

The social security number and dates of birth
have been redacted from this opinion.

**STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
WORKER'S COMPENSATION AGENCY**

**Nagi Aamir,
SS# xxx,**

Plaintiff,

v

**ABM Lakeside, Inc., and
Cambridge Integrated Services Group, Inc.,
Defendants.**

APPEARANCES

PLAINTIFF

Mr. Paul Renzo (P63597)

DEFENDANTS

Mr. Milton T. Means (P24489)

TRIAL DATE

2/22/07

CLAIM

The plaintiff, by Application for Mediation or Hearing – Form A, filed on 11-23-04, alleged an injury date of 8-27-04 as follows: *Head, neck, left upper extremity. Petitioner hit by van in course of employment. Psychogenic overlay.* There were no amendments to this pleading.

Defendant filed an appearance, answer, demand for medical report, affirmative defenses, notice of lien, and carrier's response on 4/29/05. There were no amendments to these pleadings.

STIPULATIONS

The parties *stipulated* that, on 3/8/04:

1. Both the employer and the employee were subject to the compensation law on the date of the injury alleged.

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2. Respondent insurance carrier carried the risk.
3. The claim was made within the statutory prescribed period.
4. A personal injury arose out of and in the course of the employment.
5. The employer had notice of the alleged personal injury within the statutory period.
6. The employee was in the employ of the respondent at the time of the alleged personal injury.
7. The appropriate amounts as to the following:
 - A. gross wage excluding benefits: **\$482.54 (excluding tips)**
 - B. value of discontinued fringe benefits: N/A
 - C. date fringe benefits were discontinued: N/A
 - D. proper rate, if previously paid: N/A
 - E. appropriate compensation rate: N/A
8. There was no dual employment.
9. The employee did not receive any social security, self-insured plan, wage continuation plan, disability insurance policy or pension or retirement payments or any other benefits under section 354 or 358 for coordination or offset. The employee did receive first party no-fault benefits.
10. Plaintiff received weekly benefits of \$313.47 from 8-30-04 through 9-29-04 totaling \$1,388.22.

The issues remaining for trial are as follows:

1. Whether the disability was due to the alleged personal injury.
2. Whether plaintiff earned tips, and if so what amount on a weekly basis.
 - a. The appropriate compensation rate.
3. Plaintiff's IRS filing status.
4. Whether Plaintiff claims any dependents.

PRETRIAL MATTERS

There were no pretrial issues.

WITNESSES TESTIFYING AT TRIAL

PLAINTIFF

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Mr. Nagi Aamir (Plaintiff)

DEFENDANTS

Mr. Jack Janiga (General Manager)
Mr. Gary Essary (Investigator)

WITNESSES TESTIFYING BY DEPOSITION

PLAINTIFF

Dr. Haranath Policherla, M.D.

DEFENDANTS

Dr. Edward Klarman, M.D.
Dr. Emmanuel N. Obianwu, M.D.
Dr. Robert J. Gordon, D.O.
Dr. Steven Geiringer, M.D.

EXHIBITS

PLAINTIFF

1. Deposition of Dr. Haranath Policherla, M.D. (3/28/06)
2. ACCESS Psychiatric Evaluation (Nadia Sultani, MSW; Pravin Soni, M.D.) (1/14/04)
3. Affidavit of Dr. Haranath Policherla, M.D. (4/17/06)
4. Letter from Dr. Mahmoud Rahim, M.D. (8/30/05)
5. Note of Dr. Theodore R. Densley, M.D. (8/30/05)
6. Medical Bills

DEFENDANTS

- A. Deposition of Dr. Edward Klarman, M.D. (4/5/06)
- B. Deposition of Dr. Emmanuel N. Obianwu, M.D. (4/7/06)
- C. Continued Deposition of Dr. Emmanuel N. Obianwu, M.D. (5/12/06)
- D. Deposition of Dr. Robert J. Gordon, D.O. (7/11/06)
- E. Deposition of Dr. Steven Geiringer, M.D. (5/17/06)
- F. Letter from Dr. Theodore R. Densley, M.D. (11/03/04)
- G. Letter from ABM Lakeside (9/28/04)
- H. Letter from ABM Lakeside (11/4/04)
- I. Letter from Ren Cen Parking (11/29/04)
- J. Surveillance DVD (4/19/05 and 4/29/05)

ADMISSION OF DEPOSITIONS/EXHIBITS

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All depositions were admitted into evidence subject to the objections contained in the deposition transcripts. Remaining exhibits were admitted without objection.

Relative to the deposition of Dr. Gordon, plaintiff's counsel objected to the deposition and moved to quash on the basis that he did not receive Dr. Gordon's addendum report of November 30, 2004 until minutes before the deposition. Defense counsel indicates that he did not know the report existed until he arrived to conduct the deposition. At that time he presented it to plaintiff's counsel for review. Defense counsel argues that the addendum report does not materially affect the deponent's conclusions and further that the addendum does nothing to hamper plaintiff counsel's ability to present an effective cross-examination of the witness.

Ideally, the report should have been provided to plaintiff timely, but it wasn't. Sometimes these things happen despite the litigants' best efforts. There has been no allegation by the plaintiff that the addendum report was *intentionally* withheld until moments before the deposition, and there has been no motion pursuant to MCR 418.222. I do not believe, nor do I find that the addendum report was intentionally withheld. I think that under the circumstances, both parties were surprised by the discovery of the addendum report, and are thus similarly situated. I find that late receipt of the report was not *unfairly* prejudicial to the plaintiff, and that plaintiff's counsel was able to perform an effective cross-examination of the witness. ***Plaintiff's motion to quash the deposition is denied.***

FACT FINDING

Plaintiff's Case in Chief

Testimony of Nagi Aamir

Mr. Nagi Aamir resides at 5664 Elmer, Detroit, MI 48210. He came to the United States in 1969. Thereafter he obtained his citizenship (approximately 10 years ago). He is a high school graduate. He did not attend college. Mr. Aamir is married and has seven children: Ali (1970); Bakel (1987); Ensaf (1980); Abraham (1994); Youseph (2000); Zehra (2002), and Merwan (2004). Bakel, Ensaf and Abraham live with his sister overseas, the remaining children reside with him. Mr. Aamir indicates that his filing status is married filing jointly.

His prior work experience is as follows: 1) Farm worker (picking grapes); 2) restaurant work (1-2 years); 3) Merchant marines (1975-1995) (\$3,000/monthly); 4) United Technologies (Indiana) auto factory work, \$12.00/hr (1995, 1 year); 5) International Paper, forklift driver, \$11.00/hr, (1.5 years); 6) CBM Detroit, janitorial work, \$8.50/hr (2 years); and 7) Sodexo Food Service Company, truck driver, \$10.00/hr. Mr. Aamir indicated that he held a commercial driver's license for forklift and truck.

Mr. Aamir then worked for ABM Lakeside, Inc. He could not remember the date he began his employment. He recalled working there for two years prior to the accident which is the subject of this litigation. He was employed as a valet attendant. His location was the Renaissance Center, Detroit, Michigan. His job required him to park and retrieve customer's cars, give

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directions, etc. He testified that the major physical requirement of his job was to drive. He stopped working for ABM Lakeside on 8/29/04 when he was involved in a vehicle pedestrian accident. He was struck by a vehicle and sustained serious injury.

Mr. Aamir testified that he worked 40-50 hours per week. He indicated that the regular work week was 40 hours, five days a week. He indicated that he earned \$480.00 weekly and that he also enjoyed tips, which ranged from \$250-\$300 weekly. Mr. Aamir indicated that he did not receive fringe benefits. Mr. Aamir indicated that he could work as much as 70 hours over 7 days a week, based on the need of the business and his availability.

Mr. Aamir indicated that on 8/29/05 he went to assist a customer with a broken parking gate. He went to inform the customer that the gate was broken and to send them to a different gate. In the process, Mr. Aamir was struck by a shuttle bus. He sustained injury to his right shoulder, right neck, lower back and right leg. Since the accident, he indicates that he cannot sleep without medication, has memory problems, has panic attacks, and that he hears voices.

Mr. Aamir recalls treating with Dr. Soni, and Dr. Rahim on a monthly basis. Mr. Aamir testified that he has medical bills in excess of \$45,000 as a result of the incident which is the subject of this litigation. He has received no unemployment or social security benefits. He did receive \$1300.00 in worker's compensation benefits.

Mr. Aamir testified that he is not physically able to resume work. He is unable to do any of the jobs that he used to do. He is not working because he is sick and can't work. His head, back neck, and mind are not normal.

On *cross-examination*, Mr. Aamir agreed that he did present at trial with a cane and that sometimes he uses it and sometimes he doesn't. He believes the cane helps.

Mr. Aamir explained that the problem he has with his mind is poor memory. He feels that his memory is not 100% since the accident.

Mr. Aamir indicated that he is 63 years old and started working when he was about 23 years old.

Mr. Aamir indicates that he cannot drive. He is afraid that he will kill somebody. He later admitted that he does drive sometimes (short distances, when friends are not available). He owns a Ford. He drives two days a week. Sometimes he drives to the doctor, sometimes he gets a ride. He indicated that he drives to appointments with Dr. Soni (1 mile) and to appointments with Dr. Rahim (1 mile).

Mr. Aamir indicated that his back, shoulder and neck all hurt. He testified that when he sits or stands too much he has pain. Essentially, everything hurts all the time.

Mr. Aamir indicates that he passed out at the time of injury, but didn't recall telling Dr. Gordon that. He denied loss of consciousness at Henry Ford Hospital.

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Mr. Aamir indicates that in 5/05, he didn't tell Dr. Obianwu that he had a back problem. He indicates that it didn't hurt that bad at the time and he thought it would be ok. He also didn't tell Dr. Obianwu that he had pains in his legs because they weren't that significant at the time. Mr. Aamir indicates that he saw Dr. Obianwu for his shoulder, neck and right arm. He told him about this pain. Mr. Aamir indicates that in 5/06 he told Dr. Obianwu about persistent back pain. In 2/06, Mr. Aamir complained of both upper and lower extremity radiating pain to Dr. Policherla.

During his examination by Dr. Klarman, Mr. Aamir testified that he reported that he hears voices which call his name when he sleeps. He recalled that when he saw Dr. Klarman, he had lost a little weight because he was having problems eating.

Mr. Aamir testified that he takes sleeping pills every night. He reports that he seldom gets a full night's sleep.

On redirect examination, Mr. Aamir indicated that his duties as a valet required him to stand, walk, run and carry luggage. Presently, he is unable to do these things. He testified that he has not driven a forklift or truck since the accident. His main areas of concern are his neck, shoulders and head.

Summary of the Deposition of Dr. Haranath Policherla, M.D. (3/28/06)

Dr. Policherla is a physician licensed to practice medicine in the State of Michigan. He is Board Certified in Neurology; Sleep Medicine; Neurophysiology; Psychiatry and Neurology with added qualifications in clinical Neurophysiology; and Neuro Rehabilitation.

I summarize/paraphrase the doctor's testimony as follows:

Dr. Policherla took the following history: Mr. Aamir was a 58-year-old who had no major problems and was involved in an accident on December 29th, '05. He was a pedestrian hit by a shuttle bus and knocked onto the right shoulder. He also hit his head and had a loss of consciousness. He was admitted to Henry Ford Hospital. He had therapy through Dr. Densley. He had pain in the right side of the neck and shoulder radiating into the arms, a numbness, tingling sensation. He also complained of low back pain radiating into the lower extremities bilaterally. His pain gets worse when he stands. He's been taking Motrin and also muscle relaxants to relax the muscles.

Diagnostic testing (EMG) shows there is a bilateral C5-6 and bilateral L5-S1 radiculopathy. General physical and neurological examination shows that Mr. Aamir has cervical, thoracic and lumbar muscle spasms. Range of motion of the neck was reduced. Also he had a positive straight leg raise test right more than left. And he has increased dizziness when he keeps his legs and arms together called the Romberg test which was positive.

The initial evaluation with reference to his neck and low back which were the major issues that need to be attended to, so he has bilateral C5-6 radiculopathy and bilateral L5-S1 radiculopathy. And by looking at this, you know, usually I look at all the testing, make a follow-

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up visit, I put all the things together which this shows I don't have that, but doing the follow-up now the patient also has a closed head injury.

Dr. Policherla opined that *the accident where he was hit by a bus on December 29th, '05 was the cause of his problems as he diagnosed them.* He opined that *Mr. Aamir is totally disabled from the date of the accident, though the date of his next scheduled evaluation (4/3/06).*

Dr. Policherla indicated that Mr. Aamir needed further treatment relative to his orthopedic injuries, a work-up for the closed head injury, as well as a work-up relative to his balance.

Dr. Policherla admitted that he did not know what Mr. Aamir's job duties were at Lakeside. Nonetheless, he still felt that he was totally disabled from any type of work. He based this conclusion on the *cervical radiculopathy, lumbar radiculopathy, as well as dizziness with a positive Romberg and his closed head injury.* He even ruled out sit-down jobs. He never restricted Mr. Aamir.

As of the date of his deposition, Dr. Policherla was of the opinion that Mr. Aamir suffers from a closed head injury.

Exhibits to the deposition were: 1) CV; 2) 2/6/06 evaluation letter; 3) 2/6/06 EMG report.

Summary of ACCESS Psychiatric Evaluation (Nadia Sultani, MSW; Pravin Soni, M.D.) (1/14/04)

CHIEF COMPLAINT: Patient speaks English and stated, "I'm not together myself since my accident. My neck hurts, shoulder hurts. I was standing and a car hit me. I don't remember. I was in Henry Ford Hospital."

IDENTIFIED PROBLEMS: 1) Nightmares/flashbacks; 2) Depression; 3) Anxiety; 4) Sleep/appetite disturbances; 5) Impaired concentration/attention span.

HISTORY OF PRESENT ILLNESS:

Since the above-mentioned episode, he stated his is unable to sleep well. He is constantly crying because he cannot function. He cannot work now and is having nightmares, flashbacks. Now he is very afraid to drive the car and he stopped driving. His wife usually drives him around and takes him for medical clinic appointments and other areas. He stated that when he has a nightmare he has some palpitations, perspiration. He claimed his life has changed since that incident, and he has become totally nonfunctional.

DIAGNOSES:

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- Axis I: 1) Major depressive disorder-single episode with psychotic features; 2) Post-traumatic stress disorder-acute.
- Axis II: Deferred.
- Axis III: Please see the medical history.
- Axis IV: 1) Financial problems; 2) Relationship problems; 3) Acculturation problems; 4) Other psychosocial and environmental problems; 5) Recent history of trauma.
- Axis V: Global Assessment Function 40.

TREATMENT PLAN: 1) Periodic psychotropic medication evaluation in order to alleviate the symptoms of the illness and to assess the benefits and side effects of the medication; 2) Psychotherapy; 3) Crisis intervention PRN; 4) Medical problem follow-up care by his primary care physician.

Summary of Affidavit of Dr. Haranath Policherla, M.D. (4/17/06)

Dr. Policherla's 4/17/06 affidavit is consistent with his deposition testimony. He concluded that based upon the medical records he reviewed, the treatment he rendered beginning February 6, 2006, and the history: 1) that Mr. Aamir suffered a closed head injury as a result of his motor vehicle accident of 8/29/04; 2) that Mr. Aamir may continue to suffer from a serious neurological injury; 3) as a result of the accident related injuries, Mr. Aamir would no longer be able to work, do his normal household chores or engage in many physical activities; 4) that as a result of his accident related injuries, Mr. Aamir would not have been able to walk, lift, bend, pull, perform household chores, shop, socialize much, or perform most physical activities and that these limitations would have been present from the date of the motor vehicle accident to date.

Summary of Letter from Dr. Mahmoud Rahim, M.D.

Dr. Rahim is from Associated Physicians of South East Michigan, P.C. His letter indicates that Mr. Aamir was involved in an MVA at work on 8/27/04 and injured his neck and right shoulder. He received physical therapy and medications for his injuries. He was also diagnosed with Hepatitis A&B. It is noted that Mr. Aamir also suffers from *chronic* low back pain with recurrent exacerbation. He takes Motrin for this condition. Finally it is noted that he is an ETOH abuser (alcohol).

Summary of Note of Dr. Theodore R. Densley, M.D.

CHIEF COMPLAINT: Facial pain along with right shoulder, neck and lower back pain. The patient also has a complaint of hearing voices.

OBJECTIVE FINDINGS: The patient again has tenderness of paraspinal area, cervical and lumbar spine with decreased range of motion, there is some facial tenderness as well, although I do not feel this is hypersensitivity. No focal neurological signs are elicited. Mental status is felt to be in order at this time.

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ASSESSMENT: The patient with chronic pain syndrome secondary to motor vehicle accident and also complains of hallucinations, exact etiology of which is unremarkable.

Summary of Medical Bills

There is a billing statement from Henry Ford Health System dated 4/23/05 reflecting a **\$4,816.00** balance due.

There is a billing statement from Advanced Neuro-Rehab SVS, PC dated 3/8/06 reflecting a **\$2,400.00** balance due.

There is a billing statement from Associated Physicians of SE MI PC reflecting a **\$30.00** balance due.

There is a billing detail from PRO-MED Management Services, LLC reflecting dates of service from 9/22/04 through 2/13/06. The statement reflects a balance of **\$41,852.00**

Defendant's Case in Chief

Testimony of Mr. Jack Janiga, General Manager (Ren Cen/Lakeside)

Mr. Janiga is the general manager of Metropolitan Services at Ren Cen/Lakeside. Mr. Janiga became an employee in August 2004. Mr. Janiga was the operations manager, and responsible for the oversight of parking operations.

Mr. Janiga testified that he knew Mr. Aamir, and indirectly supervised him. Overall Mr. Janiga felt that Mr. Aamir was a good employee and would have no problem if Mr. Aamir returned to his job as a valet attendant.

Mr. Janiga indicated that Mr. Aamir was a valet attendant. The job required him to park/retrieve vehicles for customers. Mr. Janiga indicated that there is a written job description for this position. He noted that valet attendant is not required to handle luggage. The position does not require lifting above the shoulder.

Mr. Janiga indicated that tips were not reported. He essentially testified that he could provide no information based upon his personal knowledge relative to the amount of Mr. Aamir's income from tips.

On *cross-examination*, Mr. Janiga indicated that the valet attendant can sit/stand as they prefer. They walk to and from cars, which may be parked up to a city block away. Mr. Janiga testified that on a normal day, a valet may have to park/retrieve 10-12 cars. He indicated that the valet can use the shuttle van to get back from the parking lot.

Testimony of Mr. Gary Essary, Investigator

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Mr. Essary is employed by Advance Investigative Services, Warren, Michigan. He is an investigator. He was retained by Cambridge Insurance Company. He performed the video surveillance relative to Mr. Aamir on 4/19/05 and 4/20/05. He did the videography himself. The original 8mm video tape was always in his possession. He copied the tape to the CD format provided to the court.

Mr. Essary identified Mr. Aamir in the video. He identified the location/residence where the video was shot as 5664 Elmer, Detroit, MI 48210. Mr. Essary testified that Mr. Aamir drove his car on both days he surveilled him. He drove about 2.5 miles to a school (Vistas Nuvase), located at 5690 Cecil, Detroit, MI.

Summary of the Deposition of Dr. Edward Klarman, M.D. (4/5/06)

Dr. Klarman is a physician licensed to practice medicine in the State of Michigan. He practices in the field of psychiatry.

Dr. Klarman saw Mr. Aamir on 5/6/05 for the purposes of psychiatric evaluation. He took a history, conducted a mental status examination and reached certain diagnostic impressions and conclusions. He prepared a report of eleven pages, dated May 6, 2005.

Dr. Klarman's report and testimony are consistent. Dr. Klarman opines that clinically, Mr. Aamir has no mental illness. Dr. Klarman indicates further that Mr. Aamir is malingering. He is not suffering from any kind of profound deficiency with respect to his thinking. ... *this man impresses me as attempting to counterfeit some kind of memory or psychological difficulty....*

Dr. Klarman disagreed with the 1/14/04 diagnosis rendered by ACCESS Psychiatric Evaluation (Nadia Sultani, MSW; Pravin Soni, M.D.), specifically, *major depressive disorder, single episode with psychotic features and post-traumatic stress disorder, acute*. Essentially, Dr. Klarman's concluded that Mr. Aamir's clinical presentation was inconsistent with these diagnoses.

Summary of the Deposition of Dr. Emmanuel N. Obianwu, M.D. (4/7/06 and 5/12/06)

Dr. Emmanuel N. Obianwu, M.D., is a physician licensed to practice medicine in the State of Michigan. He is board certified in orthopedic surgery.

Dr. Obianwu saw Mr. Aamir on 5/6/05. He took a history, conducted a clinical examination, reviewed records, and reached diagnostic impressions. He prepared an 8 page report dated May 6, 2006. Dr. Obianwu testified consistently with his report.

Dr. Obianwu evaluated Mr. Aamir for his *neck and right shoulder girdle*. The examination was confined to the neck, the right shoulder girdle and the right upper and lower back. His complaints were relative to pain on the right side of the neck and the base of the neck. He also complained of pain on the outer aspect of the upper right arm. Lifting caused pain on the top of the right shoulder. He experiences crackling sensations within the right shoulder. Nothing of

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significance was noted in the lower back. He complains of occasional aches in the mid-back area.

The findings upon physical examination of the right shoulder indicate that Mr. Aamir *effectuated overreaction throughout the examination. ...there was over-reaction with moaning and grimacing during the passive motion of the cervical spine.*

Dr. Obianwu's review of the x-rays of the right shoulder and cervical spine reveals degenerative changes in the c-spine as well as degenerative changes in the acromioclavicular joint of the right shoulder. No post traumatic abnormality was recognized in the x-rays of the cervical or lumbar spine.

Dr. Obianwu's diagnosis was *1) resolved soft tissue injury of the cervical spine; 2) cervical spondylosis, mild; 3) resolved soft tissue injury of the right shoulder and right shoulder girdle; 4) mild degenerative arthritis acromioclavicular joint.*

Dr. Obianwu's impressions indicate that although Mr. Aamir does have complaints, there are not objective criteria to substantiate his complaints. He feels that Mr. Aamir has made a full recovery from any soft tissue injuries which he may have sustained in the automobile accident, and he is now in a position to return to his regular duties (e.g., given the description of a valet driver who parks cars, in and out of cars all day long, uses both arms to steer, did not have to lift heavy items or put heavy items in and out of cars but may have had to pick up lighter weight items from time to time). No restrictions are called for in his work activities. No further medical follow up is indicated.

On *cross-examination*, Dr. Obianwu noted that Mr. Aamir was limited in his range of motion in his right shoulder (95 degrees abduction), and neck (50 degrees rotation). Even with these limitations, Dr. Obianwu opined that Mr. Aamir could return to full duty employment. Dr. Obianwu did not speak to Mr. Aamir about his head injury or neurological conditions and would defer to a neurologist on those issues.

On *redirect examination*, Dr. Obianwu noted that range of motion tests are generally subjective. He reiterated that passively, however, he was able to get full forward flexion and abduction of Mr. Aamir's shoulder, while actively, he was able to move it only 95 degrees. This suggests that there is no intrinsic tightness (true pathology) in the joint or in the neck that was preventing him from that.

Finally, on *recross-examination* Dr. Obianwu agreed that an EMG was an objective test.

In his *continued* deposition of 5/12/06, Dr. Obianwu testified that he performed a re-examination of Mr. Aamir relative to low back pain and radiating pain. He took a history, conducted a clinical examination, reviewed medical documents, records and studies including an electrodiagnostic report from Dr. Steve Geiringer dated 5/3/06. He prepared a ten page report dated 5/5/06. Dr. Obianwu testified consistently with his report.

Dr. Obianwu indicates that Mr. Aamir's lower back problems became pre-imminent sometime

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after his initial examination in May 2005. Over the last year, Mr. Aamir said he has developed pain across the lower back. It started off slowly after May 2005 and got progressively worse. Mr. Aamir did not mention any low back pain in his initial examination with Dr. Obianwu. Mr. Aamir had not returned to work in the interim.

Mr. Aamir's present complaints include pain in the right side of the neck, affecting the right ear. The pain spreads into the right shoulder blade area. There is persistent pain in the right shoulder itself. He denies any pain in the left shoulder girdle. He talks about pain that radiates from the neck into the right upper extremity and affects the right fourth and fifth digits. These digits are numb. Within the right shoulder itself, there is intense pain and he has difficulty elevating the arm. Any activity that calls for use of the right upper extremity increased the discomfort within the right shoulder.

Mr. Aamir talks about persistent pain across the lower back. It was of insidious onset, and started sometime after the last examination in May 2005. Now the discomfort is present across the entire lumbar spine. When he stands for any length of time, both lower extremities are affected, both by the pain and the numbness. Standing for more than ten minutes increases the low back pain. Strenuous activity of any sort makes the low back pain worse. Coughing and sneezing does not affect the low back pain.

Dr. Obianwu conducted a physical examination, reviewed records/studies and rendered the following diagnosis: 1) cervical spondylosis; 2) resolved soft tissue injury of the right shoulder; 3) mild degenerative arthritis of the acromioclavicular joint, right shoulder; and, 4) chronic lumbar disc disease.

His impressions were that Mr. Aamir's clinical presentation relative to his musculoskeletal system was essentially benign. There was nothing clinically to suggest the presence of either a cervical or lumbar radiculopathy. No neurologic deficits were noted in the lower extremities. The x-rays did show mild chronic degenerative changes in the lumbar spine; however no disabling features were recognized in the lumbar spine or the lower extremities. The electrodiagnostic studies performed by Dr. Geiringer did not reveal any evidence of radiculopathy in the lower extremities. Dr. Obianwu opined the same to be true for the neck and upper extremities. He did, however, note overt features suggestive of symptom magnification. Overreaction was noted throughout the physical examination. Degenerative arthritis was noted in the right AC joint. According to Dr. Obianwu, this is the only entity that would explain any ongoing symptoms in the right shoulder; however it cannot be considered disabling.

Dr. Obianwu found no need for restrictions with regard to Mr. Aamir's upper extremity and shoulder. The limitation of motion of the right shoulder, he believes, is a manifestation of symptom magnification. The neck does show degenerative changes, however, he does not consider it disabling by any means. Dr. Obianwu feels that Mr. Aamir can return to his work as a parking lot attendant at any time he so desires. No findings in his neck, right shoulder, right shoulder girdle, lower back or lower extremities would preclude this functional level. No further treatment is indicated.

On *cross-examination*, Dr. Obianwu indicated that the problems which may have arisen

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subsequent to the accident in August 2004 were probably soft tissue problems. However, when he saw him those problems had resolved completely. In his opinion, the chronic lumbar disc disease could not have been caused by the accident. He did indicate that pain or discomfort caused by the chronic lumbar disc disease could be exacerbated by the accident; however, based on his examination, he did not believe that that was the case. Mr. Aamir's pain as indicated was not in the lumbar spine. His pain was in the sacrum and there was nothing on this man's sacrum by both magnetic resonance imaging and plain x-rays.

The attachment to the continued deposition was the electrodiagnostic report of Dr. Steve R. Geiringer, MD., which states:

Summary: Nerve conduction studies are normal at the right wrist and at both ankles. Needle study of the right upper limb and both lower limbs is also normal.

Interpretation: There are no electrodiagnostic findings of a current or recent radiculopathy, plexopathy or mononeuropathy affecting the right upper limb or either lower limb. Note: the left arm is asymptomatic, according to Mr. Aamir. When the right arm tested normal, no testing was performed on the left.

Summary of the Deposition of Dr. Robert J. Gordon, D.O. (7/11/06)

Dr. Gordon is a physician licensed to practice medicine in the State of Michigan. Dr. Gordon saw Mr. Aamir on October 26, 2004. He took a history, conducted a clinical examination, reviewed records, and reached diagnostic impressions. He prepared reports dated October 26, 2004, and November 30, 2004. Dr. Gordon testified consistently with his reports. Dr. Gordon concluded as follows in his October 26, 2004 report:

Mr. Aamir is 58-year-old male, who was involved in a motor vehicle accident on either August 27 or 29, 2004 where he was struck by a shuttle van backing up, going five to 10 miles an hour. He was knocked to the ground and hit his head. He was unconscious for a few seconds to a few minutes. He was taken by ambulance to Henry Ford Hospital, where he was treated and released the following morning.

Since that time, he has complained of some headaches on the right side of his head, neck pain and right shoulder pain with decreased range of motion of the shoulder, but no numbness, tingling or weakness of the right upper extremity. He also states he injured the left knee, but states the knee is doing fine at this time and does not give him any significant difficulties. He is currently not being treated. He was seen at Concentra through his work, where he worked as a valet for ABM Lakeside. He was seen there two or three times. He states he has not returned to work. He has followed up with his personal physician, Dr. Rahim, who has sent him to Dr. Densley for physical therapy, which he has received four times per week for the last month with some mild improvement to his neck and right shoulder.

He states he still gets pain in the shoulder with decreased motion of the shoulder, and pain on the right side of his neck, the right side of his face and an occasional mild

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dizziness.

He denies any numbness, tingling or weakness of the upper or lower extremities. He states his left knee has improved and is doing well at this time. He denies any prior treatment to the left knee.

The examination, as previously described, showed no paravertebral muscle spasm noted. There was full range of motion, both active and passive, of the cervical spine with intact neural vascularity of the upper and lower extremities.

There were intact cranial nerves II through XII with negative Romberg and good tandem walk. He had good recall to recent and past history. He appears to be status post head contusion with loss of consciousness with no apparent sequelae.

Regarding the left knee, there was full range of motion with no body deformity or swelling noted. There was a negative McMurray's and no discomfort or difficulty with squatting. He had a normal examination of the left knee.

Both active and passive range of motion of the cervical spine was within normal limits. No paravertebral muscle spasm was noted.

With regard to his right shoulder, there was intact neural vascularity to the right upper extremity with mild decreased abduction actively. Passively, it was within normal limits. There was some crepitation in the supraspinatus subscapularis area with full abduction of the arm.

I have requested medical records from Henry Ford Hospital emergency room, Dr. Rahim and Dr. Densley as well as physical therapy records and x-rays that were recently taken of the neck and shoulder. When these arrive, I will forward an addendum.

At this time, it appears that his difficulty with infrapatellar contusion and tendonitis of the left knee has resolved. He does not appear to have any sequelae secondary to the contusion/loss of consciousness.

He appeared to have a normal examination of the cervical spine today. As far as the right shoulder, there appears to be some inflammation of the subscapularis supraspinatus tendon. I recommend continued physical therapy for one month.

In the interim, he can work with the only restriction being no overhead work with his upper right extremity. At the end of one month, if he has not improved to the point where he can return to regular work without restrictions, he should have an MRI of the right shoulder to evaluate for any type of internal derangement.

Dr. Gordon received Dr. Densley's records, and records from Henry Ford Hospital. In his report of November 30, 2004, he discusses those records and concludes:

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The information correlates with that which I received on the date of my examination and, therefore, I stand by my prior findings and recommendations. He may also benefit from injection therapy to the subscapularis muscle along with the physical therapy that I previously recommended. If symptoms have not improved within 30 to 60 days, he should be re-evaluated.

On **direct examination**, Dr. Gordon testified that based on his examination, he found no need to place any restrictions on Mr. Aamir's work ability related to the cervical spine area. Dr. Gordon indicated that Mr. Aamir said that there was no problem with the low back or the lower extremities. He said that the legs were fine. He noted that Mr. Aamir specifically denied any numbness, tingling or weakness of the upper extremities. Neither did he give a history of numbness, tingling or weakness of the lower extremities. He had no complaints relative to the left shoulder. Other than restricted active motion, the examination of his right shoulder was normal. The finding of crepitus in the right shoulder is consistent with the x-ray visualization of degenerative spurring (small subacromial spur). The spurring is a preexisting condition. There were no findings on the x-ray that could be attributed to his injury of being hit by a van moving five to ten miles an hour and falling perhaps on that shoulder.

Dr. Gordon opined that if Mr. Aamir's job at ABM Lakeside, Inc., did not require him to reach or work overhead, that he would have been able to return to work as a valet driver on October 26, 2004.

On **cross-examination**, Dr. Gordon admitted that he did not review any records contemporaneous with this initial examination and report of October 26, 2004. No records were provided to him at the time of the examination.

Dr. Gordon admitted that Mr. Aamir's right shoulder problem is due to inflammation of tendons. He indicates that by history, *it appears that from the fall he appeared to have inflamed those tendons either from falling directly on them or twisting the arm during the fall.*

Dr. Gordon admitted that Mr. Aamir had a pre-existing problem with his shoulder. *Whether the decreased motion of the shoulder is due to the accident or not, from the way he described it, there may have been some exacerbation of an underlying problem that he had before related to the mechanism of injury of his fall on the date that he said that he was hit.*

Dr. Gordon indicated that he did not diagnose radiating neck pain in Mr. Aamir, although Mr. Aamir complained of it, he had a normal exam in that area. He found no restrictions in the range of motion in his neck.

Dr. Gordon felt that Mr. Aamir showed some inconsistencies in his presentation. According to Dr. Densley, *Mr. Aamir stated that he was in no acute distress without any obvious deformity but with inspection, he moved with extreme deliberateness and that he couldn't move his neck at all. And he just would look from side to side and move his whole body....* Dr. Gordon testified that *it appeared that there was some exaggeration of his symptoms especially since it was a month after I saw him and he was able to move the neck fully without any problems.... Or he had a new injury.* Dr. Gordon indicated that Dr. Densley's findings as expressed above did not correlate

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with his findings. Likewise, Dr. Gordon did not agree with Dr. Densley's findings relative to 1) tenderness in the paraspinal cervical and lumbar spine with decreased range of motion due to pain; and 2) the patient appeared to have dysesthesia of the facial and neck area.

Dr. Gordon opined that historically, there had been an injury to Mr. Aamir's neck, but when he examined him, there was no abnormality and it had resolved. The same was true of his left knee.

On *redirect examination*, Dr. Gordon indicated if the Henry Ford Hospital records of August 29, 2004 reflected a history that Mr. Aamir denied loss of consciousness after the accident, then that history would be inconsistent with the history that Dr. Gordon took from Mr. Aamir, who indicated that he was knocked unconscious for a short period of time.

Attachments to the deposition were 1) Dr. Gordon's CV; and, 2) HFH Chart.

Summary of the Deposition of Dr. Steven Geiringer, M.D. (5/17/06)

Dr. Steve R. Geiringer, M.D., is a physician licensed to practice medicine in the State of Michigan. He is board certified as a Medical Examiner, Pain Management and Rehabilitation, and Electrodiagnostic Medicine.

Dr. Geiringer performed an electrodiagnostic study on Mr. Aamir on 5/3/06. He did not take an extensive history, nor did he do a clinical examination. He prepared a report of his findings and conclusions on 5/3/06. Dr. Geiringer testified consistently with his report.

Dr. Geiringer tested both of the plaintiff's legs and his right arm. The test results were completely normal for all three of the limbs that he tested.

Dr. Geiringer opined that there was zero possibility that an EMG could show a radiculopathy on February 6, 2006 and – done properly – and a properly done EMG about 3 months later show no abnormalities in the same nerve distribution.

Dr. Geiringer indicated that his examination showed no evidence of nerve injury whatsoever.

Cross-examination of Dr. Geiringer revealed that he did not perform an EMG of the cervical area. He testified that such an exam yields little for cervical radiculopathy. He does not believe that this exam would add anything to his case.

Attachments to the deposition were 1) Dr. Geiringer's CV and , 2) 5/3/06 Electrodiagnostic Report..

Summary of the 11/03/04 Letter from Dr. Theodore R. Densley, M.D.

This letter reflects treatment dates of **9/22/04** through **12/01/04**. This letter returns Mr. Aamir to work on **12/2/04**.

Summary of the 9/28/04 Letter from ABM Lakeside

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Employer's acknowledgement of Mr. Aamir's release to restricted duty effective **9/24/04** by Dr. Ballard at Concentra. Mr. Aamir is advised to return to normal duty on **9/30/04** since his job is within the restrictions.

Summary of the 11/4/04 Letter from ABM Lakeside

Employer's acknowledgement of Mr. Aamir's release to restricted duty effective **10/26/04** by Dr. Gordon at MES. Mr. Aamir is advised to return to normal duty on **11/6/04** since his job is within the restrictions. Mr. Aamir is also advised of his FMLA status. Further that failure to return to work may result in administrative termination.

Summary of the 11/29/04 Letter from Ren Cen Parking

Employment termination letter, citing prior letters of 11/1/04 and 11/4/04.

Surveillance DVD (4/19/05 and 4/29/05)

This DVD shows Mr. Aamir tending to a number of small children. He does not appear to be doing anything that is too strenuous. At one point in the surveillance, he trots after a small child that is trying to run near or into the street. The video shows him lifting, walking and carrying a child. He is not using a cane or other ambulatory assistance device in the video. The video also shows Mr. Aamir driving a car.

STANDARD OF REVIEW

Plaintiff is required to sustain her burden of proof by a preponderance of the evidence. MCL 418.851; MSA 17.237(851); *Aquilina v. General Motors Corp*, 403 Mich 206; 267 NW2d 923 (1978). In judging whether plaintiff meets this standard, I am mindful that on review, the Act requires findings of the Magistrate be supported by competent, material and substantial evidence on the whole record. Substantial evidence means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion. MCL 418.861a (3). The "whole record" means the entire record of the hearing including all of the evidence in favor and all evidence against a certain determination. MCL 418.861a (4). Notably, the commission has repeatedly held that a Magistrate need not "explain away every aspect of evidence tending to militate against his decision." *Jaworowicz v. Greyhound Lines, Inc*, 1989 ACO #53, 2 MIWCLR 1022 (1989); *accord, Forrester v. Hamilton Nursing Home*, 1996 ACO 228, 9 MIWCLR 1241 (1996).

OPINION

As a preliminary matter, counsel stipulated to a work related injury. In deference to that stipulation:

I find that it is stipulated by the parties that plaintiff did suffer a personal as alleged in his application, specifically, "Head, neck, left upper extremity. Petitioner hit by van in course of

employment. Psychogenic overlay,” arising out of and in the course of his duties as a valet attendant while employed by ABM Lakeside, Inc., on or about 3/8/04.

Since a cognizable injury under § 301(1) has been established through the parties’ stipulation, pursuant to MCL 418.315(1), I find that plaintiff is entitled to and the employer shall furnish, or cause to be furnished, reasonable medical, surgical and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed.

1. Whether the disability was due to the alleged personal injury.

Section 301(4) of the Act indicates that “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. 418.301(4); MSA 7.237(301) (4). This section has been interpreted by the Michigan Supreme Court in the case of *Sington v. Daimler Chrysler*, 467 Mich 144, 154; 648 NW2d 624 (2002). The court held: In order to establish a work-related disability, plaintiff must demonstrate that he has a limitation of his maximum wage earning capacity in work suitable to his qualifications and training.

In *Kethman v Lear Seating Corp*, 2003 ACO #250, the Worker’s Compensation Appellate Commission stated:

From our reading of *Sington*, in order to establish a prima facie case of disability and keeping in mind an economic focus rather than a medical impairment focus, the employee must demonstrate:

His work qualifications and training, and what jobs they translate to, and that he has a work-related physical or mental impairment which does not permit him to perform jobs within his qualifications and training and that he has lost wages, and

That he is either unable to perform or cannot obtain employment at all those jobs within his qualifications and training that pay his maximum income, which are reasonably available.

* * *

After putting in proofs which the fact finder accepts as sufficient to establish the three factors listed above, plaintiff has established a prima facie case, and the burden of going forward concerning these matters shifts to defendants. At this point defendant can bring forth proofs to show there were jobs reasonably available to plaintiff within [his] qualifications and training which [he] remained physically able to perform and which paid either [his] maximum wage, or less for the purposes of a section 361 wage

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loss determination.

In *Stokes v DaimlerChrysler Corporation*, ___ Mich App ___, (Docket No. 268544, October 26, 2006), the Court of Appeals further stated:

When the employee's testimony and medical evidence establish that the employee is disabled from performing all the jobs the employee has performed or which are within his qualifications and training, the *Sington* standard is met, and unless the employer shows that, contrary to the employee's proofs, there are real jobs within the employee's qualifications and training that pay the maximum wage, disability is established. (*Stokes v DaimlerChrysler Corporation, supra*, slip op at 10-11.)

In *Thomas v USF Holland, Inc.*, 2003 ACO #206, the WCAC explained:

Neither the Act nor *Sington, supra*, defines the scope of "qualifications and training." As the Commission recently stated in *Sington* following remand, we conclude that it encompasses formal training, degrees, licenses, work experiences, general education, life experiences, as well as physical and mental capabilities that would allow a worker to gain and maintain a regular job having ordinary conditions of permanency. Non-renewable, expired licenses or obsolete qualifications and training should be excluded.

The weight to be accorded to conflicting evidence is within the reasonable discretion of the magistrate *Miklik v. Michigan Special Machine Co.*, 415 Mich 364, 329 NW2d 713 (1982); *Fleese v. Bil-Mar Foods*, 1995 Mich ACO 541, 8 MIWCLR 1556 (1995); *Giles v. Detroit Board of Education*, 1992 Mich ACO 541, 8 MIWCLR 1556 (1995). A magistrate's acceptance of certain expert testimony over that of another, and the weight accorded it, are specifically within the purview of the magistrate's decision. *Kope v. Network Services, Inc.*, 1995 Mich ACO 545, 8 MIWCLR 1560 (1995); *Townsend v. Bofors Nobel, Inc., et al*, 1992 Mich ACO 2346. In assessing credibility, a magistrate is permitted, but not required, to give greater weight to the testimony of treating physicians. *Parker v. Chrysler Corp*, 1997 Mich ACO 57; *Kleinow v. McCord Gasket Corp*, 1996 Mich ACO 189; *Jones v. General Motors Corp*, 1992 Mich ACO 474; *Hardon v. National Bronze Conway Co.*, 1990 Mich ACO 259. *See, also Robinson v. General Dynamics*, 1992 Mich ACO 2021; *Alexander v. U.S. Mfg, Inc.*, 1992 ACO 1500.

Mr. Nagi Aamir testified that he is a high school graduate. He did not attend college. His prior work experience is as follows: 1) Migrant farm worker (picking grapes); 2) restaurant work (1-2 years); 3) Merchant marines (1975-1995) (\$3,000/monthly); 4) United Technologies (Indiana) auto factory work, \$12.00/hr (1995, 1 year); 5) International Paper, forklift driver, \$11.00/hr, (1.5 years); 6) CBM Detroit, janitorial work, \$8.50/hr (2 years); and 7) Sodexo Food Service Company, truck driver, \$10.00/hr. Mr. Aamir indicated that he held a commercial driver's license for forklift and truck.

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Mr. Aamir then worked for ABM Lakeside, Inc. He was employed as a valet attendant. His location was the Renaissance Center, Detroit, Michigan. His job required him to park and retrieve customer's cars, give directions, etc. Mr. Aamir testified that he worked 40-50 hours per week. He indicated that the regular work week was 40 hours, five days a week. He indicated that he earned \$480.00 weekly and that he also enjoyed tips, which ranged from \$250-\$300 weekly. Mr. Aamir indicated that he did not receive fringe benefits. Mr. Aamir indicated that he could work as much as 70 hours over 7 days a week, based on the need of the business and his availability.

Mr. Aamir stopped working for ABM Lakeside on 8/29/04 when he was involved in a vehicle pedestrian accident. He was struck by a vehicle and sustained serious injury. Mr. Aamir testified that he is not physically able to resume work. He is unable to do any of the jobs that he used to do. He is not working because he is sick and can't work. His head, back neck, and mind are not normal.

Mr. Aamir testified credibly relative to his qualifications and training, and I accept and adopt this testimony.

There is significant disagreement between the experts relative to the question of disability. Plaintiff's expert, Dr. Policherla has testified clearly that *the accident where he (Mr. Aamir) was hit by a bus on December 29th, '05 was the cause of his problems as he diagnosed them.* He opined that *Mr. Aamir is totally disabled from the date of the accident, though the date of his next scheduled evaluation (4/3/06).* Although Dr. Policherla admitted that he did not know what Mr. Aamir's job duties were at Lakeside, and never placed restrictions on him, he still felt that Mr. Aamir was totally disabled from *any* type of work. He based this conclusion on the *cervical radiculopathy, lumbar radiculopathy, as well as dizziness with a positive Romberg and his closed head injury.* He even ruled out sit-down jobs.

In his affidavit, Dr. Policherla reiterated: 1) that Mr. Aamir suffered a closed head injury as a result of his motor vehicle accident of 8/29/04; 2) that Mr. Aamir may continue to suffer from a serious neurological injury; 3) as a result of the accident related injuries, Mr. Aamir would no longer be able to work, do his normal household chores or engage in many physical activities; 4) that as a result of his accident related injuries, Mr. Aamir would not have been able to walk, lift, bend, pull, perform household chores, shop, socialize much, or perform most physical activities and that these limitations would have been present from the date of the motor vehicle accident to date.

Relative to the allegation of *Psychogenic overlay*, plaintiff has presented 1/14/04 diagnosis rendered by ACCESS Psychiatric Evaluation indicating:

- Axis I: 1) Major depressive disorder-single episode with psychotic features; 2) Post-traumatic stress disorder-acute.*
- Axis II: Deferred.*
- Axis III: Please see the medical history.*
- Axis IV: 1) Financial problems; 2) Relationship problems; 3) Acculturation problems; 4) Other psychosocial and environmental problems; 5) Recent*

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Axis V: *history of trauma.*
Global Assessment Function 40.

Dr. Densley's assessment relative to this condition is not as clear and he states simply ...*also complains of hallucinations, exact etiology of which is unremarkable.*

The defense experts arrayed against Mr. Aamir present a different picture, however. Relative to his alleged orthopedic injuries, Drs. Obianwu, Gordon and Geiringer present testimony which establishes that whatever injuries Mr. Aamir had were essentially soft tissue in nature, and in any event, resolved at this point. Further that the objective testing (EMG) shows a normal result for the affected extremities. Both Dr. Obianwu and Dr. Gordon testified that Mr. Aamir seemed to embellish his symptoms. Dr. Obianwu testified that he noted overt features suggestive of symptom magnification; overreaction was noted throughout the physical examination. Likewise, Dr. Gordon testified that it appeared that there was some exaggeration of his symptoms. Dr. Obianwu's evaluation letters suggest that Mr. Aamir could have returned to work as early as 5/6/05 (the date of his first examination). Dr. Gordon indicated that Mr. Aamir could have returned to work as early as 10/26/04 (the date of his examination).

Relative to the alleged psychogenic overlay, Dr. Klarman opines that clinically, Mr. Aamir has no mental illness. Dr. Klarman indicates further that Mr. Aamir is *malingering*. He is not suffering from any kind of profound deficiency with respect to his thinking. ... *this man impresses me as attempting to counterfeit some kind of memory or psychological difficulty...* Dr. Klarman disagreed with the 1/14/04 diagnosis rendered by ACCESS Psychiatric Evaluation (Nadia Sultani, MSW; Pravin Soni, M.D.), specifically, *major depressive disorder, single episode with psychotic features and post-traumatic stress disorder, acute*. Essentially, Dr. Klarman's concluded that Mr. Aamir's clinical presentation was inconsistent with these diagnoses.

There were a number of inconsistencies in Mr. Aamir's testimony and his documented behavior which *severely undermine his credibility* relative to his claim of ongoing disability. First, I found it odd that he did not give a complete history to the physicians that he saw. Plaintiff even admitted that he did not give Dr. Obianwu a complete history. Mr. Aamir testified that in May '05, he didn't tell Dr. Obianwu that he had a back problem. He said it *didn't hurt that bad at the time and he thought it would be ok*. He also didn't tell Dr. Obianwu that he had pains in his legs because *they weren't that significant at the time*. Yet, a year later (Dr. Obianwu's evaluation of 2006) and at trial (almost 2 years later), he complains of significant back and leg discomfort.

Mr. Aamir testified that he could not do any of the tasks associated with this job as a valet attendant. Review of the job duties reveals that this is a relatively *easy* job. Mr. Aamir testified that the major physical requirement of the job was driving. Mr. Aamir also testified, however, that he *could not* drive because he was afraid that he might kill someone. He then contradicted himself when on cross-examination he admitted that he did sometimes drive. Also, the surveillance video shows him entering and exiting his vehicle, presumably having driven between locations as described by the investigator Mr. Essary, whom I find to be a credible witness. I note that Mr. Aamir did not look at all disheveled, distraught or otherwise disturbed upon entering or exiting the vehicle. I also note that in each case, he had a small child with him

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in the car. I judge Mr. Aamir to be a man who loves his children. I do not believe that if he felt he could not safely drive, that he would endanger one of his children by having them in the car with him.

The surveillance video also shows Mr. Aamir sweeping outside of his house and dumping the refuse in a dumpster. The video shows him trotting down the street to catch a small child. At no time did he appear to be in any physical distress when performing these actions. On the contrary, he appeared to be very loose and relaxed.

Mr. Aamir presented in court using a cane. I saw nothing in the medical evidence indicating that he needed any ambulatory assistive device. At no time in the video did I see Mr. Aamir using a cane or other ambulatory assistive device. He seemed to have very good balance and moved without any apparent difficulty. He was able to pick up a small child in one arm and guide another in a stroller with the other. His walking and trotting seemed to be well balanced, and effortless.

Turning again to the medical testimony, both Dr. Obianwu and Dr. Gordon testified that Mr. Aamir seemed to embellish his symptoms. Dr. Obianwu testified that he noted overt features suggestive of symptom magnification; overreaction was noted throughout the physical examination. Likewise, Dr. Gordon testified that it appeared that there was some exaggeration of his symptoms. Dr. Klarman was slightly less tactful in his assessment and stated ... *this man impresses me as attempting to counterfeit some kind of memory or psychological difficulty...*

According to Dr. Polichurla, Mr. Aamir is unable to do anything. I **do not** find Dr. Polichurla's opinion to be credible in light of the video surveillance, the defense medical testimony, and my own assessment of Mr. Aamir's credibility at trial.

While I do believe that Mr. Aamir may have been disabled for some *period* of time as a result of his work related personal injury, I do not find Mr. Aamir credible relative to his claim of *ongoing* disability.

Relative to the orthopedic claims (head, neck, left upper extremity), while I do not believe that Mr. Aamir has ongoing disability, I have little doubt that he was disabled for a *period* of time, and was thereby rendered unable earn maximum dollars in jobs suitable to his qualifications and training. I accept and adopt Dr. Obianwu's opinion as expressed in his 5/6/05 report. Based upon the foregoing, I find it reasonable that Mr. Aamir's disability no longer existed as of the date of that report.

Relative allegation of *Psychogenic overlay*, I likewise accept and adopt the testimony of defense expert, Dr. Klarman. He was the only expert who testified and explained the bases of his evaluation relative to this allegation. While I believe that Mr. Aamir may indeed have experienced some difficulties with sleep disturbances, depression, anxiety, and impaired concentration/attention span for a *period* of time, as of Dr. Klarman's 5/6/05 examination, no mental illness existed. Based upon the foregoing, I find it reasonable that Mr. Aamir's disability relative to the allegation of *Psychogenic overlay* no longer existed as of the date of Dr. Klarman's examination.

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I find that plaintiff has met his burden by preponderance of evidence and established a work-related disability and limitation of his maximum wage earning capacity in work suitable to his qualifications and training for the period 8/27/04 through 5/6/05.

Under the burden shifting analysis enunciated in *Kethman (Stokes)*, I find that defendant has failed to produce any competent evidence from which a finding could be based relative to what jobs were reasonably available to plaintiff within his qualifications and training which he remained physically able to perform and which paid either his maximum wage or less for the purposes of section 361 wage loss determination.

2. Whether plaintiff earned tips, and if so what amount on a weekly basis.

Plaintiff stipulated to an average weekly wage (exclusive of tips) of \$482.54. Mr. Aamir testified that he also earned tips, which ranged from \$250.00-\$300.00 weekly. This testimony is essentially un rebutted; I therefore accept Mr. Aamir's testimony and estimate his weekly tips at \$275.00 weekly.

a. The appropriate compensation rate.

Adding the tips (\$275.00) to the stipulated average weekly wage (exclusive of tips) (\$482.54) yields an average weekly wage of \$757.54.

I find that plaintiff's average weekly wage is \$757.54.

Based upon the following findings relative to Mr. Aamir's filing status and his number of dependents, I calculate the appropriate worker's compensation rate to be \$492.62.

I find that the appropriate worker's compensation rate is \$492.62.

3. Plaintiff's IRS filing status.

The application reflects, and plaintiff testified that his filing status is "married filing joint."

I find that plaintiff's filing status is married filing joint.

4. Whether Plaintiff claims any dependents.

Mr. Aamir testified that he is married and has seven dependent children: Ali (1970); Bakel (1987); Ensaf (1980); Abraham (1994); Youseph (2000); Zehra (2002), and Merwan (2004). Bakel, Ensaf and Abraham live with is sister overseas, the remaining children reside with him. Mr. Aamir indicates that his filing status is married filing jointly.

Section 418.353 controls the determination of dependents under the Act and states as follows:

Sec. 353. (1) For the purposes of sections 351 and 361, dependency shall be determined as follows:

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(a) The following shall be conclusively presumed to be dependent for support upon an injured employee:

(i) The wife of an injured employee living with such employee as such wife at the time of the injury.

(ii) A child under the age of 16 years, or over said age, if physically or mentally incapacitated from earning, living with is parent at the time of the injury of such parent.

(b) In all other cases questions of dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury, except as provided in subsection (3). No person shall be considered a dependent unless he is a member of the family of the injured employee, or unless such person bears to such injured employee the relation of husband or wife, or lineal descendent, or ancestor or brother or sister. Except as to those conclusively presumed to be dependents, no person shall be deemed a dependent who receives less than ½ of his support from an injured employee.

Review of the testimony reveals that Bakel, Ensaf and Abraham did not live with Mr. Aamir. Additionally, review of the dates of birth reveal that Ali (xxx) would have been about 34 years of age and Ensaf, about 24 years of age when the injury occurred on 8/27/04. No facts were presented relative to Ali which would have established his dependency [See, 418.353(1) (a) (ii) and 418.353(1) (b)].

It would appear that Mr. Aamir's wife, as well as his remaining children [Youseph (xxx); Zehra (xxx), and Merwan (xxx)] are dependents under the statute. Thus, pursuant to the statute, Mr. Aamir has four (4) dependents.

I find that Mr. Aamir has established that he has four (4) dependents.

ORDER

IT IS HEREBY ORDERED that Plaintiff's application for benefits is granted. Defendant shall pay Plaintiff worker's compensation wage loss benefits relative to the injury date of **8/27/04** in the amount of **\$492.62** weekly for the period **8/27/04 through 5/6/05**.

IT IS FURTHER ORDERED that Defendant shall pay for all reasonable, related and necessary medical treatment relative to Plaintiff's personal injury, specifically his head, neck, left upper extremity, and psychogenic overlay. All treatment is subject to cost containment.

IT IS FURTHER ORDERED that Defendant shall have credit for any/all benefits previously paid.

IT IS FURTHER ORDERED the payments shall be coordinated pursuant to the statute if applicable. If the parties cannot agree as to the amount of coordinateable benefits and offsets, they may return to the Bureau for further proceedings.

IT IS FURTHER ORDERED that the opinion/order form WC-200 (Green Sheet) is incorporated into this document by reference.

WORKERS' COMPENSATION BOARD OF MAGISTRATES

VICTOR A. McCOY, Magistrate (232G)

Signed this 15th day of March, 2007, at Wayne County, Detroit, Michigan.