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

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARINGS SYSTEM
WORKERS' COMPENSATION BOARD OF MAGISTRATES

ROBERT J CUMMINGS,
SS#: XXX-XX-XXXX,
Plaintiff,

vs.

GM B O C LANSING,
SELF-INSURED,
Defendant.
_____/

OPINION

APPEARANCES:
THE PLAINTIFF- STEVE POLLOK (P-27592)
THE DEFENDANT- THOMAS RUTH (P-44434)

TRIAL:

Trial was held on July 12, 2018, in Okemos, Michigan. The parties were given until August 8, 2018 to submit stipulated facts and Briefs. The Court was approached by the parties August 6, 2018. Based upon a showing of "good cause," the parties were granted an extension of one (1) week. Briefs were submitted, and proofs were closed on August 17, 2018.

CLAIM:

By Application dated August 26, 2009, plaintiff alleged an injury date of April 18, 2005. Plaintiff alleged that: "lifting, bending, twisting, turning, reaching, pushing, pulling, standing, walking, climbing & grasping caused & aggravated neck, shoulder, arm, hand, wrist, back & leg pathology."

An Amended Application for Mediation or Hearing-Form A was received March 16, 2018. Plaintiff alleged injury dates of February 1988; December 4, 2001; and April 18, 2005. Plaintiff alleged that in February of 1988 he was struck by a forklift truck which caused and aggravated neck, shoulder, arm, back and leg pathology. For the alleged December 4, 2001 and April 18, 2005 dates of injury, plaintiff alleged that his job duties caused and aggravated neck, shoulder, arm, back, leg, elbows and hand pathology. Plaintiff also requested that the defendant pay the proper weekly wage loss benefit rate.

STIPULATIONS:

It was stipulated that both parties were subject to the Act, General Motors Corporation carried the risk on the date of injury, and the defendant employed the plaintiff. It was also stipulated that a personal injury occurred on April 18, 2005. Notice and claim were admitted. It was stipulated the average weekly wage was $957.40. The parties stipulated that the disability was due to the alleged personal injury and the plaintiff's tax filing status was married joint. The only issue left in dispute was the appropriate workers' compensation rate.

ISSUE:

1. Is the plaintiff being paid the appropriate weekly workers' compensation rate?

LAY WITNESSES:
Plaintiff: Robert Cummings
Defendant: None

WITNESSES TESTIFYING BY DEPOSITION:
Plaintiff: None
Defendant: None

EXHIBITS:

Joint Exhibit #1: Letter dated May 16, 2009 from General Motors Corporation to the UAW regarding "PENSION PLAN." The letter was sent to the attention of Mr. Cal Rapson, Vice President and Director of the UAW. It confirmed that during the 2009 labor negotiations, the parties discussed the 2007 letter agreement titled "Workers Compensation."

The letter then goes on to confirm:

> "This letter of agreement constitutes an amendment to the 2007 GM-UAW Pension Plan and shall be construed and applied as if it were therein incorporated.

> Pursuant to Subsection 354 (14) of the Michigan Worker's Compensation Act, as amended, until termination or earlier amendment of the 2007 Collective-Bargaining Agreement for employees who are injured and retire on or after October 1, 2007, workers compensation payments for such employees shall be reduced by disability retirement benefits payable under the Hourly-Rate Employees Pension Plan to the extent that the combined workers compensation payments, initial Social Security Disability Insurance Benefit amount, and the initial disability retirement benefit (per week) exceed the employee's gross Average Weekly Wage at the time of injury. In no event shall such reduction be greater than the disability retirement benefits payable."

The letter goes on to provide that:

> "As a result of the 2009 negotiations, the parties have agreed that the 2007 letter agreement, referenced above, will be amended such that, effective January 1, 2010, the provisions of the 2007 letter agreement will be applied to all retirees who retire prior to January 1, 2010, Regardless of their date of retirement or injury.
>
> Additionally, the parties have agreed that, for employees who retire on or after January 1, 2010, the above referenced 2007 letter titled Workers Compensation will be eliminated and that, pursuant to the Michigan Worker's Compensation Act, workers compensation payable for all such retirees shall be reduced, commencing January 1, 2010, by pension or retirement payments payable under the Hourly-Rate Employee's Pension Plan."

Joint Exhibit #2: Letter dated December 9, 2009 from GM Benefits & Services Center to Robert Cummings. This letter sets forth the following:

Weekly Workers Compensation:	$570.85
Initial Social Security Disability Insurance Benefit:	$427.71
Initial Disability Retirement Benefit:	$355.85
Average Weekly Wage at the time of injury:	$957.40

"Therefore as a result of the above, coordination will apply in your weekly workers compensation rate will be $250.70 as of January 1, 2010." The enclosure referenced in the letter is a BWC-701 dated January 1, 2010. The adjustment to the base rate is listed as $320.15.

Joint Exhibit #3: Signed "STIPULATED FACTS" Submitted by the Parties. The parties executed and signed a set of stipulated facts consisting of 14 paragraphs. One major difference listed is that the plaintiff's initial Social Security Disability benefit expressed in weekly terms is $527.71 per week as opposed to the amount listed in Exhibit #2, which was $427.71. Furthermore, it was stipulated that plaintiff did not agree that the GM-UAW amendment was legal; plaintiff acknowledged that GM properly calculated plaintiff's benefits utilizing the

formula set forth in the agreement. In paragraph 13, it was agreed issues raised by plaintiff were threefold: 1) does the use of SSDIB constitute an improper coordination under Section 354(11) of the Act for the period January 1, 2010 to present; 2) whether the doctrine of promissory estoppel applies to this case; 3) whether defendant's method of coordination is a violation of the Workers' Disability Compensation Act.

SUMMARY OF EVIDENCE

This matter was tried on July 12, 2018. The plaintiff, Robert Cummings, testified he was born xx/xx/xx and was married at the time of Trial. He testified he was hired by General Motors Corporation on May 17, 1976. His last day worked was April 18, 2005.

He stated he was working with restrictions when he last worked. He transferred out of the wheel room to the tool crib. He testified prior to his last day worked, he was called into the office of Ken Pearl, the superintendent of assembly. According to plaintiff, he had never been called into Mr. Pearl's office before. In addition, he stated he never met or socialized with Mr. Pearl outside of the work environment. Plaintiff's counsel then questioned plaintiff about the conversation which allegedly took place in Mr. Pearl's office. Plaintiff's counsel stipulated that defense counsel could have a continuing objection to testimony from plaintiff regarding the conversation. The basis of the objection was that any alleged statements by Mr. Pearl would constitute inadmissible hearsay.

According to plaintiff, Mr. Pearl stated, "you know our rules are if you're on restrictions, you're not gonna make your 40 hours a week". Mr. Pearl stated that plaintiff could make more money if he were on workers' compensation than he could make working 20 to 32 hours a week. Plaintiff knew he could collect his pension, because he had over 30 years of credited service. (In fact, he had 30.6 years of credited service.) He was told by Mr. Pearl that he would get both his workers' compensation benefits and his pension.

Q And did he (Pearl) discuss with you how to go out on a temporary basis, permanent basis? Did you have discussions about that?
A Yes. He told me, "Go out on workers' comp and then you'll--you'll collect your retirement—
Q Okay
A ---with that"
Q Did he tell you that you should apply for your retirement?
A Yes, because I had actually 30.6 years at that--somewhere in there.
Q And did you go out on a regular or disability retirement?
A Disability.

Plaintiff applied for a disability pension. He did not receive his pension right away. He testified that Mr. Pearl told him that once he was "qualified" for his

pension he would receive it from there on out. According to plaintiff, it took quite a while for him to obtain workers' compensation benefits. He testified that he filed for workers' compensation benefits, but they were denied. He testified that he had to work hard to receive workers' compensation benefits. He had to fight them (GM). He talked to his Union about this and finally retained the services of an attorney.

According to the Agency file, the plaintiff's initial Application for Mediation or Hearing-Form A was received by the Agency on March 17, 2006. An Amended Application for Mediation or Hearing was received on January 9, 2008. The Voluntary Payment Form authorizing weekly benefits was signed by Magistrate Goolsby on January 16, 2009.

When he was approved for workers' compensation benefits he was receiving $570.85 per week. During cross examination, plaintiff acknowledged that Mr. Pearl did not state he would always receive workers' compensation benefits. He also admitted that he was aware of contract changes between the UAW and General Motors Corporation, which occurred with each contract. He admitted that those contract changes over the years affected what benefits he received. Plaintiff stated that he never talked with Mr. Pearl after leaving the plant. He also acknowledged that he never discussed with the Union his conversation with Mr. Pearl. According to plaintiff, he recalls that he was first approved for his pension and then was approved for workers' compensation benefits through a voluntary payment of benefits. He further admitted it was his understanding his benefits were reduced because of an agreement between the UAW and General Motors Corporation.

During RE-DIRECT EXAMINATION:

Q So when Mr. Pearl had this conversation with you and he told you that you would be getting your Worker's Comp.—
A Can I stand for a second?
THE COURT: Absolutely.
Q You were getting your workers' comp and your pension, is that what he told you?
A Yes.

When plaintiff was asked, he admitted Mr. Pearl never stated that his workers' compensation rate would never change.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff has the burden of proof to establish a compensable workers' compensation claim by a preponderance of the evidence for each element of the claim. Aquilina v General Motors, Corp., 403 Mich 206 (1978). In this case, the parties stipulated to a very narrow issue. Was the plaintiff being paid the appropriate weekly Worker's Compensation rate? The plaintiff has the burden of

proof to establish he is being paid at an incorrect rate. In his Brief he puts forth three arguments in support of his position.

His first argument states: “every employer **shall** be subject to the… Act and **shall** be bound thereby." (Plaintiff’s emphasis) The plaintiff maintains the Act “has specific provisions as to the method of coordinating benefits and defendant and the Union have chosen to ignore those provisions and contractually establish an alternative methodology to coordinate benefits." Plaintiff goes on to argue that there is no provision in the Act allowing the defendant to utilize an alternative to Section 354 as a method to reduce or coordinate benefits under the Act. In addition, plaintiff maintains there is no provision of the Act which allows an employer and Union to contractually establish an alternative method of coordinating benefits.

MCL 418.354 was first enacted in 1982. Section 354(1) provides with few exceptions that weekly workers’ compensation benefits payable “shall be reduced by these amounts." Section 354(14) states: “This section does not apply to any payments received or to be received under a disability pension plan provided by the same employer which plan is in existence on March 31, 1982. Therefore, when read together, it appears clear that the legislative intent was that disability pensions in existence prior to 1982 were not to be reduced. That was further reinforced by the Amendment to Section 354 in 1987, which declared the Michigan Supreme Court case of Frank's v. White Pine Copper Division, 422 Mich 636 (1985) was erroneously rendered in so far as its interpretation of this section. It was the legislative intention not to coordinate payments under this section for any injuries occurring before March 31, 1982. This section continues, “Any disability pension plan entered into or renewed after March 31, 1982 **may** provide that the payments under that disability pension plan provided by the employer shall not be coordinated pursuant to this section. (Court’s emphasis.) It appears that prior to 2009, General Motors Corporation and the UAW exercised their statutory right to prevent coordination of disability pensions of hourly rate employees, i.e. “the employer shall not” coordinate pension pursuant to this section. The statute always required an affirmative action by the employer to prevent disability pensions from being coordinated. This section provides that the employer “may" provide for no coordination. **There is no other limitation found in Section 354(14) (**Court’s emphasis**)** Specifically, there is no prohibition against an employer (and bargaining unit) providing for terms in which disability pension benefits **may** be coordinated**.**

Plaintiff's second argument concerns an interpretation of Section 354(11). Plaintiff argues that the letter agreement of May 16, 2009 allowing the defendant to use Social Security Disability benefits to reduce the employees wage loss benefits is prohibited by that section. The Court agrees that an employer cannot coordinate Social Security benefits to reduce an employee’s weekly workers’ compensation benefits. Plaintiff bases his argument on the last sentence of Section (11). Not only must Section (11) be read in its entirety, but it also must

be read as part of Section 354 and the significant overhaul of the Workers' Compensation Act that occurred in 1982. Section (11) provides that disability insurance benefit payments under the Social Security Act shall be payments from funds provided by the employer, and to be primary payments on the employer's obligations. Like the language contained in Section (14), the legislative intent was that Social Security Disability benefits could be coordinated from the date of the award certificate. "The coordination of social security disability benefits shall commence on the date of the award certificate of the social security disability benefits." There is no evidence in the record that the defendant ever "coordinated" as that term is used in Section 354 of the Act any Social Security Disability benefits.

Defendants acknowledge that they "considered" Social Security Disability benefits when applying the formula set out in Exhibit #1. Plaintiff's exact argument was made in the Federal District Court for the Eastern District of Detroit. The Federal District Judge and the 6th Circuit Court of Appeals addressed this argument. In Garbinski v General Motors LLC, 521Fed Appx 549 (CA 6, 2013), pages 552-553, the 6th Circuit Court of Appeals concluded that Michigan law prohibits an employer from coordinating SSDI benefits with workers' compensation payments. "GM is not using SSDI benefits to partially satisfy its obligation to pay workers' compensation benefits; thus it is not 'considering' SSDI benefits in a way prohibited under Michigan law. Rather, SSDI is part of an equation designed to reduce the amount GM would otherwise lawfully coordinate workers' compensation benefits with disability benefits provided under the GM pension plan. That is not what the plain language of section 418.354 (11) prohibits."

Plaintiff's third argument involves the equitable doctrine of Promissory Estoppel. The doctrine evolved out of common law interpretation of contracts. There generally are five elements of a promissory estoppel that must exist for the concept to be enforceable. The first element is a legal relationship. Generally there must be some form of legal relationship in existence or anticipated between the parties such as a contractual relationship. The second element is a promise. It must be shown that a promise was made between the parties to the action that led the injured party to assume that some sort of action was to be taken. Such a promise must be reasonably reliable, or believable. The third element is reliance. It must be shown that the injured party relied on the promise that was made, and took some action based on that promise. The fourth element is detriment. The party that relied upon the promise must have suffered some sort of detriment or loss, which puts him in a worse position than when he started. Last element is unconscionability. It must be shown that it was unfair for the promisor to break his promise to the promisee.

This argument is based upon statements by Ken Pearl who had died prior to Trial. I find that Mr. Pearl was an employee of the defendant and was employed in a supervisory position. Although I do not find that Mr. Pearl was acting in the capacity of an agent for the defendant, I do find he was placed in an

apparent representative capacity by the defendant. As such, I believe that the conversation that was held with the plaintiff would not be considered hearsay under MRE 801 (d)(2). Even if the conversation met the definition of hearsay, I believe that his death prior to Trial would allow the admission of the testimony as a hearsay exception under MRE 804 (a) (4).

I believe the conversation took place, and that plaintiff honestly recounted his recollection of the meeting and what was discussed. The fact the conversation took place over thirteen years ago, must be considered. However, I find that under the principles of promissory estoppel, relief cannot be granted to plaintiff for several reasons. I do not believe that Mr. Pearl and plaintiff anticipated entering into a legal, contractual agreement. Instead, I find that Mr. Pearl suggested to plaintiff that he could make more money drawing workers' compensation benefits and taking his "retirement," then he could work 20 to 32 hours a week. This was sage advice. I did not find in the testimony any evidence that Mr. Pearl guaranteed or promised plaintiff that he would receive workers' compensation benefits and a total and permanent disability pension if he were to leave work and apply for same. If plaintiff interpreted the conversation to imply that guarantee or promise (reliance), he did very little after the conversation took place to try and enforce that promise. He testified that it took 8 to 9 months to obtain his pension. Furthermore, it was a period of almost 4 years before he received workers' compensation benefits. I believe that if plaintiff truly thought he was made a promise or guarantee, he would have contacted Mr. Pearl about his pension or about his workers' compensation status at some point in time. Instead, plaintiff testified that he did not talk with or meet with Mr. Pearl after the conversation in his office. At a minimum, a discussion of this important issue should have been brought up with a union representative or an attorney. Plaintiff met with his Union and met with attorneys, but at no time, so far as the record shows, did he mention to anyone this conversation with Mr. Pearl.

Mr. Cummings acknowledged the reduction of his workers' compensation benefit was a direct result of contract negotiations between his Union and General Motors Corporation. He admitted that benefits of his employment and retirement had changed over the years based upon changes in the contract that was negotiated by his Union and General Motors Corporation. Most importantly, plaintiff admitted that Mr. Pearl never told him or promised him that his weekly workers' compensation benefits would continue or would not be reduced. According to the testimony, the plaintiff was told once he qualified for his pension, he would receive it "from there on out." Per the stipulation and testimony, that remains the case.

The parties stipulated "GM properly calculated Plaintiff's benefits utilizing the formula set forth in the agreement". (Joint Exhibit #1) Based upon the STIPULATED FACTS, testimony, and arguments presented, I find the weekly benefit amount being paid is appropriate.

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

_____
J. WILLIAM HOUSEFIELD, Magistrate (255G)

Signed this 20th day of September, 2018 at Okemos, Michigan.