

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

**STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
WORKERS' COMPENSATION AGENCY
BOARD OF MAGISTRATES**

**DANIEL ACKER
SS #XXX XX XXX
Plaintiff,**

v.

**GENERAL MOTORS CORP,
Defendant.**

OPINION

APPEARANCES

THE PLAINTIFF

Michael P Doud, P 55491, for Plaintiff.

THE DEFENDANTS

Tom Ruth, P 44434, for Defendant.

THE TRIAL

Trial was held on January 30 2008 in Flint, Genesee County Michigan.

THE CLAIM

Plaintiff claims that he injured his low back, shoulders and wrists while working as a skilled tradesman, a millwright, for General Motors. He alleges that he is disabled as a result.

STIPULATIONS:

1. The parties are subject to the Michigan compensation laws on the dates of injury alleged, 6/9/05 and the last day worked of 4/30/06.
2. The defendant was self-insured.
3. Plaintiff was in the employ of defendant on the date of injury alleged.
4. Notice was given and claim made according to statute.
5. The gross wage is sufficient for the maximum rates in effect, which would be \$689 on 6/9/05, and \$706 on 4/30/06.
6. There is no dual employment.
7. The tax status is no relevant or material in light of stipulation 5.

ISSUES:

1. Whether plaintiff met with personal injury arising out of and in the course of his employment on or about the date or dates alleged,
2. Whether a disability resulted from the alleged injury or injuries.
3. Whether a wage loss has been incurred, and if so, the term and amount of compensation to be paid as a result.
4. Plaintiff's entitlement to medical expenses and treatment.
5. Whether any benefits were paid or furnished for which coordination or offset would be appropriate under Section 354 or 358.
6. Back Rules.

SUMMARY OF THE EVIDENCE

DANIEL ACKER, Plaintiff, testified that he was born XXX and is 57 years old. He graduated from Arthur Hill High in Saginaw and completed a Bachelor's Degree eventually from Saginaw Valley. Plaintiff worked in the foundry during the summer and became a metal tester, preparing core samples for the metallurgy lab. He rehired in the summer of 1971 and did the same thing. In 1972 he hired in as a summer replacement foreman.. He was kept on after the end of the summer, because the person he was replacing was off on injuries. In 1973 plaintiff became a sales person at Carpet Land USA. His best year there he made \$16,000, which was good money back then . In 1975 he did odd jobs, roofing, clerking at Jacobsen's, and selling insurance. He did not make a lot of money at those jobs.

In 1977, he hired in to GM. He had no problems with shoulders or back or other body parts. He started in the cleaning room, using a stationary grinder to clean calipers, housings and crankcases coming from the factory. He was accepted into the apprentice millwright program next.

He started out lifting pieces of iron weighing from 10 pounds to hundreds of pounds. He used every hand tool there is, and mechanical tools as well. This work was very hand intensive. Lifting the iron was hand intensive. He had to climb and get in awkward positions as well to clamp the iron up. Half of the work was at shoulder level or above. The steel he carried to the job by equipment, but to move it from there where they needed it, they had to throw it on their shoulders and carry it.

He drove machinery and kept a toolbox as well. It was 2 feet long and a foot wide and it weighed 70 pounds. The millwrights carried these tool boxes on a welder's rig.

While doing millwright activities he developed back problems in the late 1970s. He thought it was just normal wear and tear. He was laid off a year and then was returned to the gray iron foundry. He was there a year and was laid off again. He started back at Consumers Power from 1982 to 1985. He was a material analyst. He did inventory and ordered what they needed. He was at a desk. He made \$400 a week.

In 1985 he hired back into GM at the Flint Truck and Bus plant. He hired in on the line and was working on halos, a part of the Suburban. He was bent over while doing it. He had pain in his neck, back, shoulders and hands. He also worked as a spot welder, while the line is moving. He welded door frames. He did not complain because he thought he needed to get used to it.

After 90 days he went back to a millwright apprentice job. He had to repair machines in the body shop. He eventually got his journeyman's card, and it took about 8 years due to the layoff. He was now the "leader instead of the follower." He worked usually 12 hours a day, 6 or 7 days a week. As a journeyman he did the same work as an apprentice.

Dr. Jesko's records show his shoulders were hurting him in 1997. He had severe numbness and sharp pain in his left shoulder and he attributed that to lifting. The doctor gave him shots.

As he continued working long hours through 2003 his condition continued to get worse. He went back to Dr. Jesko in 2003 received a shot. He had an MRI in January 2004, and after some therapy, Dr. Jesko recommended surgery. That was done in 2005. He also had some shots at the St Mary's Pain Clinic. These were in his back. They did not help.

He reported his back problems to the plant medical. They gave him ice. The surgery done in 2005 by Dr. Jesko was to his left shoulder. He was off 16

weeks, and got some decent results. There was improvement in the range of motion. He returned to work in October 2005 with restrictions of no lifting over 10 pounds, and no overhead work. He did regular millwright work. Plaintiff worked until 4/30/06. The pain was too much, and he could not help his partners like he needed to. His family doctor took him off work.

Plaintiff has seen Dr. Adams and he does not want to be operated on again. Today, he has problems with his hands, neck and shoulders. He has his T & P disability and his social security disability. His problems that disable him are listed on the forms as his shoulders and his back. He can't do outdoor work or sporting activities. He cannot work as a millwright due to his injuries. He wanted to work until 62 or 65.

Cross: In 2002, it is possible he had restrictions from his chiropractor, but he cannot recall. He no longer treats with him, not since 2005. He does not treat with Dr. Akbar or Dr. LaClair. He still sees Dr. Levin. Plant medical records talk about a back problem for 20 years. He says that he has had long standing back problems. He has never had back surgery, only shoulder surgery. He cuts grass and shovels light snow around the house. He golfed and hunted but can't do that anymore. He quit in 2005. He used to hunt. He went up north. He used to bowl, but does not now. He quit in the early 1980s.

Plaintiff does minor repairs around the home. He has diabetes and is on medication. He takes a pain pill such as Ibuprofen for his shoulders. In 1993, plaintiff was having pain and numbness in his back and leg. He has pain still in his shoulder. On a scale of 1 to 10 his pain now is 4-5. It is getting worse. The back pain is increasing as well. His shoulder hurts right now.

Redirect: the early pain in his back and shoulders in 1993 is different than the pain 2005 and 2006. The more recent pain is much more intense. In 2004 the pain began in the right leg as well. He still has left leg problems.

JEFFREY LEVIN, M.D., a neurologist, testified by deposition of January 29 2008 that he first saw plaintiff on August 4 2005.

Dr. Levin's initial visit was for investigation of right shoulder pain, bilateral hand pain, neck pain and back pain with radicular pain into the right leg and right arm. There was also a recent rotator cuff repair to the left shoulder in June 2005. Exam findings supported reasons for these complaints and an MRI and EMGs were ordered.

The EMGS showed carpal tunnel syndrome, a C6-7 radiculopathy on the right, and an L4-5 radiculopathy on the left.

Plaintiff was apparently seen again on 9/20/05, and then last seen on 1/28/08. On the latter date, he told the doctor he had stopped working and had stopped smoking, and had developed some new symptoms, right hip pain. The exam continued to show positive tests for carpal tunnel and there was also thenar weakness and atrophy. There was cervical muscle spasm and the Spurling's maneuver sent radicular symptoms into the right upper extremity. There was biceps and triceps weakness and some weakness in the legs as well. There was no improvement since the last visit. Repeat EMGS showed the same findings as in 2005.

The doctor explained the nature of the findings. He characterized the carpal tunnel as moderate. Restrictions for that problem would be no repetitive gripping or grasping, no lift over 2.5 pounds and no repetitive lifting, and no exposure to vibrating tools or machines. For the lumbar spine problems, the doctor said that plaintiff should have no repetitive twisting or bending of the back, a sit/stand option, no exposure to rough riding vehicles, and no lift over 15 pounds. MRIs of plaintiff's spine showed a progression of the spondylolisthesis. Increased forces on the lumbar spine over time can cause the increase in the

spinal slippage so a job involving lots of heavy activity like plaintiff had might cause this problem.

For the shoulder impingement problems the doctor thought that the heavy physical work caused wear and tear which can cause impingement of the shoulders. Restrictions for the shoulders would be to avoid work at or above shoulder level, a weight restriction of ten pounds or less, and no exposure to vibrating machines or tools.

In response to a lengthy hypothetical question, Dr. Levin implicated workplace activity in the plaintiff's carpal tunnel, cervical spine, lumbar spine and shoulder problems, and differentiated between the problems and what findings would have been observed if the problems were from diabetes in the case of the radicular problems, and from the aging process in the case of the lumbar spine.

Cross-examination was largely focused on other possible causes for the various maladies plaintiff has, including aging, and degeneration.

PAUL LACLAIR, M.D., a physical medicine specialist, testified for plaintiff that he saw him on April 20 2006 and three times thereafter. On his first visit, the doctor examined plaintiff for problems with his neck, shoulder and low back pain that had progressed for years. Lumbar studies showed the progression of the spondylolisthesis from grade I to grade II, and shoulder impingement symptoms continued on the left side in spite of a surgery a couple of years earlier. Neck pain was explained by a large disc osteophyte complex at C6-7 and a moderate C4-5 disc bulge with some stenosis at that level in the canal.

Recommendations were made to avoid lifting over 15 pounds, no reaching above shoulder level, and no repeated flexion or extension or rotation of the trunk of the body. Therapy was initiated and a recheck was ordered in 5 weeks.

Plaintiff was seen again 5/18/06 and was getting increased pain into the left thigh. He was given Celebrex for that problem and a prescription for Neurontin as well.

On 6/15/06 the plaintiff was seen again and was having problems with his carpal tunnel. He did not want surgery so he was instructed in some stretching exercises for that.

On 8/8/06 plaintiff was seen again and some increase in spinal range of motion was noticed. Plaintiff was symptomatically about the same and was not interested in surgery for any of his problems. He had experienced some right side pain into his buttocks while exercising. The doctor noted that plaintiff was not working and was looking into a retirement disability plan from GM.

The doctor testified that plaintiff's problems in his cervical spine, lumbar spine and shoulder were likely caused, or aggravated by his heavy work activities.

Cross-examination focused on other possible causes for the conditions, including the aging process. The doctor did concede that the problems could be seen in a population that had not done heavy work, and that in the case of the spondylolisthesis it may have started as a developmental problem.

WILLIAM GONTE, M.D., a physician board-certified in sports medicine, internal medicine and geriatrics, testified for the defendant that he examined plaintiff in March 2007.

Plaintiff gave no specific injury history, just 31 years of heavy work as a millwright. Plaintiff gave complaints of mostly anterior shoulder pain bilaterally, and pain in the back and neck as well. The doctor reviewed MRIs and reports, and reports of physicians as well.

After examining plaintiff Dr. Gonte concluded that the impressions were degenerative joint disease of the lumbar spine, bilateral tendonitis of the biceps tendons, status left shoulder arthroscopic decompression, and a history of diabetes, hypertension and hyperlipidemia. The doctor found that none of the musculoskeletal complaints or neurological complaints appeared to be related to plaintiff's work in any way, but were due to the aging process and plaintiff body habitus. The doctor recommended weight loss and anti-inflammatory medications as needed for the complaints.

During direct examination the doctor said plaintiff could work as tolerated with his back, and neck and shoulders, needing no specific restrictions.

On cross-examination the doctor said he didn't receive complaints of carpal tunnel symptoms and was not really sure if he did a Phalen's or Tinel's test on the plaintiff. He did acknowledge that he saw some information about carpal tunnel in Dr. Levin's records and reports. He also admitted that the MRI report of the discs in the cervical spine noted that there was a small to moderate disc herniation with some C7 nerve root encroachment. The doctor said plaintiff's problems with carpal tunnel could be diabetic in origin and that on occasion diabetic neuropathy can be specific to the carpal tunnel. He also said most diabetics have carpal tunnel syndrome.

TRIAL EXHIBITS: Plaintiff's 2 is the chart of Dr. James Jesko of Saginaw, an orthopedic surgeon. These records show treatment in 1997 and then a surgery in June 2005 for the problems with the left shoulder. The surgery ended up being mostly diagnostic with an acromioplasty and removal of a bursa.

Plaintiff's 3 is the chart of Riverfront Exam Center. An exam by Dr. Sil of the plaintiff's lumbar spine showed extensive changes and disabled plaintiff for four weeks as of June 2006.

Plaintiff's 4 is the chart of the Flint Exam Center. An exam by Dr. Tofaute, an orthopedist as of 8/24/06 found plaintiff unable to work for at least 3 to 4 months due to the problems in the lumbar spine and weakness in the legs.

Plaintiff's 5 is the plant medical records. These show regular but not excessive visits to plant medical for elbow, shoulder, and back problems.

Plaintiff's 6 is the chart of Dr. Mark Adams regarding treatment of the back problem. At an exam of 11/3/0-5, plaintiff had muscle spasms and difficulty walking, with decreased strength in the gastrocnemius muscles bilaterally. Reflexes were diminished and x-rays showed a grade II spondylolisthesis. Spinal fusion was discussed.

Plaintiff's 7 is the chart of St Mary's of Saginaw. These records show the MRIs of plaintiff's lumbar spine, and the treatment by facet injections.

Defendant's B is the complete medical record of the plant.

Defendant's C is a file from counsel's file labeled miscellaneous medical and it contains a report of 7/9/97 from Dr. Jesko, a record of 1/18/06 from Dr. Jesko, concerning plaintiff's back shoulder, a spine MRI of 4/24/96, showing a grade 1 spondylolisthesis, a report from Dr. Akbar dated February 11 1993 regarding back pain and leg pain, a report of 6/24/04 from Dr. Srinivasan regarding the facet joint injections, and the report of Dr. Tofaute previously mentioned in plaintiff's exhibits.

Defendant's D is the statement of employee's physician submitted by Dr. LaClair in October 2006 for plaintiff. It lists low back and shoulder pain for the disabling diagnoses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. **CREDIBILITY:** Plaintiff is entirely credible. I take his entire testimony at face value, and I find it both accurate and helpful. I give it great weight. As to the physicians, I find Dr. Levin and Dr. LaClair credible and give their testimony significant weight. I find Dr. Gonte less so. Dr. Levin is a board-certified neurologist and so he treats and diagnoses neuropathies and neurological/musculoskeletal problems. Dr. LaClair, as a specialist in Physical Medicine and Rehabilitation is likewise well-acquainted with musculoskeletal and neurological problems. Dr. Gonte is boarded in internal medicine, which is basically adult primary care, in sports medicine, and in geriatrics. None of those board certifications really equip him with any special expertise in the types of injuries and conditions that plaintiff has. Not that he isn't entitled to express his opinions—he certainly is—but when compared to those opinions of specialists board-certified in areas of expertise like Neurology or Physical Medicine and Rehabilitation, the weight of the opinions of Dr. Gonte pale. Further, both Dr. Levin and Dr. LaClair functioned in the roles of consulting/treating doctors. It appears that Dr. Levin's care was interrupted due to insurance problems, but in any event it appears that both Dr. Levin and Dr. LaClair were engaged in the care and treatment of plaintiff rather than just the rendition of an opinion from an IME. This gives them a natural advantage credibility wise, in that they are seeking medical solutions rather than just an opinion to be used in litigation, plus they had opportunity to evaluate plaintiff on more than one occasion, which is always helpful as well. So, to the extent that their opinions differ, I give Dr. LaClair and Dr. Levin's opinions greater weight than Dr. Gonte. To the extent that the opinions concerning impairments and recommended restrictions differ between Dr. LaClair and Dr. Levin, I give Dr. Levin greater weight because his last treatment/exam was the

most recent and so encompasses the most current view of plaintiff's residual difficulties from his work-related injuries.

2. INJURY: Plaintiff suffered personal injury arising out of and in the course of his employment on the last day of work, 4/30/06. This injury includes aggravation and acceleration of his carpal tunnel condition, his shoulder problems, his cervical spine, and his lumbar spinal difficulties as well. I do not find a specific event injury in 2005, but his physical problems are such that they can be assigned a last day worked or last date of injurious exposure date such as this. Because of the insidious nature of the problems and the allegations of one doctor that they were from the aging process, I have done an analysis as to whether the work contributed in a significant manner to plaintiff's condition. I have considered the opinions of the physicians and the weight of their testimony and have given greater weight to the opinions of Dr. Levin and Dr. LaClair as previously mentioned. I have also considered plaintiff's diabetes and what part it may have played in the injurious conditions and find that it played a minimal role at best. The plaintiff is not currently insulin dependent according to the doctors, and his radiating nerve problems seem clearly to be caused by carpal tunnel syndrome and he does not have the diabetic radiculopathy pattern, according to the EMGS, that is more common in diabetics. There is no evidence of similar rigorous activity outside his employment activities. The leg pain is well-explained by the nerve impingement caused by the problems in the low back. As to the spondylolisthesis, there is evidence that it is either congenital or acquired and so I find that it is not a product of the aging process. Plaintiff's degenerative condition in his low back seems more likely to be caused by the heavy lifting activity at work and the abnormalities of the vertebral alignments than to aging. The shoulders seem clearly to be the result of the heavy and repetitive work activities as well.

3. **DISABILITY:** Plaintiff's maximum reasonable earning ability is represented by his last employment with GM and his earning as of his last day worked. Since there is not a specific wage figure given, but rather just a stipulation concerning the benefit rate, it is not possible to find the plaintiff's wage earning capacity with complete accuracy. It is possible, though, to find that it is at least \$1,320 a week, as that wage for a person who is single without any dependents produces a compensation rate based on the State's calculation program of slightly under the maximum rate. The only job which plaintiff ever had which paid "good money,"¹ other than GM work, was with Carpet Land as a salesperson, and that was about \$16,000 annually in 1973 and 1974. So, I find plaintiff's reasonable earning ability to be in the area of \$1,300 a week.

4. Plaintiff is unable, due to his injuries and restrictions, to return to GM in any capacity currently. He is not seeking employment with GM or elsewhere because he is drawing total and permanent disability benefits. These benefits preclude him from employment with GM or full-time employment elsewhere. For all practical purposes, Plaintiff is able to do at most just sedentary work. He might well be able to do his former job at Carpet Land but it does not pay a comparable wage. He does have a college degree, but he has worked in heavy manual labor for GM for most of his working life. He has not used his college education since at least 1977, when he went to work at GM, and there is certainly no evidence at all that plaintiff could or would qualify for any type of employment as a result of an old college degree that would pay him a wage comparable to that which he earned at GM.

¹ Plaintiff's way of describing earning \$15,000 annually in the early 1970's.

5. Plaintiff has a limitation in his maximum wage earning capacity in all jobs suitable to his qualifications and training as contemplated by MCL 418.301 (4) and case law. In making this finding, I have utilized the analysis and considered the various factors set out in case law, including *Sington v Chrysler*, and the more recent Appellate Commission decisions such as *Childers v La Z Boy Showcase*, 2007 ACO #217. Plaintiff has a complete wage loss as a result of his injuries and disability. Accordingly, he is entitled to an award of benefits.

6. COMPENSATION: Plaintiff is entitled to benefits to be paid at the stipulated rate of \$706 a week from and after May 1 2006 until further order. He is entitled to have all his medical care and treatment for injuries to his shoulders, low back, and wrists (carpal tunnel) paid under cost containment provisions of the Act.

7. ATTORNEY FEES: Plaintiff's attorneys are entitled to a fee not to exceed 30% of amounts recovered under this award, all in accordance with the statutes and rules of the Workers Compensation Agency.

THE ABOVE FINDINGS ARE INCORPORATED BY REFERENCE INTO AN ORDER ISSUED THIS DATE AND THE ATTACHED ORDER IS ALSO INCORPORATED HEREIN BY REFERENCE.

IT IS SO ORDERED.

WORKERS' COMPENSATION BOARD OF MAGISTRATES

Michael T. Harris, MAGISTRATE, 199

Dated and issued this ____ day of April 2008, at Flint, Genesee County, Michigan.