2025 ACO #10

STATE OF MICHIGAN
WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

MAXIMILIANO A. SANCHEZ,
PLAINTIFF,

V DOCKET #16-0051

WAL-MART ASSOCIATES, INCORPORATED AND
AMERICAN HOME ASSURANCE COMPANY AND
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
DEFENDANTS.

APPEAL FROM MAGISTRATE WILLIAMS.

MARK D. GREENMAN FOR PLAINTIFF,
DOUGLAS J. KLEIN FOR DEFENDANTS.

OPINION

RIES, COMMISSIONER

This case arises from a tangle of opinions and orders by three different magistrates and two remands by the Michigan Compensation Appellate Commission ("MCAC").[1] Although the evidence presented, the magistrate's opinions, and the remand opinions from the MCAC have provided considerable fodder for the parties, the magistrates, the MCAC, and, now, the Workers' Disability Compensation Appeals Commission ("WDCAC") upon which to expound, the result in this case is largely driven by the magistrate's authority and the authority and standard of review applicable to the administrative appellate tribunal.

On plaintiff Maximiliano Sanchez's appeal, we reject the conclusions as to the rate of plaintiff's wage loss benefits after February of 2012 made by Magistrate David H. Williams in his opinion mailed September 12, 2016, but utilize his findings and the applicable legal standard to implement the conclusions of Magistrate Kim C. Rochau in his original opinion and order mailed August 22, 2012. On remand from the first MCAC panel, Magistrate David M. Kurtz, Jr., issued

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[1] The Michigan Compensation Appellate Commission ("MCAC") was created by Executive Order No. 2011-6; MCL 445.2032 and then was written into the Workers' Disability Compensation Act ("Act") by 2011 PA 266 and codified as MCL 418.274. Subsequently, by Executive Order No. 2019-13, effective August 11, 2019, the MCAC was abolished. The authorities, powers, duties, functions, and responsibilities of the MCAC are transferred to the Workers' Disability Compensation Appeals Commission (WDCAC).

an opinion and order mailed October 3, 2013, that, in essence, adopted the findings and rulings of Magistrate Rochau. On the appeal of defendants, Wal Mart Associates, Incorporated and American Home Assurance Company/Insurance Company of the State of Pennsylvania, we do not find cause to reject the findings of compensable injuries on February 9, 2007, and December 18, 2007. An order will enter accordingly.

On the second day of trial, held on April 15, 2012, counsel for defendants clarified that American Home Assurance Company carried the risk for alleged injury dates in 2002 and 2007 and Insurance Company of the State of Pennsylvania carried the risk for the alleged last day of work in March of 2009. (Trial transcript of April 15, 2012, at 7-9; Magistrate Rochau opinion at 2-3.)

Standard of Review

The standard of review for an administrative appellate tribunal applicable to findings of fact made by a magistrate is that findings of fact made by the magistrate are accepted as conclusive, in the absence of fraud,[2] if those findings are supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3). The Worker's Disability Compensation Act ("Act") defines the "whole record" in MCL 418.861a(4) as "the entire record of the hearing including all of the evidence in favor and all the evidence against a certain determination." In addition, MCL 418.847(2) provides that the magistrate's "order and opinion shall be part of the record of the hearing." Our review includes "both a qualitative and quantitative analysis of that evidence in order to ensure a full, thorough, and fair review." MCL 418.861a(13). The competency and materiality of the evidence is not at issue here, but there are findings from the magistrate that are said not to be supported by "substantial" evidence. The Act provides a definition of substantial evidence: "[S]ubstantial evidence means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion." MCL 418.861a(3). Also, "[s]ubstantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *Lawrence v Michigan Unemployment Insurance Agency*, 320 Mich App 422, 431; 906 NW2d 482 (2017).

The rule is that, when reviewing a finding contained in an opinion to determine whether that finding is supported by substantial evidence, we will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record. This principle is taken from *In re Payne*, 444 Mich 679, 692 *et seq*; 514 NW2d 121 (1994), which portion thereof --- Part III of Justice Boyle's opinion --- was joined by Justice Riley. *Id.*, at 698. The applicability of this portion of *Payne* to this case is not impacted by the fact that this is a worker's compensation case, and *Payne* is not. The very first case decided by the initial iteration of the appellate commission applying the statutory standard enacted by the Legislature rejecting the prior *de novo* standard, *McAuliff v Cambridge East Nursing Home*, 1988 Mich ACO #1 at 3, utilized this standard. This standard became a cornerstone ruling in *Pitts v General Motors Corp*,

[2] Fraud is said to be an issue in this case and so we will return to this phrase below.

1989 Mich ACO #189 at 2, when it was stated that "the test is not whether a finding had it been made, …, could have been supported as required, but, rather, whether the finding that was made is so supported." (Emphasis in original.)

The rule in *Payne* relied upon in *McAuliff* and *Pitts* was applied in workers' compensation cases in *Mudel v Great Atlantic & Pacific Tea Company*, 462 Mich 691, 700; 614 NW2d 607 (2000), where the Court held that an appellate administrative body cannot "engage in its own statutorily permitted independent fact finding if 'substantial evidence' on the whole record existed supporting the decision of the magistrate." This rule from *Mudel* is applied to each finding at issue.[3] Also, simply because one finding is or is not supported by such evidence, this does not mean that another finding is or is not supported by substantial evidence.

This rule, however, does not forever insulate the magistrate's findings from alteration. The WDCAC "need not necessarily defer to all the magistrate's findings of fact." *Mudel*, 462 Mich at 703. We are permitted "in some circumstances to substitute [our] own findings of fact for those of the magistrate" when the record calls upon us to "accord[] different weight to the quality or quantity of evidence presented." *Id*., at 700; footnote omitted. But we "will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record." *Payne*, 444 Mich at 692. As a result, while we are especially mindful of the deference to be paid to the magistrate's findings, there are circumstances where the magistrate's findings of fact are not conclusive.

We consider not only findings of fact made by a magistrate but also necessary implicit or implied findings, *Clark v Apex Foundry, Inc*, 7 Mich App 684, 688-689; 153 NW2d 182 (1967), citing cases, and subject such findings to the same standard of review applicable to explicit findings of fact.

In contrast to the deference owed to the magistrate's findings of fact, questions of law involved in a magistrate's opinion are reviewed *de novo*. *Calovecchi v Michigan*, 461 Mich 616; 611 NW2d 300 (2000); *Abbey v Campbell, Wyant & Cannon Foundry (On Remand)*, 194 Mich App 341, 351; 486 NW2d 131 (1992). Review *de novo* contemplates an independent review, with no required deference to the magistrate as to the issue. *People v Beck*, 504 Mich 605, 618; 939 NW2d 213 (2019); *Genesee County Drain Commissioner v Genesee County*, 504 Mich 410, 417; 934 NW2d 805 (2019); *People v Bruner*, 501 Mich 220, 226; 912 NW2d 514 (2018).

Challenges to the legal sufficiency of factual conclusions, as opposed to the credence to be given to the factual conclusion, are reviewed *de novo* as questions of law because such challenges implicate a construction of the statute.

[3] That is, to findings a party --- almost always an appellant or cross-appellant --- requests be reviewed. MCL 418.861a(11).

While the WDCAC reviews "only those specific findings of fact or conclusions of law that the parties have requested be reviewed,"[4] plaintiff and defendants have either addressed the findings of fact and conclusions of law as to the issues we address here, or the questions implicate the authority of the magistrate and the MCAC or WDCAC to issue the documents it has entered and, therefore, are not excluded from consideration by MCL 418.861a(11).

Summary of Case

In this case, Magistrate Rochau's finding was that plaintiff was a credible witness. True, he did not explicitly state that plaintiff was credible, but he did explicitly reject defendants' argument that plaintiff was not credible, and he did rely upon plaintiff's testimony to fashion his order. There was contrary evidence at the same hearing and a finding that plaintiff was credible was not the only finding that could be made. However, it was the finding that *was* made. There are many ways to characterize plaintiff's testimony, but the allegation of "fraud" was never established. However, to respect the conclusions of the magistrates, we will simply state at this point that the evidence of plaintiff's ability to perform activities is "inconsistent."

Defendants' argument as to the work-related injury that entitles plaintiff to benefits under the Act does not present an issue within our authority to review. Defendants have set forth an alternative view of the record not accepted at the level of the Board of Magistrates and do not advocate any error by a magistrate. That is, defendants do not advocate that the findings are not supported as legally required and do not contend that the wrong standard of law was utilized.

As for plaintiff's disability and wage loss, the failure of defendants' argument in this case, as we will explain, is that the alternative views the record presents of plaintiff's physical abilities do not, from this limited record, demonstrate that an adjustment of plaintiff's weekly wage loss rate, as found and ordered by Magistrate Williams, is appropriate. To be sure, it can be thought that there was fertile ground upon which defendants could have come forward with evidence to demonstrate that work was available for plaintiff in light of the abilities defendants thought their investigator had discovered in plaintiff. But, defendants did not do so. And, what defendants did not supply, neither a magistrate nor the MCAC nor this WDCAC can provide.

Magistrate Williams did not refer to or apply the standards for partial disability that MCL 418.361(1) requires. Applying the standards to this case, and recognizing plaintiff's burden of proof, plaintiff is entitled to wage loss benefits for partial disability in the amount ordered by Magistrates Rochau and Kurtz.

The order we enter draws heavily from the order entered by Magistrate Rochau. The order also rejects an essential determination by Magistrate Williams that plaintiff's rate should be adjusted to zero because of the investigator's videos.

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[4] MCL 418.861a(11); see *Cane v Michigan Beverage Company*, 240 Mich App 76, 80-81; 610 NW2d 269 (2000).

Summary of Facts

Plaintiff, Maximiliano Sanchez, was hired by defendant, Wal-Mart Associates, Incorporated, in 2001 and last worked for them in March of 2009, when he left to have surgery on his back. Plaintiff's work involved unloading trucks. Delivery trucks would arrive, and he would unload materials from the truck. On occasion, plaintiff performed stocking activities. He encountered various weights in the process. Plaintiff sustained an injury at work in 2002 when he was struck by a box that had fallen down on his head. He worked with restrictions for a month and then returned to his regular job.

Plaintiff also claimed an injury took place at work in May of 2002 when he moved a patio set. Pain was present in the middle of his lower back, and it persisted. Although he had difficulties with his back, he again returned to his regular job.

In February of 2007, plaintiff injured his back while lifting a television at work. He sought medical treatment and returned to regular work after a few weeks.

In December of 2007, plaintiff sustained an injury to his back while lifting a pallet of chemicals at work and sought medical treatment. The event is documented by a Form 100 report of the injury written by the employer, medical records, and a confirming statement from a co-worker. He received an injection and physical therapy that did not help. He returned to light duty for three weeks while still experiencing back pain and then returned to his regular job. He continued receiving injections which did not help. Plaintiff stopped working and surgery was performed on March 3, 2009, with treatment including physical therapy. His condition did not improve, and a second surgery took place on October 22, 2010. After this he had physical therapy but continued to have complaints of pain and numbness.

Plaintiff continues to have problems in the low back area along with radiation into his left leg. His complaints impact his walking, and he walks around the block by his home. He indicates that he can stand for about 15 minutes by shifting his weight to his right leg to take pressure off the left. He sits for 10 to 15 minutes at a time and then lays down for 1 to 1 ½ hours. Plaintiff can read and write in Spanish but not in English. In the past, he had worked on a cattle ranch and a farm, but he could not return to that work at the time he testified. He also worked as a dishwasher but could not do that work. He also worked as a mason laborer requiring the lifting of 100-150 pounds along with extensive bending. He also had a job performing boiler maintenance and this job required considerable walking and lifting. Plaintiff also worked as a meat cutter involving heavy work in a freezer which required full-time standing. He has also performed assembly work which required sitting, standing and walking.

Plaintiff has not returned to work since leaving work in March of 2009 to have surgery. The injury dates found by the magistrates are February 7 and December 18, 2007.

The medical information in this case is voluminous. Plaintiff suffers, as previously described, pathological abnormalities confirmed by objective testing and surgeries. The extent to

which the doctors and clinics relied upon the information plaintiff gave them, except to describe the location of plaintiff's maladies, is debatable. What was never found was that any concerns about the information plaintiff gave the medical professionals impacted the opinions the medical professionals provided.

Law of the Case, Remands, and Rehearings

The MCAC, twice, remanded the orders entered by the first two magistrates to rule in this case. The Act and decisional law establish that remands may properly be ordered in four circumstances and are not permitted in a fifth circumstance.

The first, and most obvious, circumstance in which a remand may be appropriate is where the magistrate's opinion is insufficient for purposes of review. Examples of this include where the magistrate has clearly failed to consider a part of the record that could be outcome-determinative, and no reason is apparent that would justify a wholesale failure to analyze that part of the record. Authority for a remand lies in MCL 418.861a(12), which provides as follows:

> (12) The commission or a panel of the commission may remand a matter to a worker's compensation magistrate for purposes of supplying a complete record if it is determined that the record is insufficient for purposes of review.

When a magistrate fails to consider testimony or an exhibit that a party has gone to the time, trouble, and expense of placing into the record, a remand is usually justified. Such a failure is not mere disappointment that the magistrate has not given as much consideration to the testimony or exhibit as desired, it is a failure on the part of the magistrate to make that consideration that amounts to an omission as if the testimony or exhibit were not a part of the record. The magistrate's opinion --- which is a part of the record, MCL 418.847(2) --- in such circumstances is simply not complete and MCL 418.861a(12) permits a remand in such circumstances.

A second circumstance where a remand may be appropriate arises when a magistrate renders one or more findings of fact but utilizes an improper standard of law to do so, because the standard of law has been altered in a manner applicable to the case after the opinion was written.[5] In such circumstances, the parties have an opportunity to present facts to the magistrate for an opinion and order that finds facts in light of the proper (newly-stated) standard of law. A related instance is where the magistrate's recitation of the legal standard is in error. In such circumstances, it is of no moment that the findings of fact are supported by the record, the matter must be remanded to the magistrate to allow the magistrate to render findings of fact supported by the record in light of the correct standard of law. *See*, *e.g.*, *Williams v Lang (After Remand)*, 415 Mich

[5] A notable example was the rendering of *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008) which was decided in 2008 and made applicable to numerous cases pending on appeal before the WCAC, and remands were ordered. *E.g.*, *Curtiss v Curtiss Reporting*, 2009 Mich ACO #9 (en banc).

179; 273 NW2d 498 (1982); *Cooper v Chrysler Corporation*, 125 Mich App 811, 819; 336 NW2d 877 (1983).

A third circumstance where a remand may be appropriate is where the magistrate's findings of fact are not supported by competent, material, and substantial evidence on the whole record even though a proper standard of law has been utilized. A finding of fact is not supported by substantial evidence if a reasonable person cannot accept the record as adequately justifying the magistrate's conclusion. MCL 418.861a(3). In such circumstances, a remand may be appropriate, or the appellate tribunal may proceed to make the finding itself. *Mudel*, 462 Mich at 702-703.

A fourth circumstance where a remand may be appropriate is where the magistrate has failed to set forth the finding in sufficient detail to allow for appellate review because a conclusory finding has been made that fails to indicate "the testimony adopted, the standard followed and the reasoning it used in reaching its conclusion." *McClary v Wagoner*, 16 Mich App 326, 327-328; 167 NW2d 800 (1969). That this requirement is of constitutional dimension was established in *Nunn v George A. Cantrick Company, Incorporated*, 113 Mich App 486, 493-494; 317 NW2d 331(1982). In such circumstances, a remand is for the purpose of *explaining* the process through which the result is determined. *Jordan v Department of Health and Human Services,* 510 Mich 369, 376, 378-379; 987 NW2d 119 (2022).

To say a remand may be appropriate, however, is not to say that a remand is required. The shortcoming in the magistrate's opinion, upon closer inspection than the parties propose, may not exist. Also, the deficiency may be remediable as part of the appeal, as where the facts and law are set forth and there is only one result that could be supported by competent, material, and substantial evidence utilizing a proper standard of law. A remand in such circumstances is imprudent.

A remand is not appropriate in a fifth circumstance, a situation where the administrative appellate tribunal is dismayed with the result below but has no authority to change it without meandering outside the limits of its authority[6] and so chooses to remand the case to allow the magistrate to, essentially, take another swipe at the matter with, even worse, a prediction as to whether the result is a ball or a strike. This is shielded from appellate review in the courts, initially, because of the interlocutory nature of the order[7] but the magistrate must trudge through the record anew for the benefit of a party and administrative appellate tribunal displeased with the prior result. This is improper in administrative proceedings because a finding of fact supported as legally

[6] Recall that an administrative appellate tribunal's findings are conclusive upon further appellate review if supported by any evidence only if the tribunal is cognizant of its role and does "not misapprehend its administrative appellate role." *Mudel*, 462 Mich at 703.

[7] MCL 418.861a(14) restricts appellate court review to *final* orders of the administrative appellate tribunal. *Lucas v Ford Motor Co*, 299 Mich 280, 283; 300 NW 87 (1941). Eventually, after the final order is issued, the appellate courts may (if asked) review the interlocutory order. *Harper Hospital v Michigan Labor Mediation Board*, 25 Mich App 662, 666-667; 181 NW2d 566 (1970).

required is conclusive. Also, there is no authority for any rehearing in such a proceeding, much less a rehearing that comes to a different result. *Jones v St. Joseph Iron Works*, 212 Mich 174, 178-179; 180 NW 374 (1920) ("There is no power in the board to direct the submission to a second set of arbitrators and vacate the steps already regularly taken.").[8]

In this case, the remand from the MCAC, twice, was an invitation for a rehearing. It expressed clear and unmistakable dissatisfaction with the result below, but it identified no error: the finding that was made was supportable as the statute requires and no error of law was established. It was not the only result that could be obtained, but no matter: cases are legion that, simply because another finding is possible, this is not cause to reject the finding that **was** obtained.

The task is complicated in this case by the specific orders previously entered by the MCAC. In its first review, in *Sanchez*, 2013 Mich ACO #39, the MCAC remanded the order, saying in its order as follows:

> IT IS ORDERED that the magistrate's order is remanded in accordance with the attached opinion. We do not retain jurisdiction.

The MCAC did not affirm, reverse, vacate, or modify, the magistrate's order. The MCAC concluded that "the critical conflict in the evidence" had not been addressed by the magistrate. *Sanchez*, 2013 Mich ACO #39 at 3. "The proofs in this case necessitate a credibility determination of plaintiff." *Id*. The MCAC felt plaintiff "clearly distorted" the "reports [of] the frequency, intensity and precipitants of his pain." *Id*. The MCAC did not retain jurisdiction.

After remand, and after Magistrate Kurtz issued an opinion and order, the MCAC, in its second remand opinion, *Sanchez*, 2014 Mich ACO #16, initially stated that Magistrate Kurtz had "found plaintiff a credible witness." *Id*., at 1. By page 4, however, it was concluded that "Magistrate Kurtz fails to make a credibility determination." Then, after having previously quoted the magistrate's opinion at length, the MCAC wrote that "[t]he magistrate must simply address plaintiff's credibility." *Id.*, at 5. Plaintiff's credibility, the MCAC concluded, was "less-than-perfect."[9] Again, the MCAC simply remanded the order:

> IT IS ORDERED that the magistrate's order is remanded for a credibility assessment of plaintiff. After the magistrate makes the credibility assessment, he

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[8] A remand for a proper reason by an administrative tribunal with authority to issue a remand order --- the four categories described above --- changes this, but a remand for a proper reason by a tribunal with authority is not a rehearing. *Prange v Grand Rapids Lumber Co*, 295 Mich 40, 43; 294 NW 90 (1940). And, we do not here address changes in physical condition, or the taking of additional testimony, or a new application for hearing, because none of these occurred here.

[9] *Id*. No explanation was provided as to why plaintiff must have "perfect" credibility to prevail.

> must decide the impact on the previous findings concerning injury, disability and wage loss. We do not retain jurisdiction.

The order of Magistrate Kurtz was not affirmed, reversed, vacated, or modified. Again, the MCAC did not retain jurisdiction.

An administrative tribunal speaks through its orders. *Kadri v Ford Motor Company*, 134 Mich App 138; 350 NW2d 763 (1984). A "remand" is simply a transmittal of the matter to a lower tribunal for further consideration. However, a remand with instruction, without more, is no better, particularly if the instruction implies a change of thought is advised. Yet, it was the magistrates' opinions, not their orders, that were supposedly insufficient. If either magistrates' order had been substantively addressed --- vacated or reversed, for example --- the magistrate on remand could have written an opinion and then entered the order the opinion required. A simple remand does not allow for this. Even in *Prange*, where it was stated that a remand is not a rehearing, the Supreme Court described an administrative reversal of the order, a remand for further proofs with discussion of matters not previously addressed and issuance of an opinion, and only then a new administrative order was entered. *Id.*, at 42. Here, after the MCAC stated that Magistrate Kurtz had "found plaintiff a credible witness," *Sanchez*, 2014 Mich ACO #16 at 1, the MCAC's administrative remand to address matters already decided without alteration of the order and without retaining jurisdiction is simply a prohibited rehearing. *Jones*, 212 Mich at 178-179.

To be sure, the magistrate can be asked to augment the opinion on remand but, if the magistrate is also expected to write a new order, it is because the previous magistrate's order has been reversed or vacated as a result of legal error. Numerous examples of this abound, as remands are the bane of any tribunal's existence. A tribunal has a legal obligation to explain its findings, and one category of legal error is where the tribunal has not explained itself. *E.g., Jordan*, 510 Mich at 376, 378-379; *McClary*, 16 Mich App at 327-328. If the administrative order is reversed or vacated, and the matter remanded, it is expected that a new order be entered by the lower tribunal. *Jordan*. Whatever evidentiary support there is for the findings does not matter; still the *order* is reversed and the matter remanded. *Zaremba v Chrysler Corporation*, 377 Mich 226, 231-232; 139 NW2d 745 (1966). If the order is not reversed or vacated, jurisdiction is retained, and the appellate tribunal writes an order incorporating the new findings. *McClary*.

In this case, no legal error was identified by the prior MCAC panels. If Magistrate Rochau did not explain his findings, it was not explained how this (especially with regard to disability and wage loss) could impact the result. The mandate by the prior MCAC panels to reconsider his findings was an invitation for error. The *orders* of Magistrate Kurtz and Williams will be vacated in our accompanying order.

Analysis

Fraud

With but five letters and one syllable, a claim of "fraud" is within easy reach of anyone's lexicon. But "fraud" is a term of art, to be proven with information in the evidentiary record, and is not presumed or assumed. In *Hi-Way Motor Company v International Harvester Company*, 398 Mich 330, 336; 247 NW2d 813 (1976), citing cases, the Court defined "fraud" as requiring the following to be shown:

> -A material representation was made; and
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> -The material representation was false; and
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> -When the material representation was made, the author "knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion;" and
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> -The material representation was made "with the intention that it should be acted upon;" and
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> -
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> -Action was taken in reliance upon the material representation; and
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> -Injury resulted from the action taken in reliance upon the material representation.

Fraud must be established by "clear, satisfactory and convincing evidence." *Id.*; *Cooper v Auto Club Insurance Association*, 481 Mich 399, 414; 751 NW2d 443 (2008).

In this case, the competing visions of plaintiff's abilities were, arguably, quite inconsistent and presented, initially, a factual issue to be resolved by the magistrate. "Fraud" was alleged, but not (by a very wide margin)[10] proven in this case. Defendants' argument assumes what must be proven, and proven with evidence no less. Defendants' argument repeats the allegation of "fraud" so often that it is constructed as if it were a self-fulfilling prophecy. The case law upon which defendants rely is easily distinguishable, as plaintiff states, but it is also mostly irrelevant as the case law upon which defendants rely discusses the consequences of fraud having been established (or to be established) elsewhere by an authority with jurisdiction to render the conclusion. In this case, the "fraud" was not established and, therefore, we should have no occasion to discuss it at length. However, such a discussion is necessary because the MCAC, twice, appropriated the role

[10] There was no reliance alleged, nor proven, hence the very wide margin.

and authority of the magistrate for itself,[11] insisting that its view of the facts must control, and twice remanded the case. Finally, a third magistrate who had not seen the parties but viewed the words on the page as any reviewer might but who was more acutely aware of the MCAC's appellate mandate placing an elephant's foot on the scales of the magistrate's fact-finding authority, decided the issues in a manner inconsistent with any issue properly presented or preserved, the most relevant part of which neither party attempts to sustain on appeal.

To briefly recount the relevant facts on this issue, in chronological order and not in the order of their presentation at the hearing, defendants hired a private investigator whose surveillance on February 28, 2012, and March 3, 2012, revealed plaintiff carrying a small child some distance and performing other activities, such as walking a dog along a trail. Thereafter, at hearings on and after March 12, 2012, plaintiff testified that he could not, and did not, do very much. The rejoinder --- plaintiff's attorney's assertion which we do not accept in isolation but, rather, look to the record --- was that the activities portrayed were not inconsistent with the medical doctors' restrictions.

This is a classic example of inconsistent factual presentation, a factual dispute which can be resolved, if a tribunal is properly asked to do so. It is not fraud.

As a term of art in the law, conduct alleged to be fraudulent must be measured against the legal definition and not by the casual invocation of the most pejorative term readily available. Definitions abound, as the word appears in numerous appellate court cases.[12] The species of fraud upon which defendants attempt to demonstrate in this case is "intrinsic fraud," which "is a fraud within the cause of action itself. An example of intrinsic fraud would be perjury." *Sprague v Buhagiar*, 213 Mich App 310, 314; 539 NW2d 587 (1995), citing *Triplett v St. Amour*, 444 Mich 170, 175-176; 507 NW2d 194 (1993). There is no independent cause of action for intrinsic fraud, as the victim of what is said to be intrinsic fraud can pursue other action within the course of the case, such as an appeal, as defendants have done here. Decisions discussed below regarding employee Frank Atherton are illuminating, if not dispositive. See notes 13 and 29, below, and following text.

The Specifics of Defendants' Fraud Contention

Defendants' failure to define "fraud," and the failure of their argument to distinguish between "intrinsic fraud" and "extrinsic fraud" substantially undercut their argument. In addition, the cases upon which defendants rely do not require, or even necessarily allow, the result defendants seek.

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[11] Indeed, defendants tell us the MCAC "has already concluded … the plaintiff lacked credibility." (Brief of Defendants-Appellees at 6.)

[12] However, upon some inspection, many refer to a standard of review that operates "in the absence of fraud."

The fraud about which the employer complained in *Oliver Iron Mining Co v Pneff*, 262 Mich 116; 247 NW 126 (1933), which is not a worker's compensation case so much as it is a case about worker's compensation,[13] did not occur in the course of the worker's compensation case but, rather, occurred in the course of the civil case in which the employee was asserting the right to receive worker's compensation benefits for total disability while working with, apparently, no loss in wages. The Supreme Court held that "[e]quity will not countenance the fraud and imposition here practiced by defendant Pneff, nor will it subject industry to such an arrant mulct."[14] The Court added:

> "It is true that, when the employee went back to work, the employer should have asked the Department of Labor and Industry to stop compensation, but the failure to do so offers no excuse to the employee to perpetrate fraud and imposition." (*Id.*, at 122.)

We agree that there is "no excuse" for the employer or employee "to perpetrate fraud and imposition." *Id*., at 122.[15] As applied to this case, however, the take-away from *Oliver Iron Mining*

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[13] We distinguish between workers' compensation cases, which arise in the administrative agency and then proceed to the appellate courts on direct appeal, and cases about workers' compensation, which originate in civil court and concern a worker's compensation case (or issue) that has (or could have) proceeded to finality in the administrative agency. Thus, for example, a case involving an attempt to secure the worker's compensation benefits payable under a final administrative order under MCL 418.863, or its predecessors, is a case about worker's compensation, not a worker's compensation case. The distinction is one of substantial difference: a civil court possesses equitable powers an administrative agency does not have. *Jones*, 212 Mich at 178; *Mackin v Detroit-Timkin Axle Co*, 187 Mich 8, 19-20; 153 NW 49 (1915). The authority of the appellate court is driven, in part, by the initial identity of the trial-level body. When the authority of the trial-level authority is written in some fashion, the appellate body's authority is no greater. *In re Fraser's Estate*, 288 Mich 392, 395; 285 NW 1 (1939). However, civil courts are a part of a one court of justice (Const (1963) art 6; §1) and it can be significant that an appellate court can exercise the authority of a lower civil court. See MCR 7.216(A)(1). Even though MCR 7.216(A)(1) also refers to "a tribunal," this expansion is not applicable to worker's compensation cases. *Atherton v Fawcett*, 294 Mich 436, 440-441; 293 NW 708 (1940).

[14] *Id*., at 122. Today, we might identify "arrant mulct" as an "unmitigated deception" or fraud.

[15] The quandary described in *Oliver Iron Mining* was largely of the employer's own making as it acknowledged that, upon the employee's return to work, "the exact situation escaped the knowledge of the officers of plaintiff[-corporation] having the compensation work in charge" as it expected the employee to accept the employer's calculation of the benefit due the employee "sooner or later." When he did not, the employer was left to insist that "it would be inequitable to require an employer to tender compensation." Employer's Opening Brief in *Oliver Iron Mining*, at 18-19.

is just exactly how much it was an exercise of equity and the exercise of the authority of a *court* of equity to " 'enjoin[] … deceit and imposition practiced upon the *court* as a means of obtaining a judgment which otherwise would not be rendered.' 34 C. J. p. 473.". *Id*. at 122; emphasis added. Subsequent cases confirm this while we pause to recall that divisions of the agency (here, the magistrate(s) and the appellate administrative bodies (the MCAC and the WDCAC)) are not a court, and not a court of equity,[16] even if we do retain eyes upon fundamental fairness. However, we do require "fraud," if that is what it is, to be demonstrated with evidence that is "clear, satisfactory and convincing." *Hi-Way Motor Co*, 398 Mich at 336. "The burden of showing fraud is upon the person alleging it. Fraud is never presumed, nor is it to be lightly inferred." *Goldberg v Goldberg*, 295 Mich 380, 384; 295 NW 194 (1940); citations omitted.

The administrative (workers' compensation)[17] cases upon which defendants rely do not require the result defendants seek. In *Wood v D & L Concrete ConstructionIncorporated*, 1999 Mich ACO #570, the WCAC made expansive statements in *dicta* but concluded that "the instant case can and should be resolved utilizing Section 222 of the Act."[18] Section 222 is not at issue in this case.

In *Kick v Grayling Mercy Hospital*, 1995 Mich ACO #479, the employee had previously been awarded benefits under the Act. In the course of a second Application for Mediation or Hearing seeking the payment of medical expenses and the employer's request to stop the continuing benefits it had previously been ordered to pay in a final order, it was determined by the magistrate that the employee demonstrated a lack of "honesty and veracity" and her Application was denied. (*Id*., at 8.) On the employer's appeal, the magistrate's opinion "did not consider … the legal consequences of plaintiff's fraudulent conduct." *Id*. Relying upon *Oliver Iron Mining*, but failing to appreciate that *Oliver Iron Mining* involved a court sitting in equity, not an administrative tribunal with limited authority, the WCAC "corrected" the magistrate's decision and granted the application to stop or recoup. (*Id.*, at 9.) The suggestion that the employee in *Kick* perpetrated a

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The quandary in which the employer found itself in *Oliver Iron Mining* was largely rectified by the enactment of what is now MCL 418.833(2), and the issuance of decisions such as *Samels v Goodyear Tire & Rubber Co*, 323 Mich 251; 35 NW2d 265 (1948) and *Fisher v Kalamazoo Regional Psychiatric Hospital*, 329 Mich App 555; 942 NW2d 706 (2019).

[16] *Jones*, 212 Mich at 178.

[17] See note 13, above.

[18] *Wood*, 1999 Mich ACO #570 at 3. MCL 418.222 requires, *inter alia*, an employee to disclose certain information on an Application for Mediation or Hearing (Form WC-104A) and contains the legislative judgment that the "willful failure" to disclose the information the Legislature deemed "shall" (§222(3) and (4)) be disclosed "shall prohibit that party from proceeding under this act." (§222(6)) This is a different standard than "fraud" because Section 222 contains no element of intent or reliance, even if it allows, in many instances, for the conclusion that the employee cannot proceed or prevail. Plaintiff filed his Application for Mediation or Hearing long before the events chronicled by defendants' private investigator occurred.

fraud was a make-weight; it was sufficient to justify the result in *Kick* that the magistrate had concluded that the employee lacked "honesty and veracity" (*id.,* at 8) such that there was reliable evidence that the employee's condition had improved.[19] In this case, the magistrate with authority to act in this case, Magistrate Rochau, did not make the findings the magistrate made in *Kick* because it was not found in this case that the employee's condition improved. As a result, *Kick* does not require the result defendants advocate here.

In *Cooper v Wolverine World Wide Inc*, 1995 Mich ACO #546; the employee was said to have altered a return-to-work slip, and this was said to have precluded the employer from rehiring her in reasonable employment. The magistrate "determined that it was plaintiff who altered the return to work slip," (*Id.*, at 4) and that her "at-fault termination extinguished her right to benefits." (*Id.*, at 3.) On appeal, this finding was said to compel the conclusion that the employee had "voluntarily removed herself from the work force. She is not entitled to benefits." (*Id.*, at 4.) The WCAC discussed fraud, relying upon *Kick* and its reference to *Oliver Iron Mining*, but also (and again) failing to grasp that *Oliver Iron Mining* arose in equity. *Cooper* is, however, factually distinguishable from this case because it directly involved a potential return to reasonable employment implicating the structure of the Act[20] whereas, in this case, no return to employment was in the offing. Also, whether the rule of law applied in *Cooper* in 1995 survives the trilogy of cases[21] decided by the Supreme Court in 2000 is not obvious. *Cooper* does not provide enough support for defendants' argument to require our acceptance of it as compelling the result defendants seek in this case.

Smith v GM-BOC Fleetwood, 1997 Mich ACO #475, repeats the dicta in *Kick* and fails to state the equitable nature of the source of the court's authority in *Oliver Iron Mining*. Like *Kick*, the magistrate found the employee in *Smith* to be "less than candid." In light of this finding from the magistrate in *Smith*, which the WCAC affirmed, the assertion of fraud was, again, a make-weight. The lack of credibility in the employee allowed for the stopping and recoupment of benefits paid beginning a year after the prior award had been entered. See, *Smith*, 1997 ACO #475 at 2, footnote 3.

Polk v Fort & Griswold Limited Partnership, 1999 Mich ACO #101 and 1999 Mich ACO #551, makes clear that the issue in the case revolved around MCL 418.222, which is unlike this case. It was alleged that the employee in *Polk* "failed to disclose" post-injury employment as required on her Application for Mediation or Hearing. *Polk*, 1999 Mich ACO #101 at 1. Whereas

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[19] Exactly how the evidence demonstrated that the improvement in the employee's condition allowed for a finding of a restoration of wage-earning capacity was apparently not raised in *Kick* and not addressed.

[20] Then, and as would be applicable to this case, MCL 418.301(5), and now, MCL 418.301(9) and (11).

[21] *Russell v Whirlpool Financial Corporation*, 461 Mich 579; 608 NW2d 52 (2000); *McJunkin v Cellasto Plastic Corporation*, 461 Mich 590; 608 NW2d 57 (2000); *Perez v Keeler Brass Co*, 461 Mich 602; 608 NW2d 45 (2000).

MCL 418.222(3) required (then and now) the employee to disclose*, inter alia*, "whether the employee had any other employment at the time of, or subsequent to, the date of the personal injury and the names and addresses of the employers" under penalty of MCL 418.222(6), it was established that Ms. Polk had substantial earnings from self-employment "and tried to hide it." This, the WCAC held, satisfied the sanction of MCL 418.222(6) that would "prohibit" the employee "from proceeding under the act."[22] The WCAC thus reversed the magistrate on this issue and ordered that the employer was entitled to recoup all benefits paid under the Act.

The opinion quoted in *Polk* is a study in contradiction. While the magistrate did not find Ms. Polk to have committed any fraud, she clearly was not willing to accept Ms. Polk's testimony in the face of tax returns she concluded "are conclusive in this matter and must be used as a[n] indication of any wages plaintiff earned." *Polk*, 1999 Mich ACO #551 at 2. This is tantamount to a conclusion that Ms. Polk's testimony was not credible, and the WCAC stated that all other testimony was contrary to Ms. Polk's testimony. Accordingly, the WCAC held that Ms. Polk "willfully withheld information in violation of the … Act which bars her from any recovery." *Polk*, 1999 Mich ACO #551 at 3.

While the WCAC identified this as "fraud," *id.*, at 3, footnote 2, the conclusion of "fraud" is, again, a make-weight: it was sufficient that Section 222 was violated and, whether the facts were that Ms. Polk made a dollar or one hundred thousand dollars from her nursing care work, the legal result was the same: she was required to disclose it by statute, she did not, and the legislatively-prescribed remedy from Section 222(6) was that she was barred from proceeding. The instant case is not a Section 222 case.

In the trilogy of cases that is *Bailey v Curtis Lee Bailey*, 1998 Mich ACO #716, *after rem*, 1999 Mich ACO #310 and 1999 Mich ACO #393, a rule was set forth that did not precipitate the result in the case and it is, therefore, *dicta*. Initially, the issue was whether Mr. Bailey had disclosed subsequent employment and, if not, whether a sanction pursuant to MCL 418.222 was appropriate. The legislative mandate of MCL 418.222(6) was quoted[23] and this was paired with the assertion that "[f]raud is a bar to worker's compensation benefits" and the case was remanded with the remark that the "record is presently inadequate for us to make a decision." *Id.,* 1998 Mich ACO #716 at 2. After remand, the employer discovered that Mr. Bailey was an accomplished guitar player and sought another remand. A remand was denied because the employer had failed to pursue inquiries about Mr. Bailey's activities at the hearing and the WCAC "discern[ed] no effort at concealment." *Id.*, at 1999 Mich ACO #310 at 3. On the merits of the appeal, the WCAC described a "lack of forthrightness on the application [that] was certainly inappropriate." *Id.*, 1999 Mich ACO #393 at 1. However, the employer "simply did not follow up on plaintiff's revelation that there had been further employment." *Id.* Ultimately, Mr. Bailey was held to be …

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[22] We quote this entire provision below at note 23.

[23] MCL 418.222(6) provides: "The willful failure of a party to comply with this section shall prohibit that party from proceeding under this act."

> "… an independent contractor, [and] even though he purchased worker's compensation insurance, he is not entitled to benefits. The magistrate properly recognized that 'equity would not allow Liberty to escape liability in this case.' However, that is a matter for the circuit court, and not this Commission, which is solely a creature of statute."(*Id.*, at 1999 Mich ACO #393 at 8-9; footnote omitted.)

This holding did not depend on the facts so much as it considered, and rejected, the assertion that self-employment is employment.[24]

The expansive statements about fraud in *Bailey*, and cases that simply repeat what is stated in *Bailey*, are dicta as applied to the merits of this case. The applicable take-away from *Bailey* is to differentiate between, on the one hand, some other tribunal's authority and, on the other hand, the authority of the magistrate and the appellate administrative tribunal. The latter are "solely … creature[s] of statute." *Id.*, 1999 Mich ACO #393 at 9.[25] We do take note, however, of the employer's failure to follow up on the employee's revelation.[26]

Rather than being controlled by *Oliver Iron Mining* "as a matter of law" as defendants suggest,[27] we conclude that this case is controlled by the twin holdings of the Supreme Court in *Klettke*[28] and *Atherton*.[29]

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[24] Mr. Bailey's remedy, then, was in the appellate courts to seek to overturn *White v Searls and White Tree Service*, 60 Mich App 714, 716-718; 231 NW2d 522 (1975), and *Lee v J. H. Lee and Sons*, 72 Mich App 257, 264-265; 249 NW2d 380 (1976), which had not occurred then (or now).

[25] No cases were cited to support this unremarkable proposition, but the supportive cases are many. *Union Carbide Corporation v Public Service Commission*, 431 Mich 135, 146; 428 NW2d 322 (1988); *Mason County Civil Research Council v Mason County*, 343 Mich 313, 326-327; 72 NW2d 292 (1955); *Taylor v Public Utilities Commission*, 217 Mich 400, 402-403; 186 NW 485 (1922); *Jones*, 212 Mich at 178.

[26] *Id.*, at 1999 ACO 393 at 1.

[27] Brief of Defendants-Appellants at 29.

[28] The worker's compensation case is *Klettke v C. & J. Commercial Driveaway Inc*, 250 Mich 454; 231 NW 132 (1930). The case about workers' compensation is *Columbia Casualty Co v Klettke*, 259 Mich 564; 244 NW 164 (1932). We refer to both of these cases as *Klettke*, with a citation to differentiate between the authority of the tribunal making the statement.

[29] The worker's compensation case is *Atherton v Fawcett*, 294 Mich 436; 293 NW 708 (1940). The case about workers' compensation is *Fawcett v Atherton*, 298 Mich 362; 299 NW 108 (1941). There is a third (earlier in time) case in this safari, *Fawcett v Department of Labor and Industry*, 282 Mich 489; 276 NW 528 (1937), which is not relevant here as it involved an administrative case processing error. We refer to these cases as *Atherton*, with a citation to differentiate between the authority of the tribunal making the statement.

In *Oliver Iron Mining*, the fraud said to have occurred certainly occurred in the civil court proceedings, not where it is alleged to have occurred here, in the administrative proceeding. That simple undisputed fact determines the authority of the tribunal to address the crucial question: we simply cannot transfer abstract theories as to a tribunal's authority across the divide between courts and administrative agencies no matter how abhorrent the conduct in question. And, while we are bound by precedent from appellate courts even if we disagree with it (which, here, we do not), we are more tightly bound by precedent from appellate courts in worker's compensation cases applying substantive worker's compensation law.

In *Atherton*, the employee's award of benefits under the Workmen's Compensation Act, as it was then known, was affirmed by a unanimous court. The lengthy quotation from the administrative opinion, 294 Mich at 438-439, suggests that the award in large part relied upon the employee's testimony as to "the happening and nature of the original injury" as a foundation for the medical opinion. "[A]fter the award and this appeal,"[30] the employer "discovered … many witnesses, whose affidavits are before us, … [stating] that [the employee] had had heart trouble for many years." Nonetheless, the Supreme Court affirmed the administrative award, recognizing its standard of review, and indicated that, if the employee "by false testimony, obtained an award to which he was not, in fact, entitled the remedy, if any, is in a court of equity." *Id.*, at 294 Mich 440. The Court stated it "do[es] not review the issues of fact de novo or determine whether the finding of the commission was against the preponderance or weight of the evidence, we must let the finding of the commission stand. This rule of limitation upon our review is well settled both by statute and our former decisions."[31]

As one might expect, an equity proceeding in civil court ensued. In *Fawcett v Atherton*, 298 Mich 362; 299 NW 108 (1941), the employer sought to prevent enforcement of the award. The employee was said to have failed "to give the true facts regarding his previous physical condition … thereby perpetrat[ing] a fraud upon them and the Department [now, Board of Magistrates]." *Id.*, at 363. After noting its previous invitation to the employer that a "remedy, if any, is in a court of equity,"[32] the Court relied upon *Klettke*, 259 Mich 564, a case about worker's compensation, and upheld the dismissal of the employer's bill of complaint in equity.

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[30] *Atherton*, 294 Mich at 439. We assume this means *during* the pendency of the appeal before the Court.

[31] *Atherton*, 294 Mich at 441. The Court cited *Froman v Banquet Barbecue, Inc,* 284 Mich 44; 278 NW 758 (1938). In *Froman*, 284 Mich at 53, the appellate court applied the "any competent evidence" rule. In this case, we apply a deferential, but not toothless, standard of "competent, material, and substantial" evidence. MCL 418.861a(3); *Mudel*, 461 Mich at 703. While we generally accept the magistrate's findings, our review is *de novo* (and, thus, not deferential) as to questions of law and, below, we do not agree with the recitation or application of legal standards with regard to partial disability as set forth by Magistrate Williams.

[32] *Atherton*, 298 Mich at 364.

In *Klettke*, the widow eventually conceded that there was no ceremonial marriage. This said that her "proof" of dependency necessary to justify an award of death benefits to her was perjury. *Klettke*, 259 Mich at 565. No relief, however, was provided to the insurer victimized by the admitted fraud. The Court concluded:

> In almost every case there are disputed facts. *Courts, juries, and administrative tribunals are constantly called upon to weigh testimony, pass upon the credibility of witnesses, and determine, in legal controversies, who has told the truth*. Though the authorities are not agreed, this state is committed to the rule, stated in Pomeroy's Equitable Remedies (2d Ed.) Par. 656, published as paragraph 2077, Pomeroy's Equity Jurisprudence (4th Ed.) as follows:
>
> > 'The courts hold that perjury is intrinsic fraud and that therefore it is not ground for equitable relief against a judgment resulting from it. We have seen that the fraud which warrants equity in interfering with such a solemn thing as a judgment must be fraud in obtaining the judgment, and must be such as prevents the losing party from having an adversary trial of the issue. *Perjury is a fraud in obtaining the judgment, but it does not prevent an adversary trial. The losing party is before the court and is well able to make his defense. His opponent does nothing to prevent it. This rule seems harsh, for often a party will lose valuable rights because of the perjury of his adversary*. However, public policy seems to demand that there be an end to litigation.
>
> (*Klettke*, 259 Mich at 565-566; emphasis added.)

And, so it is here: Magistrate Rochau determined, in the words of *Klettke*, "who has told the truth" or, more precisely, that there was an "understatement," but it did not have an adverse impact on the result plaintiff sought. (Magistrate Rochau opinion at 53.) Dissatisfaction with Magistrate Rochau's finding does not permit a court of equity to intervene and does not demand another opportunity for defendants to argue the point via an administrative remand. And if opposites in *Klettke* (married, 250 Mich at 454; not married, 259 Mich at 564) did not permit a remedy, differences in this case in how one interprets the evidence do not demand the remedy defendants seek here.

In this case, fraud was not established. There are differences and inconsistencies in this case to be sure, but none so glaringly opposite as is present in the cases upon which defendants rely, where the possibility of one fact --- (no) re-marriage; (no) wage; an altered return-to-work slip; post-injury employment --- entirely excludes the possibility of the opposite. In the cases defendants cite, one version of the facts precluded the employee from proceeding. In this case, neither version precludes plaintiff from a recovery.

Credibility

A witness who lacks credibility has not necessarily committed fraud. They are different issues and there are degrees of credibility. Fraud is more of a legal issue as to whether the conduct described meets the legal definition.[33] Credibility is more of a factual issue and usually devolves into whether one should be willing to rely upon a statement or conduct for the conclusion advanced or, for that matter, *any* conclusion.

For Magistrates Rochau and Kurtz, any doubts as to plaintiff's credibility did not serve to impugn the result plaintiff sought in the proceeding. For Magistrate Williams, on the other hand, he concluded the plaintiff's conduct did not contravene the finding of a work-related injury and the need for medical care but, on the other hand, after the date of this surveillance, it was "simply no longer believable that [plaintiff] is *un*able to work in *any* capacity." (Magistrate Williams opinion at 8; emphasis added; underlining provided in original.) Thus, plaintiff was "capable of working within the confines of certain restrictions" which he identified (*id*., at 19) and plaintiff "at such point appears to be able to engage in some form of employment, even if of a limited nature and restricted capacity, but clearly not total inability." (*Id.*, at 20; underlining provided in original.) It is not argued, nor was it found, that any ability to engage in employment would fully replace the wages plaintiff earned while employed prior to his injury. None of this generates "a residual functional capacity ("RFC") to what Plaintiff previously earned" (*id*., at 21) prior to injury. As a result, the magistrate[34] held, plaintiff credibly proved he remained (partially) disabled and entitled to wage loss benefits.

However, the magistrate held that plaintiff's inability to earn the wage he was receiving at the time of his injury "did not however address whether there were any jobs within the confines of such alternative restrictions available which may have provided earnings of some measure, but of a lesser amount." **(***Id*., at 21; emphasis omitted**.)** Because plaintiff had not investigated the possibility of other work, the magistrate held, there "is no way to reasonably assess, let alone definitively find, exactly just what is the amount of any 'post-injury wage earning capacity' he possesses at present or any date after February 28, 2012" and "[o]ne cannot 'speculate' as to what

[33] We do not agree with the assertion of the MCAC that "fraud in workers compensation litigation only concerns the actual application for hearing in MCL 418.222." *Sanchez*, 2013 Mich ACO #39 at 3. "Fraud" is not mentioned in MCL 418.222, and it is a party's "willful failure … to comply" with MCL 418.222 (which are disclosure requirements) that "shall prohibit that party from proceeding" under the Act. On the other hand, the elements of fraud include a material representation that was false and relied upon, *Hi-Way Motor Co*, 398 Mich at 336, such that, if properly presented and preserved, a so-called fraudulent assertion cannot support an award in the administrative agency.

[34] From this point onward, we will refer to Magistrate Williams as "the magistrate," as it is his opinion and order pending before us.

such potential earning capacity, if any, may exist absent evidence in the record which would support a finding on this question." (*Id*., at 22.) As a result, even though …

> … *there is little doubt in my mind Plaintiff has suffered from some measure of loss in earning capacity secondary to his work-related back condition and physical limitations associated therewith*, in the absence of evidence which demonstrates precisely the [sic] what that is, such being the situation presented herein, there is little choice but to conclude that Plaintiff has <u>failed</u> to carry his burden of proof to establish entitlement to weekly benefits in <u>any</u> amount or duration beyond February 28, 2012. (*Id*.; emphasis added; underlining provided in original.)[35]

Plaintiff's impairment, Magistrate Williams held, is "only partial rather than total." (*Id*., at 23.) Therefore, Magistrate Williams held at page 24 of his opinion that …

> … the only conclusion which this Magistrate can reasonably reach on the basis of the evidence presented is that as of February 28. 2012 the proofs fail to establish the amount, if any, of continuing weekly benefits to which he may otherwise have been found entitled given the actual extent and degree of physical impairment which still exists as a result of his work-related injuries and multiple back surgeries.

The magistrate concluded "there is *no doubt* that he could not return to unrestricted labor of the unskilled or semi-skilled variety." (*Id*.; emphasis added.) Further, he "cannot return to his former position for Defendant or other unrestricted work he performed in the past." (*Id*.) Plaintiff, however, has a residual earning capacity which "exists" but it is of "an undetermined or unquantifiable degree given the lack of evidence presented on this specific question." (*Id.*) Thus, the magistrate concluded, plaintiff "appears to be able to engage in some form of employment." (*Id*., at 20.) Because of this apparent ability, "benefits claimed beyond [February 28, 2012,] are denied." (*Id*., at 24.)

The magistrate erred. In *McKissack v Comprehensive Health Services of Detroit*, 447 Mich 57, 70-71; 523 NW2d 444 (1994), the Supreme Court held that the absence of wages and evidence of a work-related injury does not entitle an employer to a determination of a residual wage earning capacity and permits an award of maximum benefits in the absence of "*actual* wages earned, avoided, or refused" and consideration may be had of "other factors affecting an employee's actual as opposed to theoretical, employability." (*Id.*, at 71; emphasis added.) The court held that, while the absence of wages and evidence of a work-related injury *permits* an award of maximum benefits, these do not require that maximum benefits must be paid. Rather, other factors must be considered: *actual* wages earned, avoided, or refused as well as actual, not theoretical, employability. (*Id*.)

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[35] As we will describe below, the emphasized portion of this quotation entitles plaintiff to the open award of continuing wage loss benefits entered by Magistrate Rochau, and the balance of the quotation does not, in this case, allow for the reduction in the amount of those wage loss benefits as imposed by Magistrate Williams.

In this case, defendants offered no evidence of actual wages or actual employability and, as a result, they were "not entitled to a determination of a residual wage earning capacity." (*Id*., at 71.) As a result, the magistrate erred in attempting to determine a residual wage earning capacity and then denying an award after concluding he could not do so. Defendants, in this case, did not put the video in context: it revealed a non-vocational activity that confirmed in the magistrate's eyes that plaintiff remained partially disabled. Vocational testimony could have suggested that, if plaintiff was able to engage in a nonvocational activity portrayed in the video, he could perform certain employment. No such testimony was provided. If the video had revealed an employment activity, one could inquire what plaintiff was paid for the activity. This is not what the video portrays. It is simply speculation, no different than the magistrate's speculation as to what hourly wage plaintiff could earn, which was not part of the record, and no reliance can be had on such speculation.

None of what the magistrate wrote, or found, demonstrates that plaintiff is "able to earn" within the meaning of MCL 418.361(1) or what the "after-tax average weekly wage" of what the magistrate identified as "some form of employment." The magistrate found plaintiff to be entitled to wage loss benefits for his disability (see note 35, above, and accompanying text) but the amount of those benefits (actually, the reduction from the full amount of benefits plaintiff was otherwise entitled to receive) after February 28, 2012, the date of the video, could not be quantified. The magistrate's analysis followed the statute (MCL 418.301(4)) and case law (*Stokes v Chrysler LLC,* 481 Mich 266; 750 NW2d 129 (2008) and *Sington v Chrysler Corporation,* 467 Mich 144; 648 NW2d 624 (2002)) in concluding that plaintiff was entitled to weekly wage loss benefits in a determined amount that were awarded as embodied in the order, but sight of the statute (MCL 418.361(1)) and case law (*Lofton v Autozone, Inc.,* 482 Mich 1005; 756 NW2d 85 (2008) and *Harder v Castle Bluff Apartments,* 2010 Mich ACO #77, aff'd 489 Mich 951; 798 NW2d 26 (2011) and other cases) was lost in the attempt to quantify the amount of plaintiff's wage loss benefits once the video information came into play. He ascribed to plaintiff a claim of total disability which plaintiff never made and appears nowhere in the lengthy history of this case. A claim of partial disability requires a comparison of plaintiff's situation before and after the work-related injury, but all this is done with reference to terms utilized in the statute (MCL 418.361(1)) and requires a tethering of the facts of the case to the words of the statute beyond case names. With no reference to the statute or no reference to the words and phrases in the statute, the magistrate's result cannot be left undisturbed.

Work-Related Injury

Before continuing to address plaintiff's disability, we discuss plaintiff's work-related injuries and reject the argument of defendants-appellants.

Defendants argue, once again, that plaintiff did not sustain a work-related injury. This case was remanded for reconsideration of "the impact [of the credibility assessment] on the previous findings concerning injury." *Sanchez*, 2014 Mich ACO #16 at 5. If defendants previously had not

abandoned a challenge to the findings of a work-related injury,[36] they have now. In briefing, defendants have not identified *any* finding by the magistrate relative to plaintiff's injury that may be said to contain any error. Indeed, their brief is patently oblivious to our standard of review and often reads as if it were to be presented to the magistrate.[37]

Defendants' argument merely sets forth a selection of references to the record said to allow for a different result than that which Magistrate Williams arrived.[38] Our standard of review demands more as it precludes our acceptance of this argument. If the magistrate's findings of fact are not supported by "competent, material, and substantial evidence on the whole record,"[39] only then may we consider the concept that the record might support a different result.[40] Thus, to make this argument, the appellant must first identify the finding made by the magistrate said not to be supported as legally required. An appellant may also attempt to demonstrate that the magistrate utilized the wrong standard of law[41] in which case it matters not that the magistrate's finding finds support. *Cooper*, 125 Mich App at 819. Such an argument from an appellant begins with identifying what the magistrate wrote, and where,[42] that is said to allow for the conclusion that a finding is not supported as legally required or utilizes an incorrect legal standard.

Defendants' argument as to the finding of a compensable injury does none of this. Defendants' argument, as plaintiff observes, merely sets forth a selection of testimony that could (but, we hasten to add, does not necessarily) lead to a result defendants desire. Defendants' argument was properly to be made to the magistrate, but having failed to obtain the desired result before the magistrate is no cause to make the same argument here. In briefing on appeal, the time

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[36] *Sanchez*, 2014 Mich ACO #16 at 7.

[37] For example, on page 30 of defendants-appellants' brief, defendants assert to the WDCAC that "… the Magistrate should deny all benefits … ." On page 31, defendants assert that, "… if the Magistrate does not dismiss Sanchez's claim outright, he should … ."

[38] We will refer to the opinion of Magistrate Williams from this point on, as it is his opinion and order that are on review, but also recognize his agreement with the results of Magistrates Rochau and Kurtz as to injury.

[39] MCL 418.861a(3). Elsewhere in this opinion, this standard is referred to "as supported by the record as legally required."

[40] *Mudel*, 462 Mich at 700. ("Clearly, it would be improper for the WCAC to engage in its own statutorily permitted independent fact finding if 'substantial evidence' on the whole record existed supporting the decision of the magistrate.")

[41] Or failed to identify the correct standard. *Daniels v Flat Rock Community Schools*, 2024 Mich ACO #7 at 6-7.

[42] MCL 418.861a(8); *Byron v Delphi Automotive Corporation*, 2011 Mich ACO #99 at 2 ("[S]pecific references to the record do more than facilitate our review; they convey confidence that the record persuasively establishes the point the author is attempting to make.").

for such an argument is long past if (as here) there is no attempt to show that a magistrate's finding is not supported as legally required or does not utilize a correct legal standard.

For the sake of completeness,[43] we have reviewed the findings of Magistrate Williams related to plaintiff's injuries and find that those findings are supported by the record as work-related as legally required and utilize a proper standard of law to make the finding. The findings of Magistrate Williams refer to the record and case law and utilize the legal standards defendants assert should be utilized. Defendants do not explain how thoughts about plaintiff's credibility enter into the conclusion that is essentially dependent upon medical findings embraced in testimony establishing the fact of damage ("injury") causally related to employment ("arising out of") events at work ("in the course of employment"), all as required by the Act.[44]

Magistrate Williams wrote that the "recitation of the evidence" by Magistrate Kurtz "upon which Magistrate Rochau based the finding as to the underlying injury, condition resulting therefrom and need for treatment, including surgery, finds more than abundant evidentiary support and corroboration" even in the face of plaintiff's testimony "being overstated and less than forthright." Such testimony did "not completely undermine or otherwise serve to defeat the initial portions of his claim." Thus, he "conclude[d] that the summary of such evidence as set forth by Magistrate Kurtz … (in large measure incorporating an extensive reference to the record and findings of Magistrate Rochau) more that sufficiently explains the basis for such conclusions" and he "adopt[ed] and incorporate[d] by reference herein" those conclusions. (Magistrate Williams opinion at 7.)

As a result, Magistrate Williams found that "[p]laintiff sustained an 'injury' or injuries arising out of and in the course of his employment" with the defendant-employer. Further, he held that, "notwithstanding the presence of an underlying and pre-existing condition involving his low back, such injury did result in a medically distinguishable condition." He found this resulted in "disc pathology over and above mere degenerative changes" that do …

> … not merely account for increased symptoms, but indeed constitutes a compensable condition per Rakestraw v. General Dynamics Land Systems, 469 Mich 220; 666 NW2d 199 (2003) and Fahr v. General Motors Corp., 478 Mich 922; 733 NW2d 22 (2007). His overall credibility as far as these initial parts of his claim, notwithstanding the later compromise of such believability, fails to provide

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[43] *Ramos v Production Steel Company*, 87 Mich App 30, 38; 273 NW2d 578 (1978).

[44] MCL 418.301(1). The magistrate cited *Rakestraw* v *General Dynamics Land Systems, Inc.*, 469 Mich 220; 666 NW2d 199 (2003), and *Fahr v General Motors Corporation*, 478 Mich 922; 733 NW2d 22 (2007). We have also considered *Miklik v Michigan Special Machine Company*, 415 Mich 364, 367-368; 329 NW2d 713 (1982), and *Kostamo v Marquette Iron Mining Company*, 405 Mich 105, 116; 274 NW2d 411 (1979).

> sufficient basis to conclude that Mr. Sanchez did not suffer from a significant back condition which was attributable to his work with Defendant and injuries sustained in the course thereof. (*Id*., at 7-8.)

If there are shortcomings in this passage, defendants do not identify any. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 381; 689 NW2d 145 (2004); lv den, 474 Mich 955 (2005) ("When an appellant fails to dispute the basis of the trial court's ruling, '[the tribunal]'… need not even consider granting plaintiff's the relief they seek.") Where appellants have not addressed an issue which necessarily must be reached if they are to succeed, the relief sought may not be granted. *Roberts & Son Contracting, Inc v North Oakland Development Corporation*, 163 Mich App 109, 113; 413 NW2d 744 (1987). Defendants do no more than cite testimony said to be contrary to the magistrate's result, which is not sufficient, *Pitts*, as the magistrate was not obligated to accept defendants' recitation and defendants identify no error of law.

This determination requires the affirmance of orders finding plaintiff to sustain work-related injuries and the need for medical care pursuant to MCL 418.315 and the rules promulgated thereunder.

Disability

There are, potentially, a vast number of issues in this case regarding plaintiff's disability and the resulting rate of his wage loss benefits, none of which were presented to Magistrate Williams by defendants nor on appeal and, hence, are not discussed herein. MCL 418.861a(11); *Cane*. Plaintiff has preserved issues that arose only after Magistrate Williams discussed an issue of the rate of plaintiff's wage loss benefits without using the proper legal framework in MCL 418.361(1) and without finding that any work was available to plaintiff.

Previously, Magistrates Rochau and Kurtz found plaintiff entitled to an open award of continuing wage loss benefits for disability at the full rate.[45] The WCAC remanded this case after their orders were entered in response to timely appeals by defendants. After the second remand, Magistrate Williams also found that plaintiff continued to be disabled but reduced the rate of wage loss benefits to zero after video information revealed activities not consistent with plaintiff's trial testimony. Both plaintiff and defendants have appealed the order that Magistrate Williams entered.

We find no error in the finding of disability but the reduction of plaintiff's wage loss benefit rate to zero is an error of law and, accordingly, order the full rate of wage loss benefits to be paid on a continuing basis.

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[45] Because there is one same phrase that effectively appears in both MCL 418.351 and MCL 418.361(1) --- "80% of the employee's after-tax average weekly wage" --- this has become known as "the full rate." This "full rate," in turn, is defined in the Act by MCL 418.313(1) and MCL 418.371(2-7). *See*, *Schmaltz v Troy Metal Concepts, Inc*, 469 Mich 467, 469; 673 NW2d 95 (2003); *Schambers v National Redi Mix Inc*, 244 Mich App 546, 549; 624 NW2d 572 (2001).

The Act defines the fact of disability in MCL 418.301(4), which provides:[46]

> (4) As used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.

In *Stokes*, 481 Mich at 276, the Supreme Court relied upon *Sington*, 467 Mich at 155, to state that "the standard for establishing a *prima facie* case of disability under *Sington* requires that the claimant prove a work-related injury, and that injury must result in a reduction of the claimant's maximum wage-earning capacity in work suitable to his qualifications and training. *Sington*, [467 Mich] at 155." The Court then described at *Stokes*, 481 Mich at 281-284, four steps the employee must follow to establish a claim for disability:

> First, the injured claimant must disclose his qualifications and training. This includes education, skills, experience, and training, whether or not they are relevant to the job the claimant was performing at the time of the injury. It is the obligation of the finder of fact to ascertain whether such qualifications and training have been fully disclosed.
>
> Second, the claimant must then prove what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. *Sington, supra* at 157, 648 NW2d 624. The statute does not demand a transferable-skills analysis and we do not require one here, but the claimant must provide some reasonable means to assess employment opportunities to which his qualifications and training might translate. This examination is limited to jobs within the maximum salary range. There may be jobs at an appropriate wage that the claimant is qualified and trained to perform, even if he has never been employed at those particular jobs in the past. *Id*. at 160, 648 NW2d 624. The claimant is not required to hire an expert or present a formal report. For example, the claimant's analysis may simply consist of a statement of his educational attainments, and skills acquired throughout his life, work experience, and training; the job listings for which the claimant could realistically apply given his qualifications and training; and the results of any efforts to secure employment. The claimant could also consult with a job-placement agency or career counselor to consider the full range of available employment options. Again, there are no absolute requirements, and a claimant may choose whatever method he sees fit to prove an entitlement to workers' compensation benefits. A claimant sustains his burden of proof by showing that there are no reasonable employment options available for avoiding a decline in wages.

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[46] Keep in mind that plaintiff was injured in 2007 and the amendments by 2011 PA 266 do not apply here.

> We are cognizant of the difficulty of placing on the claimant the burden of defining the universe of jobs for which he is qualified and trained, because the claimant has an obvious interest in defining that universe narrowly. Nonetheless, this is required by the statute. Moreover, because the employer always has the opportunity to rebut the claimant's proofs, the claimant would undertake significant risk by failing to reasonably consider the proper array of alternative available jobs because the burden of proving disability always remains with the claimant. The finder of fact, after hearing from both parties, must evaluate whether the claimant has sustained his burden.
>
> Third, the claimant must show that his work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages. *Id*. at 158, 648 NW2d 624.
>
> Fourth, if the claimant is capable of performing any of the jobs identified, the claimant must show that he cannot obtain any of these jobs. The claimant must make a good-faith attempt to procure post-injury employment if there are jobs at the same salary or higher that he is qualified and trained to perform and the claimant's work-related injury does not preclude performance.
>
> Upon the completion of these four steps, the claimant establishes a prima facie case of disability. The following steps represent how each of the parties may then challenge the evidence presented by the other.

With regard to these four steps, the employee has the burden of proof. MCL 418.851; *Stokes*, 481 Mich at 285.

If the employee has satisfied these four steps, a *prima facie* case proving disability has been established. *Stokes*, 481 Mich at 283 (satisfaction of "these four steps … establishes a *prima facie* case of disability.") A *prima facie* case is a presentation of facts which, if proven, establish the right to the result the proponent seeks. *People v Lemons*, 454 Mich 234, 248, n 20; 562 NW2d 447 (1997) ("*Prima facie* evidence is: [e]vidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient ... to sustain a judgment in favor of the issue which it supports.... [Black's Law Dictionary (6th ed), p 1190.]"). Even so, " '*prima facie* evidence' creates a presumption that may be rebutted by contradictory evidence." *Department of Environmental Quality v Worth Township*, 491 Mich 227, 239, n 25; 814 NW2d 646 (2012).

The magistrate wrote that plaintiff had made out a *prima facie* case as plaintiff had met the requirements of the first four steps in *Stokes*:

> No doubt as it relates to Plaintiff's period of impairment from the injury date(s) up to February 28, 2012 *he has met the requirements of the first 4 steps in Stokes,* with

> the defendant having failed to rebut his inability to engage in any employment within the universe of jobs for which he has experience, training and ability, per the unrebutted testimony of Mr. Fuller, … (Magistrate Williams opinion at 20; emphasis added.)

Plaintiff's burden of demonstrating disability was satisfied by the proofs presented from the medical doctors and the vocational consultant that plaintiff "is, by all accounts, from the medical experts, unable to return to the type of unrestricted manual labor of the nature he performed while working for Defendant Wal-Mart and/or many if not all of the other employers he had over the course of numerous years prior to that." (*Id*., at 18-19) In addition, plaintiff's vocational consultant identified other work suitable to plaintiff's qualifications and training and, together with plaintiff's efforts, it was established that work suitable to plaintiff's qualifications and training paying the maximum wage was not able to be performed and was not available to plaintiff. Magistrates Rochau and Kurtz explicitly recited facts to demonstrate that plaintiff had satisfied the first four steps of *Stokes*. (Magistrate Rochau opinion at 53; Magistrate Kurtz opinion at 38-39.)[47] Magistrate Williams agreed, and defendants do not suggest that he erred in this respect. MCL 418.861a(11); *Cane*, 240 Mich App at 80-81; *Derderian*, 263 Mich App at 381.

A job search is not specifically required by MCL 418.301(4). Nonetheless, the second step of *Stokes* says plaintiff "must provide some reasonable means to assess employment opportunities to which his qualifications and training might translate." *Stokes*, 481 Mich at 282. One "reasonable means … [of] assess[ing] employment opportunities" is plaintiff's search for jobs because the analysis of the jobs "may simply consist of …[48] the job listings for which the claimant *could realistically apply* given his qualifications and training; and *the results of any efforts to secure employment*." *Id.*, 481 Mich at 282, emphasis added. The testimony of a vocational consultant can also be presented. The goal is to have the employee "consider the full range of available job opportunities." *Id*. However, the analysis under *Stokes* and MCL 418.301(4) is "limited to jobs within the maximum salary range" and the successful employee "sustains his burden of proof by showing that there are no reasonable employment options available *for avoiding a decline in wages*." *Id.*, 481 Mich at 282; emphasis added. Failure "to reasonably consider the proper array of alternative available jobs" entails considerable risk as the burden of proof "always" remains with plaintiff. *Id*., 481 Mich at 283.

The third step of *Stokes* speaks to medical impairment and asks whether the employee's work-related injury prevents the performance of "some or all jobs identified" as paying the maximum wages within qualifications and training. Again, the analysis is of "the jobs identified

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[47] While the conclusions of Magistrates Rochau and Kurtz were deemed insufficient by the MCAC, we rely upon the factual recitation by these magistrates and apply the legal standard to the factual recitation without deference as a question of law.

[48] The ellipsis here is of the Supreme Court's combining the first two steps of *Stokes*, omitting elements not at issue here.

as within his qualifications and training *that pay his maximum wages*." *Id*., 481 Mich at 283; emphasis added.

The fourth step of *Stokes* requires the employee to demonstrate that, if able to perform any of the jobs identified in step two, the employee "must show that he cannot obtain any of these jobs." *Id*., 481 Mich at 283. A "good-faith attempt to procure post-injury employment" is necessary "if there are jobs *at the same salary or higher*" that the employee "is qualified and trained to perform" and the performance of those jobs is not precluded by the work-related injury. *Id*., 481 Mich at 283; emphasis added.

A job search requirement may be seen as existing in part four of *Stokes* --- "a good-faith attempt to procure" certain jobs --- but the fourth step is not always part of plaintiff's burden of proof. Such jobs may not exist. If the employee has demonstrated that the "work-related injury prevents" the performance of all jobs within qualifications and training paying maximum wages, there is no occasion to address the fourth step (and the employee has no obligation to undertake a job search) because such an employee is not "capable of performing any of the jobs identified."[49]

An important feature of the first four steps of *Stokes* is the limitation in the field of employment suitable to qualifications and training is to those jobs paying the maximum wages or "within the maximum salary range." *Id*., at 282, 283. This is important because this part of *Stokes* is concerned with the employee establishing a disability --- "a *limitation* of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease"[50] --- and does not speak to whether the disability is total or partial. Because the statute's criteria is a "limitation" in wage earning capacity[51] --- not the elimination of an employee's wage earning capacity --- *Stokes* and MCL 418.301(4) do not address, much less answer, the question of whether the employee's disability is total or partial.

It is to be considered that, given the magistrate's findings, plaintiff's departure from the labor market arose because of the residuals of his work-related injury. Whatever one might think about a return to work for plaintiff, it is the medical impairment described by the doctors that is the impediment to his returning. This impediment is the same kind of preclusion described by the Court of Appeals in *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 8-12; 760 NW2d 586 (2008), lv den, 483 Mich 900 (2009), to conclude that there was a wage loss due to the injury. That is, Mr. Romero "is now *unable* to work as a millwright in the United States or Mexico." *Id*., at 10. Even if there is an additional reason for Mr. Romero's or plaintiff's unemployment --- the loss of a

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[49] However, at the time a job search might be undertaken, the employee cannot know whether it will be found that the employee is not "capable of performing any of the jobs identified." This is part of the "significant risk" identified in *Stokes*, 481 Mich at 283.

[50] MCL 418.301(4), emphasis added.

[51] As *Stokes*, 481 Mich at 275, explains, with our emphasis, "a person suffers a disability if an injury covered under the WDCA results in a *reduction* of that person's maximum reasonable wage earning ability in work suitable to that person's qualifications and training."

visa that enabled Mr. Romero to work in the United States or the allegation of a failure to search for lesser-paying work asserted here --- this was and is not sufficient to refute the wage loss claim. When unemployment is an additional reason, not the only reason, for the failure to receive wages, the claim for wage loss benefits due to the work-related injury is not impaired.

There are three other steps set forth in *Stokes*, 481 Mich at 283-284, and they are stated as follows:

> Fifth, once the claimant has made a prima facie case of disability, the burden of production shifts to the employer to come forward with evidence to refute the claimant's showing. At the outset, the employer obviously is in the best position to know what jobs are available within that company and has a financial incentive to rehabilitate and re-employ the claimant.
>
> Sixth, in satisfying its burden of production, the employer has a right to discovery under the reasoning of *Boggetta* if discovery is necessary for the employer to sustain its burden and present a meaningful defense. Pursuant to MCL 418.851 and MCL 418.853 the magistrate has the authority to require discovery when necessary to make a proper determination of the case. The magistrate cannot ordinarily make a proper determination of a case without becoming fully informed of all the relevant facts. If discovery is necessary for the employer to sustain its burden of production and to present a meaningful defense, then the magistrate abuses his discretion in denying the employer's request for discovery. For example, the employer may choose to hire a vocational expert to challenge the claimant's proofs. That expert must be permitted to interview the claimant and present the employer's own analysis or assessment. The employer may be able to demonstrate that there are actual jobs that fit within the claimant's qualifications, training, and physical restrictions for which the claimant did not apply or refused employment.
>
> Finally, the claimant, on whom the burden of persuasion always rests, may then come forward with additional evidence to challenge the employer's evidence.

Here, there is a prominent shift in the burdens the employee and employer must bear. Because the fifth and sixth steps of *Stokes* describe an employer's rebuttal or contradiction of the employee's *prima facie* case as has been presented in the first four steps of *Stokes*, there is a burden of production on the employer as it "is in the best position to know what jobs are available." *Id.*, 481 Mich at 283. The employer has the opportunity "to demonstrate that there are *actual jobs* that fit within the claimant's qualifications, training, and physical restrictions for which the claimant did not apply or refused employment." *Id.*, 481 Mich at 284; emphasis added.

Finally, the employee, "on whom the burden of persuasion always rests," may offer "additional evidence *to challenge the employer's evidence*." *Id.*, 481 Mich at 284; emphasis added. As a result, in demonstrating an entitlement to wage loss benefits, the search for jobs which the

employee "did not apply or refused employment" is limited to "actual jobs" at the maximum salary range and within the employee's qualifications and training and restrictions.

Steps five, six, and seven describe an employer's opportunity to produce evidence which, if the employer has accepted the invitation to produce evidence of such jobs, can be seen as augmenting the employee's burden of proof. Thus, if the employer comes forward with evidence showing the availability of "actual jobs" suitable to plaintiff's qualifications and training and within his restrictions, only then does the employee's burden of proof include challenging that evidence, with the employee's own evidence. In this case, there was no comment on the fifth, sixth, and seventh steps of *Stokes* because there was no occasion to do so: the employer did not "come forward with evidence to refute" the employee's showing.[52] In this case, like the employer in *Bailey*,[53] defendants could have shown that there is actual work available to plaintiff that pays a wage, if his abilities are greater than he orally described and are, for example, as shown in the video. Defendants did not do so, which leaves plaintiff's *prima facie* showing of disability as a result of the work-related injuries legally sufficient.

Partial Disability and The Amount of Wage Loss Benefits

None of the above, however, establishes the wage loss benefit rate plaintiff receives. For this, it must be determined whether plaintiff's disability is total or partial.

The rate for a totally disabled employee is set forth in MCL 418.351 but there is no claim of total disability here.[54] The rate for a partially disabled employee is set forth in MCL 418.361(1) and it provides:

> Sec. 361. (1) While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly

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[52] We discuss this elsewhere with regard to the amount of plaintiff's wage loss benefits as the employer failing to put the investigator's video information in context. Whatever one might think of the information, they do not show plaintiff being engaged in employment activity ---- an activity for which plaintiff would be receiving remuneration.

[53] *Bailey*, 1999 Mich ACO #393 at 1. See footnote 26, above, and preceding text. The employer "simply did not follow up on plaintiff's revelation that there had been further employment." Here, there appears to be no "further employment" and, therefore, no actual wages earned, but it is the employer's burden of production to show that there is employment available that the employee is capable of performing but he has avoided or refused. *Stokes*, 481 Mich at 284. Defendants "simply did not follow up" on the information the videos contained.

[54] The conventional wisdom is that an order of wage loss benefits at the "full rate" suggests that the employee is totally disabled and, further, that a partial benefit rate is owed to the employee who is "partially disabled." This is not accurate. The Supreme Court held in *Murray v Ford Motor Company*, 296 Mich 348, 354-355; 296 NW 284 (1941), and *Donahoe v Ford Motor Co*, 295 Mich 422; 295 NW 211 (1940), that a partially disabled employee who has stopped working for reasons unrelated to the work-related injury may receive benefits at a rate equal to those paid for total disability. Other examples abound.

> compensation equal to 80% of the difference between *the injured employee's after-tax average weekly wage* before the personal injury and the after-tax average weekly wage which the injured employee is *able to earn* after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355. (Emphasis added.)

The distributive property of mathematics allows this provision to be rewritten as the difference between "80% of the injured employee's after-tax average weekly wage before the time of injury and 80% of the after-tax average weekly wage which the injured employee is able to earn after the personal injury."[55] Both MCL 418.351 and MCL 418.361(1) contain the phrase "80% of the injured employee's after-tax average weekly wage" and this is known as the "full benefit amount." See, *Bruce v Dynamic Resources Inc*, 2010 Mich ACO #147 at 11-12; *lv den*, 491 Mich 887 (2012), relying upon *Schmaltz v Troy Metal Concepts, Inc*, 469 Mich 467, 474; 673 NW2d 95 (2003).

Rather than tethering the analysis to the statute (MCL 418.361(1)), the magistrate held that plaintiff "remains physically able to engage in physical activities of a fairly restricted nature, but nothing close to total incapacity." (Magistrate Williams opinion at 15.) Thereafter, the magistrate wrote of the conflicts in the testimony and of plaintiff's testimony, the videos, and the medical testimony, all to render the conclusion that plaintiff is "capable of working in a restricted capacity and therefore no longer 'totally disabled' by virtue of his work-related physical impairment." (Magistrate Williams opinion at 18.) The significance of being found to be "partially disabled," beyond the conclusion that plaintiff *is* disabled, is that it means that MCL 418.361(1) --- and the terms of art contained therein --- are applicable. The magistrate's opinion does not acknowledge any of this. The magistrate's reduction in the amount of wage loss benefits payable to plaintiff is not sustainable.

Plaintiff has argued as appellant that the magistrate erred because "[t]he offset [in MCL 418.361(1)] is available if work is available"[56] and, thus, plaintiff's weekly benefit rate should not have been reduced, here, to zero. We agree, with the recognition that defendants-appellees made no attempt to present the argument to the magistrate and, even after that finding was made, they have made no attempt on appeal to justify the magistrate's conclusion. That is, even after Magistrate Rochau wrote the finding that the video information "does not have an adverse impact upon the *Stokes* analysis performed by Mr. Fuller, (or any analysis per *Lofton* (supra)[])." (Magistrate Rochau opinion at 53), defendants have not disputed these findings in three waves of appellate briefing. This was found after Magistrate Rochau had determined that "[p]laintiff satisfies any requirements set forth in *Stokes* (supra) or *Lofton* (supra)." (*Id*.) These conclusions,

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[55] The distributive property of mathematics, as applied to MCL 418.361(1), says that .80 x (A – B) = (.80 x A) – (.80 x B). Here, "A" is "the injured employee's after-tax average weekly wage before the personal injury" and "B" is "the after-tax average weekly wage which the injured employee is able to earn after the personal injury." MCL 418.361(1).

[56] Plaintiff's brief at 20.

with which we agree upon our own independent[57] review as set forth below, explain that the differences between information set forth in plaintiff's testimony and in the videos do not, *in the specific facts of this case*, impact the result.

Magistrate Williams went to great lengths to attempt to determine plaintiff's "residual wage-earning capacity."[58] His failure to define the term leaves the impression that any reduction MCL 418.361(1) contemplates is to obtain a fair result or an equitable estimation of what plaintiff can perform, *i.e.*, one that does not use the terms in the statute as defined by case law. The magistrate did describe "a number of factors" which would ordinarily be considered but failed to indicate that these factors address whether plaintiff is disabled, and plaintiff had already satisfied them. See note 35, above, and accompanying text. Essentially, by not referencing the statute, and utilizing a term the act does not define ("residual wage earning capacity"),[59] the magistrate extracted from *Stokes* the allegation for plaintiff to look for jobs when *Stokes* quite explicitly limits the inquiry to jobs "that pay … maximum wages" or are "within the maximum salary range." *Stokes*, 481 Mich at 282, 283. Recall, also, that the employee is not burdened in MCL 418.361(1) with demonstrating what cannot be performed (a "limitation" is presented in MCL 418.301(4)) but, rather, what amount (the "after-tax average weekly wage" as presented in MCL 418.361(1)) work that is available ("able to earn" *id.*) to the employee will provide. It stands to reason that different inquiries are required.

This requires definitions of the operative phrases in MCL 418.361(1) of "able to earn" and "after-tax after weekly wage." Unlike issues presented by MCL 418.301(4) and disability and *Stokes*, the legal framework for partial disability is not well developed. The legal framework to be implemented is described in MCL 418.361(1) has been set forth in a series of orders from the

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[57] The issues are at least a mixed question of law and fact and, therefore, our review is *de novo* where we do not defer to the analysis below, even if we agree with it. To the extent Magistrate Williams disagreed with this result, he did so by failing to acknowledge and apply the standards dictated by MCL 418.361(1), as we explain below.

[58] Plaintiff's partial disability "requires further analysis … to parse out … [plaintiff's] current, post-injury and post-surgery, earning capacity." (Magistrate Williams opinion at 20.) "The dilemma in being able to make a finding as to the extent of Plaintiff's residual earning capacity is apparent by virtue of the limited nature of the proofs." (*Id.*, at 20.) This is the result of the video information obtained shortly before trial and, as we discuss elsewhere, not being placed in a context an analysis under the Act would require. Certainly, the party could have asked for time to respond after it was placed into evidence at the end of the hearing, but no request was made.

[59] We recognize that 2011 PA 266 does use the term "post-injury wage earning capacity" (known in some circles as "PIWEC") and may otherwise define terms differently than utilized in this opinion. These terms are not applicable here, as plaintiff was injured prior to the effective date of 2011 PA 266 --- *Finkbiner v ITT Building Service*, 189 Mich App 560, 562-563; 474 NW2d 148 (1991); lv den, 439 Mich 963 (1992); see also, MCL 418.891(4) --- and we make no determination as to how the facts of this case would be evaluated if the injury were subject to 2011 PA 266.

Supreme Court beginning with *Lofton v Autozone, Inc.*, 482 Mich 1005; 756 NW2d 85 (2008), which vacated the decision of the WCAB and provided for a remand …

> … to the Board of Magistrates for reconsideration in light of *Stokes v. Chrysler LLC*, 481 Mich 266, 750 N.W.2d 129 (2008). If it is found that the plaintiff is disabled under MCL 418.301(4), but that the limitation of wage-earning capacity is only partial, the magistrate shall compute wage loss benefits under MCL 418.361(1), based upon what the plaintiff remains capable of earning.

After the remand, the Court remanded the case to the WCAC "for review of any challenges the parties may have to the magistrate's decision pursuant to the standard of review established in MCL 418.861a." *Lofton v Autozone, Inc., as amended after rem*, 483 Mich 1133; 766 NW2d 290 (2009). No further orders were entered in *Lofton*.

Harder v Castle Bluff Apartments, 489 Mich 951; 798 NW2d 26 (2011), makes clear that "MCL 418.361(1) applies at all times to partially disabled workers." To like effect is *Umphrey v General Motors Corporation*, 489 Mich 978; 799 NW2d 16 (2011), and *Vrooman v Ford Motor Co*, 489 Mich 978; 799 NW2d 17 (2011).

Previously, in *Harder v Castle Bluff Apartments*, 2010 Mich ACO #77 at 8-10, the WCAC had established that the retention of an "ability to perform work" at a certain hourly wage "does not supply enough information to impact the result under MCL 418.361(1)." Rather, "more need be known" to perform the calculation MCL 418.361(1) requires:

> The subtraction that MCL 418.361(1) provides is a specific formula: the rate payable to a partially disabled employee is reduced by a process of subtraction for "[80% of] the after-tax average weekly wage which the employee is able to earn after the personal injury." While the order of the Court in *Lofton* referred to what the employee was capable of earning, the more important phrase is 'after-tax average weekly wage.' This phrase is a term of art in the Act and '[a] legal term of art, however, must be construed in accordance with its peculiar and appropriate legal meaning. MCL 8.3a.' *Brackett v Focus Hope, Inc*, 482 Mich 269, 276[; 753 NW2d 207] (2008). (*Id.*, at 8.)

Harder involved an employee who would return to reasonable employment and, hence, the WCAC applied what was then MCL 418.301(5) as if it had priority over MCL 418.361(1). The Supreme Court's resolution that "MCL 418.361(1) applies *at all times* to partially disabled workers"[60] establishes that MCL 418.361(1) has priority.[61] William Harder ultimately prevailed because he

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[60] *Harder*, 489 Mich at 951; emphasis added.

[61] This does not resolve the tension between the "reasonable employment" provisions and the "partial disability" provisions in other cases and, since this case does not involve "reasonable employment," we make no attempt to do so here.

"did not have the ability to earn wages within his qualifications and training, and the WCAC therefore properly affirmed the magistrate's decision." *Id*. In *Harder*, notably, there was an actual employment experience which could be utilized in the analysis.

It is apparent that there is no *statutory* requirement that an employee search for work.[62] MCL 418.301(4) did not require employees injured before December 19, 2011, to search for work. Likewise, MCL 418.361(1) does not directly require employees to search for work. *Stokes* does not require an employee to search for work to establish a *prima facie* case of disability. Searching for work only becomes an issue after it is contended, with evidence from either party,[63] that specific work is allegedly available to the employee that would present an opportunity to replace (some or all of the) wages lost as a result of injury and disability.

In rendering his analysis of plaintiff's wage loss rate after February of 2012 when, in the magistrate's eyes, plaintiff became partially disabled, it is apparent that the magistrate did not analyze MCL 418.361(1) in any manner. It is not cited, nor referenced, and the magistrate did not avert to the outcome-determinative phrases in MCL 418.361(1). Cases are cited, but not analyzed, even though *Harder* explicitly recites that MCL 418.361(1) applies at all times to partially disabled employees. And so, we evaluate MCL 418.361(1).

In interpreting MCL 418.361(1), we utilize well-known rules of statutory interpretation. "All matters of statutory interpretation begin with an examination of the language of the statute." *McQueer v Perfect Fence Company*, 502 Mich 276, 286; 917 NW2d 584 (2018). If a statute is unambiguous, it "must be applied as written." *Id*.; quotation marks and citation omitted. We may not read something into the statute "that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id*.; quotation marks and citation omitted. We "give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire and Casualty Co v Old Republic Insurance Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). The "obligation is to ascertain and effectuate the intent of the Legislature. To do so, we begin with the language of the statute, …" *Lash v City of Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007); footnote omitted.

MCL 418.361(1) requires an analysis of what the employee is "able to earn" after the injury so as to calculate the amount of a reduction, if any, in the rate of workers compensation benefits payable to the employee. The definition of "able to earn" has varied throughout the state's jurisprudence.

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[62] Contrast this with provisions of 2011 PA 266, which do mention job searches, but which are not applicable here and, again, we make no determination as to how the facts of this case would be evaluated if the injury were subject to 2011 PA 266.

[63] This is to distinguish assertions premised upon evidence with statements and arguments of an attorney, which are not evidence and, therefore, no evidentiary response can be proffered. *Bradley v Colonial Mold, Inc*, 2022 Mich ACO #7 at 20, citing cases.

"Able to earn" has sometimes been equated with "wage earning capacity" as the Supreme Court has indicated that, " '[w]age earning capacity,' in addition to other possible applications, plays a specific role in *determining the amount of benefits in a partial disability case*."[64] The only location in the Act containing the formula for "determining the amount of benefits" for a partially disabled employee is MCL 418.361(1).

The reduction in MCL 418.361(1), with our emphasis, is to account for what "the after-tax average weekly wage which the injured employee is *able to earn* after the personal injury." Case law has defined it as the amount one has the capacity to earn, which would include actual earnings that one would actually receive from employment, but it is not limited to actual earnings. Wages differ from wage earning capacity[65] because the capacity to earn wages takes into account more factors, most particularly, the ability to work, the market for labor, the opportunity to work, and whether the work has ordinary conditions of permanency. *Pulley v Detroit Engineering & Machine Co*, 378 Mich 418, 425-427; 145 NW2d 40 (1966); *MacDonald v Great Lakes Steel Corp*, 274 Mich 701, 703; 265 NW 776 (1936); *Hood v Wyandotte Oil & Fat Co*, 272 Mich 190, 193; 261 NW 295 (1935).

Hood commences an unbroken line of cases that explains that the wages the employee has the capacity to earn "affords no measure unless accompanied by opportunity to obtain suitable employment. Opportunity is circumscribed by capacity of the injured and openings to such a wage earner." *Hood*, 272 Mich at 192.

In *Eaton v Chrysler Corp*, 203 Mich App 477; 513 NW2d 156; lv den, 447 Mich 870 (1994),[66] the employee administratively found to be partially disabled was, by the Court of Appeals, held to be totally disabled because, even though it had been found that he could perform sedentary work, there was "no description of the nature of the sedentary work and no finding that such work is available to [Mr. Eaton]." *Id*., at 486. The comparison between preinjury wage earning capacity and post injury wage earning capacity requires consideration of …

> a complex of factual issues concerning the nature of the work performed, the continuing availability of work of that kind, the nature and extent of the employee's disability, and wages earned. (*Id*., at 486.)

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[64] *Lawrence v Toys R Us*, 453 Mich 112, 121; 551 NW2d 155 (1996) (Part III of Levin, J, plurality opinion). Justice Boyle agreed with this part of the opinion, which makes it a majority ruling. *Lawrence*, 453 Mich at 128 (Boyle, J, concurring in part). The dissent did not directly address this issue.

[65] *Sington*, 467 Mich at 170-171. However, wages and wage earning capacity might, when measured in dollars and cents, be the same amount.

[66] *Eaton* was thus pending before the Supreme Court during the time *Sobotka* and *McKissick* were briefed and argued and decided in the Supreme Court. The denial of leave in *Eaton* occurred just one month after the opinions in *Sobotka* and *McKissick* were issued.

The court emphasized a passage from *Pulley*, 418 Mich at 423, which quoted from *Hood*, 272 Mich at 192:

> According to *Pulley*, wage-earning capacity …
>
> > … is not limited to wages actually earned after injury, for such a holding would encourage malingering and compensation is not a pension. On the other hand *mere capacity to earn wages, if "nondescript" by reason of injury, affords no measure unless accompanied by opportunity to obtain suitable employment. Opportunity is circumscribed by capacity of the injured and openings to such a wage earner*. [*Id*. at 424 …quoting *Hood v. Wyandotte Oil & Fat Co.*, 272 Mich. 190, 192, 261 N.W. 295 (1935), and *Pigue v. General Motors Corp.*, 317 Mich. 311, 316-317, 26 N.W.2d 900 (1947); emphasis added. See also *Leizerman v. First Flight Freight Service*, 424 Mich. 463, 473, 381 N.W.2d 386 (1985)].
>
> (*Eaton*, 203 Mich App at 486-487; emphasis by Court.)

As a result, "mere capacity to earn wages, if "nondescript" by reason of injury, affords no measure unless accompanied by opportunity to obtain suitable employment." *Eaton*, 203 Mich App at 487. In this case, there is no showing of any opportunity to obtain suitable employment.

In his opinion, the magistrate suggested that he could calculate a "residual capacity" out of an hourly wage:

> Thus, for instance, if it was to be (hypothetically) assumed that on the basis of Plaintiff's actual limitations work within his qualifications and training *could at best be expected to generate earnings in the range of minimum wage* (appx. $8.50/hr.) to $9.00/hr., a residual capacity could be calculated and which would likely entitle him to a partial wage loss benefits due to that unrebutted difference between his maximal and retained earning capacities. (Magistrate Williams opinion at 21; emphasis added.)

This is, at once, theoretical employment not to be considered according to *McKissack* but, in any event, the hypothetical situation does not supply enough information to reduce the rate of wage loss benefits because MCL 418.361(1) contains a specific formula for calculating the reduction, assuming work is described that is available to plaintiff such that he is "able to earn." The reduction is a function of the "after-tax average weekly wage" in such work. An hourly wage does not contain enough information to calculate what is earned in a week. The "average weekly wage" is calculated

under MCL 418.371 and requires information as to what is paid (past tense)[67] and not what the magistrate thought could "be expected to generate" which *is* speculative and which, in any event, is not in the record for either party to support or refute. In particular, the number of hours per week is not known.[68] The presumption of a 40-hour work week described in *Morris v Metals Engineering Manufacturing Co*, 122 Mich App 404, 408-409; 332 NW2d 495 (1983), was abolished by 1980 PA 357. *Mitchell v Event Staffing, Incorporated*, 2010 Mich ACO #35 at 13.

The magistrate clearly operated under the belief that plaintiff had the burden of proof. Our conclusion is that, if plaintiff bears the burden of proof, the magistrate did not describe the burden correctly. Rather, he invented a presumption that has no basis in the Act or case law.

Because wage loss benefits are paid to the partially disabled worker on the basis of wage loss as defined in MCL 418.361(1) and not on the basis of physical impairment, *Sobotka*, 447 Mich at 6, the magistrate's focus on plaintiff's medical condition after concluding that plaintiff remained partially disabled even in light of the video is difficult to reconcile with the Act. The amount of plaintiff's wage loss benefit is determined by looking to "what wage[69] the injured workman is able to earn after his injury and the wage he was earning at the time he was injured." *Hutsko v Chrysler Corporation*, 381 Mich 99, 102; 158 NW2d 874 (1968).

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[67] The Supreme Court has indicated that the tense of the statute can be a factor in statutory interpretation. *Wilmore-Moody v Zakir*, 511 Mich 76, 85; 999 NW2d 1 (2023) ("The statute uses the past-tense phrase 'at the time the injury occurred' twice. This signals the Legislature's intent…"); *City of Coldwater v Consumers Energy Company*, 500 Mich 158, 176-177; 895 NW2d 154 (2017); *Rock v Crocker*, 499 Mich 247, 266; 884 NW2d 227 (2016).

[68] At one time, a predecessor of MCL 418.371 contained an assumption of a 40 hour work week. In *Kunde v Teesdale Lumber Company*, 55 Mich App 546, 550; 223 NW2d 67 (1974), the Court of Appeals addressed the employee "who was not employed 'specifically and not temporarily on a part-time basis' within the meaning" of what was then MCL 418.371(3), but was employed on a "work-available basis" with "no evidence of an agreement to limit the hours [he] was expected to work." Hence, he was a full-time employee, and his average weekly wage was "in no case less than 40 times his hourly rate of wage or earning." MCL 418.371(2). These provisions were eliminated from the Act long ago.

[69] Now, the "after-tax average weekly wage" is what the version of MCL 418.361(1) applicable to plaintiff's injury provides. An "average weekly wage" is transformed into an "after-tax average weekly wage" by operation of law as required by MCL 418.313 and by the Director's formulation of rate tables. *Linton v Schafer Bakeries, Inc*, 252 Mich App 41; 656 NW2d 185 (2002). This does not detract from the significance of a reliance upon an "average weekly wage." Because the transformation from "average weekly wage" to "after-tax average weekly wage" operates as a function of law, this opinion refers to "average weekly wage" with the understanding that, after the enactment of 1980 PA 357, if there is an "average weekly wage," it usually (but not in the last sentence of MCL 418.371(1)) must be converted to an "after-tax average weekly wage."

In *Sobotka*, 447 Mich at 7-8, Justice Boyle's plurality opinion indicated that the unemployed partially disabled employee "is entitled to the maximum benefit allowable under §361(1), because the employee is not 'able to earn' wages postinjury." In footnote 5 attached to this sentence in Justice Boyle's opinion, she explained that "the partially disabled employee's only burden is to show he is unable to earn wages because of his injury, *not that he must show that the economy or other factors are not the cause of unemployment*." *Sobotka*, 447 Mich at 8, n 5; emphasis added. In other words, the employee has the affirmative of the issue --- "[un]able to earn" MCL 418.361(1) --- not the negative of the issue --- rebutting the theory that there must be some other reason for the loss of wages. For that, the employer has a burden of production. After referring to *Hood* and its description that there must be an opportunity for work or an availability of work, the Supreme Court indicated:

> It then became incumbent upon *defendant to come forward with evidence* to refute plaintiff's contention. While defendant presented evidence regarding plaintiff's physical and mental condition, the WCAB found that plaintiff had satisfied his burden of proof. (*Sobotka*, 447 Mich at 32; emphasis added.)

This model is consistent with step 5 of *Stokes*, 481 Mich at 283, where the employer is permitted, with our emphasis, to "come forward *with evidence* to refute" the showing the employee has made.

There is only a narrow difference in *Sobotka* between Justice Boyle's (two-justice) plurality opinion and Justice Levin's (two-justice) opinion. Justice Levin would define "able to earn" in MCL 418.361(1) as "the wages he actually earns or refuses after the date of the injury is the amount he is 'able to earn.' " (*Id*., 447 Mich at 35.)[70] Other case law clarifies the meaning of "actual wages earn[ed] or refuse[d]." It has long been established that the receipt of "actual wages" establishes an amount the employee is "able to earn"[71] but the definition of "able to earn" is more broadly stated. It is defined in *McKissack*, 447 Mich at 71, issued the same day as *Sobotka* but argued six months later, as "evidence of actual wages earned, avoided, or refused, or other factors affecting an employee's actual as opposed to theoretical, employability."

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[70] *Sobotka*, 447 Mich at 34 (Levin, J, separate opinion), footnote quoting MCL 418.361(1) omitted. Justice Levin applied this definition to the "injured worker [who] is employed" but then, in the next two sentences, applied the same standard to "unemployed injured workers." Employed and unemployed workers embrace everyone and so the passage we quote would appear to include everyone.

[71] *Markey v S.S. Peter & Paul's Parish*, 281 Mich 292, 299-300; 274 NW 797 (1937) ("When an employee accepts work and receives wages therefor in a recognized regular employment, with the ordinary conditions of permanency, as here, there is no room for argument that he has not thereby established a present earning capacity equal to such wages, whatever may be his physical condition.")

Previously, in *Juneac v ITT Hancock Industries*, 181 Mich App 636; 450 NW2d 22 (1989); lv den, 434 Mich 900 (1990); rec den, 437 Mich 951 (1991), the Court of Appeals had held that wages the employee is "able to earn" includes more than wages actually earned:

> The applicability of § 361 does not hinge on whether the employee has actually returned to some form of work. Section 361(1) refers to "the after-tax average weekly wage which the injured employee is able to earn after the personal injury." It includes not only wages actually earned after the injury, but also any the employee has the capacity to earn. *Frammolino v Richmond Products Co*, 79 Mich App 18, 26–27; 260 NW2d 908 (1977). The Michigan Supreme Court has ruled that to hold otherwise would encourage malingering. Compensation is not a pension. *Hood v Wyandotte Oil & Fat Co*, 272 Mich 190, 192; 261 NW 295 (1935). (*Juneac,* 181 Mich App at 641.)

In this case, the one bit of evidence presented --- the videos --- cannot be interpreted as showing, with evidence, that jobs are available to plaintiff, as *Hood* and its progeny require. A showing from some source in the record that jobs are available to plaintiff which he could perform even with his medical impairment is part of the employer's burden of production.[72] Only then need

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[72] While the employee has the burden of proof, by reason of MCL 418.851, to demonstrate an "*entitlement* to compensation and benefits," plaintiff was found entitled to benefits under the Act and, now, the issue is the amount of those benefits. As a result, placing some burden upon the employer is not inconsistent with the Act, especially since it remains the employee's burden to respond to what the employer chooses (or chooses not) to provide. It is to be recalled that "… …[t]he burden of producing evidence is not invariably allocated to the pleader of the fact to be proved. That burden may be otherwise allocated by the Legislature or judicial decision based, among other factors, on an estimate of the probabilities, fairness and special policy considerations, and similar concerns may justify the creation, judicially or by law, of a presumption to aid the party who has the burden of production." (*Johnson v Secretary of State*, 406 Mich 420, 432; 280 NW2d 9 (1979); footnote omitted.)

* * * *

> "Generally, the burden of producing evidence relevant to an issue is cast initially upon the party who has pleaded the existence of facts necessary to prevail upon the issue. …
>
> > With regard to assigning the burdens of proof and persuasion, it has been said that there is no key principle governing the apportionment of the burdens of proof. Their allocation, either initially or ultimately, will depend upon the weight that is given to any one or more of several factors, including: (1) the natural tendency to place the burdens on the party desiring change, (2) special policy considerations such as those disfavoring certain defenses, (3) convenience, (4) fairness, and (5) the judicial estimate of the probabilities. [McCormick, supra, § 337, p.952.]

plaintiff respond with his evidence to prove that he cannot perform the job or it is not actually available such that it does not represent a wage he has received or refused or, in the words of *McKissack*, a wage that he has earned, avoided, or refused.

Barren of any reference to "able to earn" from MCL 418.361(1) or *McKissack*, the magistrate wrote that it "is simply impossible" to determine plaintiff's "actual loss of 'earning capacity'."[73] This is because "there is no way to reasonably assess, let alone definitively find, exactly just what is the amount of any 'post-injury wage earning capacity' he possesses at present or any date after February 28, 2012." However, it is accurate that "[o]ne cannot 'speculate' as to what such potential earning capacity, if any, may exist absent evidence in the record which would support a finding on this question." Even so, the magistrate found "there is little doubt in my mind Plaintiff has suffered from some measure of loss in earning capacity secondary to his work-related back condition and physical limitations." But, "in the absence of evidence which demonstrates precisely the what that is, such being the situation presented herein, there is little choice but to conclude that Plaintiff has failed to carry his burden of proof to establish entitlement to weekly benefits in any amount or duration beyond February 28, 2012." (Magistrate Williams opinion at 22; underlining in original.)

It **is** difficult to find what may not exist. Plaintiff's "actual loss of earning capacity" is not at issue here as MCL 418.301(4) requires a "limitation of wage earning capacity" and, in this case, the magistrate found that such a limitation exists, and continues to exist. There is nothing in the opinion which retreats from this finding.[74] The magistrate did not find, for example, that plaintiff regained the "wage-earning capacity" that he lost as a result of his work-related injury. His assertion that plaintiff's disability is partial, rather than total, when it had not been previously found that plaintiff was totally disabled, only dictates the formula utilizing any capability of earning wages subsequent to the injury. Plaintiff's entitlement to weekly benefits was established, as was the applicability of the formula in MCL 418.361(1). The magistrate's assertion at page 22, with our emphasis, that "plaintiff has failed to carry his burden of proof to establish *entitlement* to weekly benefits in any amount or duration beyond February 28, 2012" is incongruous and reflective of an improper legal standard: plaintiff's "entitlement to weekly benefits" was established; it is the *amount* of those benefits at issue. Even if the *amount* of the weekly benefit rate is zero, the finding of disability in the form of a "limitation of wage earning capacity" establishes that he is *entitled* to the weekly benefits.

Brown v Beckwith Evans Co, 192 Mich App 158, 167-168; 480 NW2d 311 (1991).

[73] All quotations in this paragraph are from the opinion of Magistrate Williams at 22.

[74] The magistrate repeatedly found that a limitation exists. For example, at page 22 of his opinion, the magistrate wrote that "there is little doubt in my mind Plaintiff has suffered from some measure of loss in earning capacity secondary to his work-related back condition and physical limitations." At page 23 of his opinion, he wrote that "Plaintiff Sanchez continues to present some level and degree of physical impairment, consistent with what one would normally characterize in lay terms as 'partial disability'."

The magistrate could not, actually did not attempt to, determine what plaintiff was "able to earn" within the meaning of MCL 418.361(1). Instead, he constructed a "theoretical employability" matrix for plaintiff in which plaintiff ought to be able to earn some hourly wage for some number of hours per week. None of this is based on the record, which is to say it was not introduced by plaintiff or defendants and, therefore, plaintiff could not know that this presented an occasion to respond with his own evidence. Moreover, the rule for the partially disabled employee is that the fact-finder …

> … is free to accept or reject evidence of actual wages earned, avoided, or refused, or other factors affecting an employee's actual as opposed to theoretical, employability. (*McKissack*, 447 Mich at 71.)[75]

In effect, the magistrate attempted to make an estimation of plaintiff's remaining earning capacity of some amount which is a misinterpretation and misapplication of the law. *Sobotka*, 447 Mich at 8. Because it is not premised upon the details of the job opportunity to earn a wage, it cannot be sustained. The magistrate's inability to make a record-based determination of what plaintiff is "able to earn" the record demonstrates, in this case, that there is no showing of any amount plaintiff is "able to earn" a wage within the meaning of MCL 418.361(1). That is, it is not shown that there is an "average weekly wage" that plaintiff is "able to earn" because there are no "actual wages received or avoided or refused." *McKissack*, 447 Mich at 71.

This point is driven all the more firmly by the recognition that it is not some abstract concept of what the employee is "able to earn" but also by the Legislature's statement that it is the "after-tax average weekly wage" that the employee is "able to earn" that is included in the calculation. The references in the Act to an "*average* weekly wage" suggests that weekly wage loss benefits will vary, as it does in actual employment paying an actual wage, but we can assume that a real job that can be described as being actually available to the employee and, therefore, represents a real opportunity to earn wages, can have attached an "average weekly wage." However, any explanation of a relevant employment experience that is available to plaintiff requires some detail, some context, that was not presented here and, yet, the magistrate treated the video information as if it portended a return to work. It does not. The video depicts plaintiff carrying a small child free of the demands of any supervision, let alone those of the employer. Unlike employment, if plaintiff were not feeling well, he could avoid the setting without penalty except for the child's disappointment. The video does not suggest that any mandate of an employment environment could be satisfied.[76] At best, there is emotional substance in the video but no economic consequence. The statute requires the latter in a mathematical formula.

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[75] The Court of Appeals in *Kurz v Michigan Wheel Corp*, 236 Mich App 508, 514; 601 NW2d 130 (1999); *lv den*, 462 Mich 861 (2000), explained that "*Sobotka* specifically rejected any calculation that included reference to an employee's " 'theoretical ability to exercise residual [wage-earning] capacity,' i.e., what the employee would have been earning but for the injury."

[76] It is, however, consistent with Dr. Gordon's vision of a job "in a sheltered environment where he can go at his own rate and his own speed." (Plaintiff's Exhibit 1, Dr. Victor C. Gordon deposition at 35.) There was no indication whether such jobs exist, let alone are available to

In this regard, we do not say that the employer could not have established a vocational opportunity parallel to the personal activity, only that they did not,[77] and plaintiff was thus not presented with any occasion to dispute the contention. Because the video does not translate terms that MCL 418.361(1) recognizes and requires, once the magistrate found that the video information does not contradict plaintiff's claim of disability, all force and effect of the video information is lost insofar as supporting the magistrate's order to set plaintiff's weekly benefit rate after 2012 at zero is concerned. We do not doubt that the video is inconsistent with some of plaintiff's trial testimony,[78] but the magistrate was (and, now, the WDCAC is) not required to see the factual matter as defendants would portray it and even defendants do not say there is only one conclusion (*i.e.,* the one they prefer) that may be drawn. Defendants' argument as appellants does not advocate, let alone establish, that the magistrate's findings are not supported by the record.[79] They merely present their preferred view, which is not sufficient as it is (even from their telling) only an alternative view of matters. *Markle v Nexteer Automotive Corporation*, 2022 Mich ACO #5 at 37, citing, *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994); *Pitts v General Motors Corporation*, 1989 Mich ACO #189 at 2. More significantly, however, it does not take advantage of the opportunity to disclose an actual vocational experience available to plaintiff that, to receive wage loss benefits without reduction, plaintiff would have to prove does not represent "actual wages received or avoided or refused." *McKissack*, 447 Mich at 71.

All of these concerns apply as well to magistrate's mention of James Fuller, plaintiff's vocational consultant, and his identification, as the magistrate wrote, of "[c]ertain jobs of the nature for which Mr. Sanchez, would be qualified, [that] still exist although in diminishing frequency as time passes."[80] Categories of work do not have the specificity that MCL 418.361(1) requires and no "average weekly wage" from multiple employers can attach.

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plaintiff, and at what average weekly wage.

[77] Indeed, defendants do not present an argument on appeal to this effect, possibly in recognition that such an argument would not be record based and we could not consider it: "All parties are expected to protect themselves on the record. Omissions from the record which are not cured by the time the case is submitted on appeal cannot be considered by the reviewing court in reaching its decision." *Hiers v Brownell*, 376 Mich 225, 232-233; 136 NW2d 10 (1965).

[78] The magistrate identified the inconsistency as "paint[ing] two different pictures." (Magistrate Williams opinion at 15) The question in this case is whether the differences have legal consequences.

[79] The failure to argue this as error is fatal to defendant's primary argument on appeal. By not addressing the actual basis for the magistrate's findings as to injury, defendants have abandoned any argument that the magistrate erred. *White v EDS Care Management LLC*, 2021 Mich ACO #6 at 4, citing cases.

[80] Magistrate Williams opinion at 21.

In this case, plaintiff does not argue that he is totally disabled. MCL 418.861a(11). However, he does argue that it is error to conclude that any reduction in his benefit rate on the basis that he is "able to earn" a wage at work with no contention, much less evidence, that such work is available to him such that no finding can be made for him to rebut that "such work is available." Further, plaintiff argues, "[a] search for lesser-paying jobs is not part of plaintiff's *prima facie* case." (Plaintiff's brief at 20.) We agree because the search for jobs, according to *Stokes*, 481 Mich 281-285, is to show that jobs "at maximum wages" are not available to him. The distinction between, on the one hand, totally disabled individuals such as Mr. Eaton, 203 Mich App at 486, and, on the other hand, partially disabled individuals such as plaintiff who are (un)able to earn a wage is, now,[81] mostly theoretical. The difference, here and in most cases, is in the formula that calculates the amount of the weekly benefit rate if the employee is "able to earn" or has a "wage earning capacity" in employment after the injury. Utilizing the provision in effect at the time of plaintiff's injury, as required by *Finkbiner v ITT Building Service*, 189 Mich App 560, 562-563; 474 NW2d 148 (1991); lv den, 439 Mich 970 (1992), the reduction for the partially disabled employee requires a calculation of "the after-tax average weekly wage which the employee is able to earn after the personal injury." MCL 418.361(1). For the totally disabled employee, the reduction is for the "employee's wage earning capacity" measured against "employee's average weekly earnings at the time of injury."[82] Different formulae may yield a different result, or they may not.[83] In either event, the subtraction can be zero if the partially disabled worker is not "able to earn" an "after-tax average weekly wage" as MCL 418.361(1) provides. Similarly, the rate for the totally disabled worker can have no reduction if there is no "wage earning capacity after the personal injury." MCL 418.371(1). As a result, we do not see the failure of plaintiff to argue that he is totally disabled, rather than partially disabled with no ability to earn, to be of much consequence. The arguments plaintiff and defendants would make are the same and MCL 418.861a(11) does not limit the issues we must consider.

Whether the record is said to pose[84] no jobs, ten jobs, or one hundred jobs, plaintiff's burden is to respond. Seen in the eyes of *Stokes* in the proof of disability which may entitle an

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[81] Partially disabled individuals, unlike those totally disabled, were not entitled to supplemental benefits because of MCL 418.352(9). *Juneac*, 181 Mich App at 641. Plaintiff is not eligible for supplemental benefits in all events because he was injured after 1979. See MCL 418.352(1).

[82] MCL 418.371(1), last sentence. This provision was made a part of the Act by 1927 PA 376. This provision was enacted to avoid "the anomaly that an employee totally disabled in a particular skilled employment would receive full compensation benefits even though that employee was fully able to earn in a different line of work." *Elliott v Peterson American Corporation*, 2003 Mich ACO #118 at 6; footnote omitted; see also, *Hebert v Ford Motor Co*, 285 Mich 607, 611-612; 281 NW 374 (1938), collecting cases.

[83] See note 54, above.

[84] "Pose," it must be said, does not mean work must be "offered" to the employee. Work that is offered to the employee commences a "reasonable employment" analysis under what was MCL 418.301(5) at the time of plaintiff's injury. *Price v City of Westland*, 451 Mich 329; 547

employee to wage loss benefits, the fifth step of *Stokes* leads to the seventh. In the eyes of *Sobotka* in the determination of the amount of wage loss benefits if plaintiff is partially disabled, the rule is that …

> … [w]here the employee is unemployed, the determination of what the employee is able to earn after the injury does not require theoretical assessments of jobs the employee could perform if available. (*Sobotka*, 447 Mich at 33.)

In *McKissack*, 447 Mich at 71, the Supreme Court directed attention to "factors affecting an employee's actual as opposed to theoretical, employability." If the employer has posed no jobs, and plaintiff himself has not identified any such jobs,[85] plaintiff's burden of proof is adjusted accordingly. Plaintiff's burden to show that he is not "able to earn" under MCL 418.361(1) is circumscribed by information about jobs subsequent to the work injury communicated to plaintiff that are thought to be appropriate for plaintiff, whatever the source of information, but it is no greater. Plaintiff need not refute a tedious portrayal of work that exists only in the mind of the speaker or writer seeking to provide an alternative explanation for unemployment beyond the employee's already-proven disability. Not only is it impossible to prove a negative, *Lawrence*, 320 Mich App at 440, it is impossible to do so with evidence after the record is closed, as occurred here when the magistrate reached for his pen.

Conclusion

The magistrate's assessment of plaintiff focused too heavily on the extent of plaintiff's medical impairment and not enough upon the economic consequences of the medical impairment. The former proves plaintiff's disability which is not seriously at issue here after accounting for the magistrate's findings and our standard of review; the latter is the issue here in light of MCL 418.361(1)'s economic command.

The failure of Magistrate Williams to meld the facts he found with the statutory formula in MCL 418.361(1) dictates that we reject his result. In concluding the plaintiff has an unquantifiable residual wage earning capacity which dictates a rate of zero after 2012, the magistrate's legal framework falls short because he did not answer the questions MCL 418.361(1) requires to calculate the amount of the rate. Is plaintiff "able to earn" and what is the "after-tax average weekly wage" of such an endeavor that is available to plaintiff? The proofs in the record did not show that any work is available to plaintiff that would provide him with an opportunity to receive wages and, hence, he is not "able to earn" within the meaning of MCL 418.361(1). There is no reduction because plaintiff has not been shown to be "able to earn" *any* "after-tax average weekly wage."

NW2d 24 (1996). This case does not involve, and the analysis herein does not extend to, any "reasonable employment' issues.

[85] The employee might pose such jobs by being employed subsequent to the work-related injury, or testimony produced by the employee might reveal potential jobs.

The obvious difficulty the magistrate had in crafting a residual wage earning capacity for plaintiff is mostly a function of it not existing. Plaintiff's burden of proof does not include showing that he is not "able to earn" premised upon an abstract categorization of jobs based solely upon medical impairment. Such a burden is virtually impossible to bear: it likely entails all employment wherever located at whatever wage. Recall that, at the point plaintiff would be marshaling the evidence of this, no determination has been made of work suitable to qualifications and training nor what alternatives to work actually performed might exist. The observation that there may be work the employee has never performed that might provide replacement wages creates an especially difficult burden when applied to work at any location and at whatever wage level, and not at maximum wages as in *Stokes*.

Proving a negative --- in this case, that some largely-unspecified work is not available to the employee --- is always a difficult task and perhaps "a near impossibility." *Lawrence*, 320 Mich App at 440. A search for such jobs is akin to running a race not knowing the distance or the direction, with a criticism always available that the employee could have looked for more (and different) jobs no matter how many were sought. It is for this reason that the employer is permitted as much control over the list of the jobs thought to be appropriate for the partially disabled employee to replace lost wages as the employer desires through the opportunity to produce evidence of such appropriate jobs. The employee may do the same, the primary example being work that has been performed after the injury and, now, the employee must show that work performed after the injury does not represent work he has refused or avoided. (In this case, plaintiff left work to have surgery, and it is not contended that a return to this work was in the offing.) This prevents the employee from arbitrarily leaving work after the injury solely for the purpose of increasing (reducing the reduction in) the wage loss benefit rate. Plaintiff, then but only then, must prove that any such thought-to-be-appropriate jobs are not available or unsatisfactory such that, from *McKissack*, 447 Mich at 71, there are no actual wages from, no actual avoidance of, and no actual refusal of work that would allow for a reduction or elimination of the rate of wage loss benefits payable.

The magistrate borrowed heavily from his analysis of plaintiff's disability --- after finding that plaintiff was (and continues to be) disabled and entitled to benefits --- to inform his analysis of how the amount of those benefits is calculated. He did this in spite of the observation that plaintiff's entitlement to wage loss benefits is measured by MCL 418.301(4) and is a "yes" or "no" answer to the statutory question: plaintiff has, or does not have, a "limitation of wage earning capacity." The amount of plaintiff's wage loss benefit, on the other hand, is measured by the statutory formula in MCL 418.361(1) and its operative phrase "able to earn" from opportunities to work that are available to plaintiff and not merely theoretical. The magistrate cited none of this; his references to *Lofton* and *Harder* indicate only that MCL 418.361(1) does apply here but does not address how it is to be applied. The magistrate's inclusion of *Stokes* and *Sington* and *Lofton* in the same sentence (Magistrate Williams opinion, at 22) strongly suggests a confusion between whether plaintiff is entitled to wage loss benefits (*Stokes* and *Sington*) and what the amount of those benefits (*Lofton*) is. Elsewhere, however, the magistrate was clear and consistent that plaintiff was entitled to wage loss benefits as plaintiff had not recovered from his disability.

Segregating the issues of plaintiff's entitlement to wage loss benefits from the amount of those benefits compels the conclusion that plaintiff is entitled to the full amount of wage loss benefits on an ongoing basis.

The finding of plaintiff's compensable injury is amply supported by the record with findings of fact made by the magistrates utilizing the correct standard of law and cannot be disturbed and, accordingly, must be affirmed. Defendants' contrary view of the record is no more than an alternative view of the record that does not permit, let alone compel, a conclusion contrary to the finding by the magistrates.

An order will enter accordingly.

Commissioner McMillan concurs.

Granner S. Ries Commissioner

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Duncan A. McMillan Commissioner

Chairperson Daryl Royal did not participate.

STATE OF MICHIGAN
WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

MAXIMILIANO A. SANCHEZ,
PLAINTIFF,

V DOCKET #16-0051

WAL-MART ASSOCIATES, INCORPORATED AND
AMERICAN HOME ASSURANCE COMPANY AND
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
DEFENDANTS.

This matter having come before the Workers' Disability Compensation Appeals Commission (WDCAC) on timely claims for review filed by plaintiff, Maximiliano Sanchez, and defendants, Wal-Mart Associates, Incorporated and American Home Assurance Company/Insurance Company of the State of Pennsylvania, from the September 12, 2016, order issued by the Worker's Compensation Board of Magistrates, Magistrate David H. Williams, and filed with the Michigan Compensation Appellate Commission ("MCAC"),[1] and the WDCAC having considered the record and the briefs of plaintiff and defendants, the WDCAC concludes for the reasons set forth in the attached opinion as follows:

IT IS FOUND that Magistrates Kurtz and Williams did not have jurisdiction to enter the orders they entered and, therefore,

IT IS ORDERED that the orders of Magistrates Kurtz and Williams are vacated; and

IT IS FOUND that the findings of Magistrate Williams are generally supported by competent, material, and substantial evidence on the whole record, subject to and as set forth in the attached opinion as to the finding of plaintiff's work-related injuries and the fact of plaintiff's resulting disability and wage loss but that, at pertinent and outcome-determinative points, as to the calculation of the rate of plaintiff's wage loss benefits, an incorrect standard of law was applied; and therefore;

IT IS ORDERED that plaintiff's claim is granted based upon the injury dates of February 9, 2007, and December 18, 2007. Defendants Wal-Mart Associates, Incorporated and American

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[1] The Michigan Compensation Appellate Commission ("MCAC") was created by Executive Order No. 2011-6; MCL 445.2032 and then was written into the Workers' Disability Compensation Act ("Act") by 2011 PA 266 and codified as MCL 418.274. Subsequently, by Executive Order No. 2019-13, effective August 11, 2019, the MCAC was abolished. The authorities, powers, duties, functions, and responsibilities of the MCAC are transferred to the Workers' Disability Compensation Appeals Commission (WDCAC).

Home Assurance Company shall, therefore, pay on an ongoing basis for plaintiff's medical care pursuant to, and as required by, MCL 418.315 and rules promulgated thereunder; and

IT IS FURTHER ORDERED that defendants Wal-Mart Associates, Incorporated and American Home Assurance Company shall pay wage loss benefits in the amount of $374.66 per week from plaintiff's last day of work, March 2, 2009, to the date of the hearing before Magistrate Williams, with interest thereon as provided in MCL 418.801(6) and subject however to the two-year-back rule as set forth below; and

IT IS FURTHER ORDERED that defendants Wal-Mart Associates, Incorporated and American Home Assurance Company shall continue to pay weekly wage loss benefits pursuant to MCL 418.361(1) at the rate of $374.66 from the date of the hearing before Magistrate Williams and thereafter until further order of the Workers' Disability Compensation Agency with interest thereon as provided in MCL 418.801(6); and

IT IS FURTHER ORDERED that, in the calculation of the accrued wage loss benefits, defendants are entitled to the limitations imposed by the two year back rule provisions of the Worker's Disability Compensation Act, MCL 418.381(2). Defendants are also entitled to credit for the wage loss benefits they have paid. MCL 418.811.

No appeals pend.

Granner S. Ries Commissioner

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Duncan A. McMillan Commissioner

Chairperson Daryl Royal did not participate.