mailed October 25, 2021, the opinions and order of Magistrate Colombo, and the remand opinion of Magistrate Watkinson, Jr., addressing the limited issue presented to him on remand, and for the reasons set forth in the attached opinion, finds and concludes that Magistrate Watkinson utilized an improper legal framework and that plaintiff did meet his burden of proving, in compliance with the second sentence of MCL 418.301(4)(c), "a connection" between his work-related disability and wage loss during the months of December, January, February and March after January 6, 2017, and pursuant to the last sentence of MCL 418.301(4)(c), "is entitled" to receive weekly benefits even during those months under subsection (7) as if totally disabled. Therefore,

IT IS ORDERED that Magistrate Grunewald's order, mailed October 25, 2021, adopting the findings of Magistrate Colombo that, after the found work-related injuries of November 10, 2015, and November 18, 2015, "plaintiff was totally unable to work at his usual work, and further that due to his lack of treatment was unable to work at any jobs until he obtained appropriate medical treatment," AND "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" and, in accordance with these findings, ordered defendants to pay plaintiff weekly wage loss benefits in the amount of $652.56 per week from November 19, 2015, to February 6, 2018, and "until further order," is AFFIRMED for the reason that plaintiff did meet his burden of proving, in compliance with the second sentence of MCL 418.301(4)(c), "a connection" between his work-related disability and wage loss during the contested months of December through March after January 6, 2017 (as well as the uncontested months of April through November), and made "a good-faith effort to procure work within his . . . wage earning capacity" as provided in the last sentence of MCL 418.301(4)(c).

FURTHER, IT IS ORDERED that the provisions in the October 25, 2021, order finding injury dates in November of 2015 and ordering defendants to pay the medical expenses pursuant to MCL 418.315 for said injuries and that the maximum authorized attorney fee shall not exceed

30 percent of the accrued compensation, subject to MCL 418.858 and Rule 14, R 408.44, are AFFIRMED.

No appeals pend.

Duncan A. McMillan Commissioner

Granner S. Ries Commissioner

Chairperson Daryl Royal did not participate.