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

BRENDA PECINA,
SS# XXX-XX-XXXX,
Plaintiff,

vs.

VALLARTA SUPER MARKET /
NO RECORD OF COVERAGE,
Defendant.
_____/

OPINION

APPEARANCES:
THE PLAINTIFF- DON WALDRON (P# 34223)
THE DEFENDANT- NONE

TRIAL:

Trial was held on September 17, 2018 in Okemos, Michigan. The Agency reflected no record of coverage for the defendant. However, Mr. Yono, the owner of the defendant appeared in my courtroom on many occasions. The Agency file reflects that correspondence and letters sent by certified mail, return receipt requested were signed for. Trial was scheduled for 9:00 a.m. No one was present on behalf of the defendant when trial started at 9:20 a.m., nor did anyone appear prior to proofs being closed. The record was closed on that date and the matter deemed submitted for Decision.

CLAIM:

By Application dated April 18, 2016, plaintiff alleges an injury date of July 22, 2015. Plaintiff alleges that she injured her neck, shoulder, back and head. She also claimed a post-concussion syndrome and an emotional sequela because of the injury. At the time of Trial, plaintiff amended her Application for

Mediation or Hearing to also include a claim for the thoracic area and a regional pain syndrome.

STIPULATIONS: There were no stipulations because no one appeared on behalf of the defendant.

ISSUES:

1. Is the plaintiff an employee as defined under § 418-161?
2. Is the defendant an employer subject to the Act under §418.115?
3. Did plaintiff meet with a personal injury on July 22, 2015?
4. Did a disability arise because of the alleged injury?
5. Did a wage loss occur ?
6. Is plaintiff entitled to medical expenses and treatment?

LAY WITNESSES:

Plaintiff: Brenda Pecina
Caroline Guzman

Defendant: None

WITNESSES TESTIFYING BY DEPOSITION:

Plaintiff: None

Defendant: None

EXHIBITS:
Plaintiff:

Plaintiff's Exhibit #1: Form 105A. Plaintiff's formal education ended with the 9th grade. She did, however, obtain her GED in 2007. She attended some tax preparation classes at Lansing Community College in 2008. From 2003 to 2015, she worked for various employers. In 2003, she was working for $6.50 per hour at Famous Taco. Prior to going to work for the defendant, she was working at Big John's Steak and Onion at minimum wage.

Plaintiff's Exhibit #2: 2015 W-2. Earnings and Hours payroll records for the period from May 3, 2015 to July 25, 2015. The W-2 lists wages of $2,180.45. The payroll records show nine (9) pay periods. The last period (week of injury) shows $207.00. There appears to be a partial week from May 31, 2015 to June 6, 2015, for a total payment of $30.32. There are no wages reported for the period between June 7, 2015 to June 20, 2015.

Plaintiff's Exhibit #3: Sparrow Hospital Records. Emergency room records include treatment on July 22, 2015 and July 25, 2015. On July 22, 2015, patient is a 27-year-old female presenting to the emergency room after sustaining a head injury. Patient states she was hit on the back of the head by a swinging metal door. She noticed moments of blurred vision during the onset of the incident. She also has complaints of neck and right shoulder pain. Her friend that brought her in to the ER says the patient has some slowed speech and confusion. Patient also complains of being nauseous. Denies similar problems in the past. Diagnoses include concussion, without loss of consciousness, acute posttraumatic headaches, not intractable. On July 25, 2015, patient presents for re-check. Patient states is having a throbbing headache, ongoing since the metal door fell onto her head. When she leans forward it throbs more. Following a CT scan she was advised to follow-up with occupational health which she did. Occupational Health advised her to follow-up at Sparrow. Event happened while at work in the produce department. An 8-foot door that swings back and forth fell onto the patient while she was pushing a cart through the door. She has been moving more slowly to reduce lightheadedness, rapid movement and position changes make the condition worse. Discharge diagnoses listed include: 1) closed head injury, 2) post concussive syndrome, 3) cervical strain, and 4) multiple contusions, related to the work injury. Patient advised to follow-up as needed.

Plaintiff's Exhibit #4: MSU Clinical Center Medical Records. Treatment from November 6, 2015 to April 2016. Plaintiff was seen by Joseph Pysh D.O., Ph.D. on November 6, 2015, in the MSU Neurology Department on referral from primary care physician (Dr. Gomoll) for headaches. History indicates on July 22, 2015 while at work at 8-foot metal door fell on the patient's head, right shoulder, and upper back, pinning her against a shopping cart. Since that time, she has been having sharp throbbing headaches with "expanding sensation" over the right parieto-occipital and vertex areas. These last 2 to 3 minutes, occurring 5 to 6 times per day. Sometimes the pain is at the level of 10. They are associated with nausea, emesis, photo\phonophobia, intermittent bluish-white photopsia's right greater than left. Diagnoses include post-traumatic headaches, pain in joint involving right shoulder region, depression and anxiety. Plaintiff seen on several occasions by Michael Slesinski, D.O. at the MSU Spine Center. As of March 25, 2016, Dr. Slesinski's diagnoses included complex regional pain syndrome of the right upper limb, dysesthesia, pain in right shoulder, cervicalgia, and post-concussion syndrome. At that time, the doctor also recommended the patient be seen by an ophthalmologist (which was also recommended by the neurology department) and that patient be evaluated at Origami for post concussive headaches. On February 17, 2016, the plaintiff was seen in follow up by Aileen Antonio, M.D., a neurologist. The doctor noted that the patient was last seen December 23, 2015. Since that time the patient continues to experience depression, increased lethargy and cognitive difficulties. She relates that she lost her way going to a store recently and cannot keep track of things while she is cooking. She needs to write things down to remember them. She still feels

nauseated and wakes up at night to vomit. She seems to be more irritable and fatigued, which is different from her original baseline. Diagnoses include, 1) post-concussion syndrome, 2) depression\anxiety and 3) complex regional pain syndrome of the right upper limb.

Plaintiff's Exhibit #5: Medical Records MSU Spine Center, Michael Slesinski, D.O. Treatment dates include February 5, 2016; March 7, 2016; March 25, 2016; and April 1, 2016. Diagnoses are the same as contained in the MSU Clinical Center medical records (Exhibit# 4).

Plaintiff's Exhibit #6: Ingham County DHS Records. Forms concerning Medical Needs-Path Submitted from January 21, 2016 to February 12, 2018 by Dr. Gomoll, Dr. Slesinski, and Dr. Ducommun. Diagnoses included cognitive disorder, TBI, chronic back and neck pain, cervical and dorsal pain, and complex regional pain syndrome.

Plaintiff's Exhibit #7: McLaren Mid-Michigan Healthcare Associates/ Edmond Ducommon, M.D. (Part I) Dr. Ducommun first treated the plaintiff on May 12, 2016. The last date of treatment in the exhibit is November 21, 2016. At that time, relevant diagnoses included back pain, cognitive disorder, lumbar radiculopathy, migraine headaches, moderate episodes of three current major depressive disorder, neck pain, pain in joint of right shoulder, and right knee pain.

Plaintiff's Exhibit #8: McLaren Mid-Michigan Healthcare Associates/ Edmond Ducommon, M.D. (Part II) Treatment dates from November 21, 2016 to August 15, 2017. Diagnoses consistent with those contained in Exhibit #7 and Exhibit #8. Plaintiff's cognitive condition and the CRPS (complex regional pain syndrome) seem to have progressed.

Plaintiff's Exhibit #9: Letter report dated September 6, 2018 from Edmond J. Ducommon, M.D. Narrative report from Edward J. Ducommun M.D., dated September 6, 2018. Dr. Ducommun is Board certified in Physical Medicine and Rehabilitation. He states he has treated the plaintiff since May 12, 2016 regarding complaints that resulted from an injury occurring at work July 22, 2015 at a grocery store. She reported that a heavy bay door fell striking her on the head, right arm and right back and pinning her against a cart. Following the accident, she has had multiple evaluations. The neurologist believes she has several problems including headaches, post concussive syndrome, cervicalgia, complex regional pain syndrome, cervical brachial syndrome, depression and anxiety, and right shoulder pain. Since the initial evaluation the doctor opines the patient continues to exhibit evidence of a cognitive disorder and traumatic brain injury as result of being hit on the head by the metal door. In his opinion, this has significantly impacted her ability to participate in even normal daily activities. She must be assisted with simple instructions with respect to taking her medications. She has difficulty trying to manage any scheduling, tasks, and housework chores. Unfortunately, her condition has failed to respond in any significant way

to any of the modalities of treatment that have been employed so far. The doctor opines he does not believe there will be any significant improvement in the foreseeable future. "Given her level of pain and cognitive limitations I do not believe she has been employable at least since the time I first saw her. If she does experience some future improvement, I expect it would only be partial and I doubt she would be able to do anything more than a part-time job that was very sedentary."

Plaintiff's Exhibit #10: Letter from EQUIAN dated July 11, 2018 asserting a lien on behalf of McLaren Health Car, a Medicaid plan. Equian notified plaintiff's attorney on July 11, 2018 it represented McLaren Health Care, a Medicaid plan. As of April 30, 2018, McLaren had paid medical benefits on behalf of plaintiff in the sum of $10,038.76. Attached to the letter was the payment report. McLaren's treatment started July 22, 2015 and dates of service ran through April 12, 2018. McLaren had charged $111,843.62 as of that date.

Defendant: No Exhibits

The Court's Exhibits:

Exhibit #1: Magistrate's letter to Nick Yono, owner of Defendant, Advising of Priority Trial Date September 17, 2018. My letter advised Mr. Yono (employer), that the case had been scheduled as a priority trial on August 7, 2018. Because it appeared a possible settlement had fallen through, the Court was not going to proceed to Trial on that date without giving him the opportunity to present witnesses and a defense. Therefore, the case had been rescheduled for September 17, 2018. It would be the only case on the docket and trial would start promptly at 9:00 a.m.

Exhibit #2: Acknowledgement & Notice of Hearing dated August 8, 2018 advising defendant of Trial date on September 17, 2018. This was sent certified mail, return receipt requested. The letter was signed for at the mailing address listed.

SUMMARY OF EVIDENCE

The plaintiff, Brenda Pecina, testified she was born xx/xx/xx. She testified her tax filing status was single head of household. She identified by name and date of birth five minor children. She testified she finished the ninth grade in school. She did however, obtain her GED in 2007. She identified plaintiff's Exhibit #1 and the accuracy of the information contained therein.

Plaintiff testified she was hired by defendant in April of 2015 to work part-time. She testified she was hired by Raja, the wife of the owner. She originally

started out in her part-time position as a cashier. After several weeks, she was offered the position of manager of produce. She testified when she was hired, she was making $8.50 per hour. She testified she considered herself an employee, and was given a W-2 by the employer. She also testified during the period she worked, she saw 6 to 7 other employees each day. When she was made manager of produce, she was told by both the owner (Mr. Yono) and Raja that she would be working 38 hours per week at nine dollars ($9.00) per hour. She worked in this capacity for a few weeks before she was injured. She testified that part of her responsibilities was to place produce in the refrigerator unit at closing, and to bring produce out during business hours. She testified there was a metal door that would open and close to the refrigerator. According to plaintiff, the door was broken and was off one of the hinges. She was not scheduled to work but was called in on July 22, 2015, because the market was shorthanded. She arrived at approximately 10:00 a.m. While working, she was pushing a two-level metal cart (which was heavy, because it was loaded out of the refrigerator) when she recalled being hit from behind. Evidently the door had come off the hinge and struck her on the head, neck, shoulder and back. She was taken to the emergency room of Sparrow Hospital. She was treated and thought she would be able to return to work on July 25, 2018. However, she continued to experience symptoms and instead of going to work went back to the emergency room at Sparrow. She testified that she has not returned to work since the injury. She has difficulty concentrating and experiences a significant amount of pain daily. She testified that she has limited use of her right upper extremity. The Court noted the plaintiff kept her right arm close to her body during the entire period she testified. It was apparent to the Court that she was guarding the right arm.

Caroline Guzman was called as a witness by the plaintiff. Mrs. Guzman retired from Michigan State University in 2001. She has a Master's degree in social work and is also the plaintiff's godmother. She met plaintiff and her family through the local church when plaintiff moved from Texas. She has known plaintiff for several years. According to Mrs. Guzman, she helped plaintiff obtain a job with ACORN. She stated that Ms. Pecina was able to handle new job responsibilities quickly. She showed initiative. Mrs. Guzman also testified that plaintiff was eager to obtain her GED so that she could enhance her job prospects. According to Mrs. Guzman, plaintiff was seen as an " up-and-coming talent."

Mrs. Guzman was the friend who went to the supermarket and drove plaintiff to the emergency room on the date of her injury. She noted in the emergency room that plaintiff was slurring her words. According to Mrs. Guzman, plaintiff has exhibited a slow decline in not only her cognitive abilities, but also in her physical abilities. Mrs. Guzman has been very active in assisting plaintiff in scheduling medical appointments and providing transportation for plaintiff to those appointments. She testified that initially it was difficult to obtain the proper treatment for plaintiff because of the restrictions or requirements of the

Ingham County DHS. Mrs. Guzman testified plaintiff has a difficult time trying to complete the necessary forms. Recently she was trying to complete an application and could not recall names and dates and needed help and instructions in completing the application. Mrs. Guzman notes that before the injury plaintiff was very active in her kitchen. She prepared all the meals for her children and loved to cook. Now, plaintiff has a difficult time remembering what ingredients she needs to add to various dishes she is preparing. Mrs. Guzman also has noted the physical limitations she exhibits. Plaintiff has a very limited range of motion in the right upper extremity. She has noted that plaintiff guards against anyone, including her children from touching her right arm.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

MCL §418.161:

(1) As used in this act, "employee" means:

(n) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act.

MCL §418.115:

This act shall apply to:

(a) All private employers, other than agricultural employers, who regularly employ 3 or more employees at 1 time.

Based upon plaintiff's testimony, I find that she is an employee within the meaning of the Act. I further find based upon her testimony that Vallarta Supermarket, is an employer subject to the Act, thus giving the Agency and this Court jurisdiction to decide the matters herein.

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). Those elements include proving an injury or disease arising out of or in the course of employment and proving that the injury or disease has placed a limitation on the claimant's wage-earning capacity in work suitable to his or her qualifications and training. MCL 418.301 (1) & (4).

In June 2008 the Supreme Court issued their Decision in Stokes v Chrysler LLC, 481 Mich 266 (2008). In that case, the Supreme Court noted:

> "The claimant bears the burden of proving a disability by a preponderance of the evidence under MCL 418.301(4), and the burden of persuasion never shifts to the employer. The claimant must show more than a mere inability to perform a previous job. Rather, to establish a disability, the claimant must prove a work-related injury and that such injury caused a reduction of his maximum wage-earning capacity in work suitable to the claimant's qualifications and training. To establish the latter element, the claimant must follow these steps:
>
> (1) The claimant must disclose all of his qualifications and training;
> (2) the claimant must consider other jobs that pay his maximum pre-injury wage to which the claimant's qualifications and training translate;
> (3) the claimant must show that the work-related injury prevents him from performing any of the jobs identified as within his qualifications and training; and
> (4) if the claimant is capable of performing some or all of those jobs, the claimant must show that he cannot obtain any of those jobs.
>
> If the claimant establishes all of these factors, then he has made a prima facie showing of disability satisfying MCL 418.301(4), and the burden of producing competing evidence then shifts to the employer. The employer is entitled to discovery before the hearing to enable the employer to meet this production burden. While the precise sequence of the presentation of proofs is not rigid, all of the steps must be followed."
> Stokes v. Chrysler LLC, 481 Mich 266 (2008).

The Workers Compensation Appellate Commission recently summarized their Opinion concerning Stokes v. Chrysler LLC, 481 Mich 266 (2008) and the status of the law in the case of Heider-Hagen v. Select Medical Corp, 208 ACO#165 by stating:

> "In *Stokes,* the Supreme Court then reversed the Court of Appeals and provided clear guidelines for future cases. In so doing, the decision specifically states that certain Appellate Commission decisions accurately reflect the *Sington* standard, but criticized the abandonment of the standard when analyzing cases. The Supreme Court *Stokes* decision also mandates discovery, including vocational rehabilitation expert interviews with plaintiff. Finally, the

decision outlines plaintiff's obligations when proving disability. It states:

> First, the injured claimant must disclose his qualifications and training. This includes education, skills, experience, and training, whether or not they are relevant to the job the claimant was performing at the time of the injury. It is the obligation of the finder of fact to ascertain whether such qualifications and training have been fully disclosed.
>
> Second, the claimant must then prove what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. *Sington, supra* at 157, 648 N.W.2d 624. The statute does not demand a transferable-skills analysis and we do not require one here, but the claimant must provide some reasonable means to assess employment opportunities to which his qualifications and training might translate. This examination is limited to jobs within the maximum salary range. There may be jobs at an appropriate wage that the claimant is qualified and trained to perform, even if he has never been employed at those particular jobs in the past. *Id.*, p 160, 648 N.W.2d 624. The claimant is not required to hire an expert or present a formal report. For example, the claimant's analysis may simply consist of a statement of his educational attainments, and skills acquired throughout his life, work experience, and training; the job listings for which the claimant could realistically apply given his qualifications and training; and the results of any efforts to secure employment. The claimant could also consult with a job-placement agency or career counselor to consider the full range of available employment options. Again, there are no absolute requirements, and a claimant may choose whatever method he sees fit to prove an entitlement to workers' compensation benefits. A claimant sustains his burden of proof by showing that there are no reasonable employment options available for avoiding a decline in wages.
>
> We are cognizant of the difficulty of placing on the claimant the burden of defining the universe of jobs for which he is qualified and trained, because the claimant has an obvious interest in defining that universe narrowly. Nonetheless, this is required by the statute. Moreover, because the employer always has the opportunity to rebut the claimant's proofs, the claimant would undertake significant risk by failing to reasonably consider the proper array of alternative available jobs because the burden of proving disability always remains with the claimant. The finder of

fact, after hearing from both parties, must evaluate whether the claimant has sustained his burden.

Third, the claimant must show that his work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages. *Id.*, p 158, 648 N.W.2d 624.

Fourth, if the claimant is capable of performing any of the jobs identified, the claimant must show that he cannot obtain any of these jobs. The claimant must make a good-faith attempt to procure post-injury employment if there are jobs at the same salary or higher that he is qualified and trained to perform and the claimant's work-related injury does not preclude performance.

Upon the completion of these four steps, the claimant establishes a prima facie case of disability. The following steps represent how each of the parties may then challenge the evidence presented by the other.

Fifth, once the claimant has made a prima facie case of disability, the burden of production shifts to the employer to come forward with evidence to refute the claimant's showing. At the outset, the employer obviously is in the best position to know what jobs are available within that company and has a financial incentive to rehabilitate and re-employ the claimant.

Sixth, in satisfying its burden of production, the employer has a right to discovery under the reasoning of *Boggetta* if discovery is necessary for the employer to sustain its burden and present a meaningful defense. Pursuant to MCL 418.851 and MCL 418.853, the magistrate has the authority to require discovery when necessary to make a proper determination of the case. The magistrate cannot ordinarily make a proper determination of a case without becoming fully informed of all the relevant facts. If discovery is necessary for the employer to sustain its burden of production and to present a meaningful defense, then the magistrate abuses his discretion in denying the employer's request for discovery. For example, the employer may choose to hire a vocational expert to challenge the claimant's proofs. That expert must be permitted to interview the claimant and present the employer's own analysis or assessment. The employer may be able to demonstrate that there are actual jobs that fit within the claimant's qualifications, training, and physical restrictions for which the claimant did not apply or refused employment.

> Finally, the claimant, on whom the burden of persuasion always rests, may then come forward with additional evidence to challenge the employer's evidence. [*Stokes, supra*, pp 281-284; footnote omitted.]
>
> The Supreme Court also reiterated that plaintiff must prove wage loss. While the Worker's Disability Compensation Act clearly defines wage loss in MCL 418.371, the courts have interpreted wage loss differently. In *Haske, supra*, the Court required plaintiff to prove that he suffered an actual loss of wages after a work injury and that the work injury caused the subsequent wage loss. While the *Sington* Court overruled the *Haske* interpretation of disability, it upheld the need for plaintiff to prove wage loss. Further, the Court in *Sington* failed to offer any different interpretation of the wage loss requirement. In *Stokes* the Court of Appeals did not address wage loss other than expressly vacating the Appellate Commission majority view of wage loss. Finally, the Supreme Court *Stokes* decision mandates that plaintiff prove wage loss, but did not expound further. Thus, we must apply the two-part *Haske* requirement."

DISABILITY AND EXPERT CREDIBILITY

First, I find plaintiff was a very credible witness. I also find that she was an employee as defined by the Workers' Compensation Act. Furthermore, I find based upon the testimony, the defendant Vallarta Supermarket, is a covered employer as defined by MCL 418.115. I find the Plaintiff did have a personal injury July 22, 2015, while working as an employee for the defendant.

I also find that plaintiff's job with the defendant established her maximum wage-earning capacity. Based upon the testimony as well as the medical records and reports, I find that plaintiff is totally disabled from performing any work at the present time. I further find that such disability has existed since the date of injury. I find as a result of the work-related injury, plaintiff has a disability which prevents her from earning any wages.

WAGE LOSS

I find that plaintiff has established a wage loss which is directly related to the disability occasioned by the work-related injury. I find the plaintiff has established a tax filing status of single/head of household with five minor dependents. Plaintiff's attorney argued that the Court should find special circumstances and find an average weekly wage of $342.00 per week. This is

based upon a promise by the defendant that plaintiff would earn $9.00 per hour for 38 hours per week. If the Court took the total reported wages for 2015 ($2,180.45) and divided by nine pay periods, the average weekly wage would be $242.27 per week. There is no good explanation for why there is an absence in reported wages for two weeks in June of 2015. There is also no explanation for why the first week in June shows reported wages of $30.32 for the entire week. Because of these factors, as well as the fact that plaintiff did not complete a full week of employment the week she was injured, I have chosen to exclude the wages earned during the last week of employment as well as the wages earned from May 31, 2015 to June 6, 2015 ($30.32). I have used a wage total of $1,943.13, divided by seven (7) to find an average weekly wage of $277.59 per week.

MEDICAL AND RELATED EXPENSES

The defendant Vallarta Supermarket is found responsible for all reasonable and necessary medical expenses associated with this claim including treatment of the cervical, thoracic, and lumbar spine. The right shoulder, right upper extremity and its sequelae. Closed head injury and its sequelae.

IT IS HEREBY ORDERED that the defendant shall be responsible for reasonable and necessary medical expenses, pursuant to MCLA 418.315, pursuant to cost containment relative to the treatment for (TBI), Traumatic Brain Injury/Closed head injury and sequelae, treatment of the cervical, thoracic, and lumbar spine, and lastly treatment of the right upper extremity including (RSD) Reflex Sympathetic Dystrophy/(CRPS) Complex Regional Pain Syndrome.

ATTORNEY FEE

IT IS HEREBY ORDERED that plaintiff's attorneys are entitled to a fee of 30% of amounts recovered under this Application, in accordance with and in conformity with the statutes and rules of the Workers' Compensation Agency.

IT IS HEREBY ORDERED that the defendants shall pay interest in accordance with MCLA 418.801(6) on any unpaid amount.

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 5th day of October, 2018 at Okemos, Michigan.