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

STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY
WORKERS' DISABILITY COMPENSATION AGENCY

Jasmin Adilovic,
SSN: xxx-xx-xxxx

Petitioner,[1]

vs

Monroe, LLC, and
Frankenmuth Mutual Insurance Company,

Respondents.[2]
_____/

OPINION

APPEARANCES

Garrett Tenhave-Chapman (P44604) for Petitioner
Douglas J. Klein (P56991) for Respondents

HEARING DATE(S)

A hearing was held on November 15, 2019 in Grand Rapids, Michigan. The record was closed on December 13, 2019, and the case was submitted for decision.

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[1] *See* R792.10103(m). The person who files the application is the "Petitioner."

[2] *See* R792,10103(o). The person or entity who is named in the application is the "Respondent."

STIPULATIONS

For injury date of April 27, 2017. The parties were subject to the Act and Frankenmuth Mutual Insurance Company carried the risk. Employment is admitted, personal injury and disability are denied. Notice and claim are admitted. The parties stipulated to an average weekly wage of $551.54 cash, and no fringe benefits for a total average weekly wage of $551.54, which generates a **stipulated** weekly compensation rate of $363.98. There was no dual employment, no benefits were paid and there is nothing to coordinate or credit. Tax filing status was married filing joint with no dependents. The parties reserve reasonableness, necessity and amounts of past medical expenses and bills. In the event they are unable to resolve these issues, they may return to the Board of Magistrates without *res judicata* effect.

CASE SUMMARY: CLAIM, ISSUES PRESENTED AND DECISION

The claim. In an amended application received by the agency on September 17, 2018, Petitioner claimed injury to his low back on April 27, 2017. He claimed that work-related activities caused or contributed to lower back and leg pain and psychological pathology. The initial application for benefits was filed on July 6, 2017. Respondent duly filed carrier's responses and responsive pleadings denying liability and putting the matter at issue.

The date of injury alleged in this case compels the application of the **"new act"** and the amendments effective for injuries occurring after December 19, 2011 are applicable. This is significant because, in addition to other matters, the new Act provisions regarding personal injury and disability, and reduction of wage earning capacity "superseded" the old standards set forth by *Stokes v Chrysler LLC*, 481 Mich 266, 750 NW2d 129 (2008). The new Act, MCL 418.301 for example, replaces the former analysis of *Stokes* and its progeny and reliance on *Stokes* in a new Act case will result in a remand. *Manjo v City of Dearborn Public Schools,* 2018 ACO #32.

Issues presented.

> Did Petitioner prove that he sustained a personal injury within the course and scope of his employment on April 17, 2017? **No.**

Did Petitioner prove a medical impairment and disability, total or partial, which arose out of a personal injury on an alleged date of injury? **No.**

Was Petitioner discharged for refusing to perform light duty or as a pretext? **Neither.** Petitioner was an "at will" employee who was discharged for insubordination.

At the commencement of the hearing and again at the close of proofs, counsel were instructed to identify all issues to be tried, and that any issue not identified would be deemed waived. This included issues raised by the pleadings, identified before testimony was taken, identified during the taking of testimony and identified at the close of proofs. Issues not identified during one of these trial phases are deemed waived or forfeited.[3] The parties are deemed to have waived any error arising from their affirmative conduct or inaction such as failing to identify issues to be decided.[4] A party may not harbor error by creating an appellate parachute by stipulation or waiver or failing to identify trial issues when directed to do so, including the failure to state specific evidentiary objections which could have been cured during the testimony of any witness. This is a use-it-or-lose-it system.[5] A Magistrate can only decide the case as it exists at the close of proofs.

Decision.

After a careful review of all the evidence presented, and faithful application of the law, I find that Petitioner did not prove an injury that occurred in the course and scope of his employment on April 27, 2017. In accordance with the amendments to the Act which became effective in

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[3] Rule 792.11309(6). "Any issue not raised in a pre-hearing brief, opening statement, final argument, or the closing of the record following lay testimony shall be deemed waived."

[4] *Universal Underwriters Ins Co v Vallejo*, 179 Mich App 637, 647, 446 NW2d 510 (1989); Stein v Braun Eng'g, 245 Mich App 149, 626 NW2d 907 (2001)(claim for reimbursement/recoupment forfeited if not timely presented to the Magistrate).

[5] *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477, 442 NW2d 705 (1989). Vague objections to expert hypothetical questions may not be improved, supplemented or replaced on appeal as grounds for reversal. If the hypothetical question could have been cured, had the totality of the objections been placed on the record at the time of the testimony, then the after-asserted objections are waived. MRE 103(a)(1); *Matter of Weiss*, 224 Mich App 37, 568 NW2d 336 (1977).

December, 2011, Petitioner carries the burden to prove, by medical testimony and evidence, that his degenerative arthritis of his spine was changed in a "significant manner" by work events. MCL 418.301(2). The record contains no such medical evidence and therefore Petitioner cannot prevail because he did not meet his burden of proof.

Witnesses testifying at trial

For Petitioner: Mike Plont, cross examination; Jasmin Adilovic

For Respondents: Mike Plont

Witnesses testifying by deposition

For Petitioner: Philip Weighner, MD, Marvin Bleiberg, MD, James Fuller, MA, CRC.

For Respondents: Grant Hyatt, DO, Michael Fontaine, MA; CDMS.

SUMMARY OF EVIDENCE

Testimony at the hearing.

Michael Plont, cross examination. Mr. Plont was called for cross examination in Petitioner's case-in-chief. He identified himself as the Human Resource manager for Monroe, LLC. Mr. Plont interviewed Mr. Adilovic for a job at Monroe. Mr. Plont met with Mr. Adilovic when he reported his injury. Mr. Plont managed the investigation regarding Mr. Adilovic's work injury. He relayed the information up the chain of command and was chosen to inform Mr. Adilovic that he was no longer employed. He was a member of the interview team. He concurred with the decision to hire and fire Mr. Adilovic. He met with the management group and the group decided to hire Mr. Adilovic. They hired him for the position of inventory auditor. Mr. Adilovic was to work at a desk to count parts in bags, weigh the parts, and enter data into a computer. These parts were automobile dashboard needles and were extremely light. Mr. Adilovic performed this job until he was injured. Mr. Plont testified that he participated in the decision with the production manager to find Mr. Adilovic a light duty job after he was injured.

Mr. Plont had very little direct involvement with Mr. Adilovic while performing his job. Mr. Plont did not witness the injury and was not present at the time. He was contacted by Mr. Adilovic or his supervisor. Monroe's work-injury procedure is to send the employee to Med-1, with whom Monroe has a contract for this purpose. Mr. Adilovic reported that he bent over to pick up something and hurt his lower back. He set up an appointment with Med-1. Mr. Adilovic drove to Med-1 and was examined by a doctor. Mr. Adilovic was given a report from Med-1 with a lifting limit which he gave to his supervisor at work.

Mr. Adilovic was then assigned to sorting needles. Mr. Plont testified that Mr. Adilovic was upset with this job because he thought he was capable of doing more than sorting needles. This may have taken place on May 2. Mr. Adilovic wanted to do more. Mr. Plont observed the needle sorting activity. Mr. Adilovic eventually returned to the work he generally performed prior to the injury.

Lakeland Finishing is a customer of Monroe. There was an incident reported which is the basis of a memo that Mr. Plont signed. He did not personally witness the incident. This incident formed part of the basis for Mr. Adilovic's termination. Lakeland had a "spill" (bad parts) and they sent Mr. Adilovic, Jessica Kooyers and Christyal Thorne to Lakeland. The co-workers reported back to Mr. Plont. They reported that Mr. Adilovic was upset that he was there and talked about suing Monroe for making him go there. Monroe's concern was that Mr. Adilovic was acting out and objecting in front of a customer making Monroe look bad.

A second memo, dated May 8, was created for the incident of May 2 or May 5. Mr. Adilovic was terminated on May 8. The memos were presented to Mr. Adilovic on May 8. These events occurred before May 8. The memos did not discuss termination. The decision took place on May 8, 2017 by a team. May 8, 2017 was the date of the memos. They document Mr. Adilovic's complaints of being able to do more than the speedometer work. Mr. Adilovic was unhappy that he was doing what he was doing and that he could do more and wanted to do more.

Mr. Plont testified that on May 4, 2017, Mr. Adilovic was acting unprofessionally on the floor. He told Mr. Plont that he (Mr. Adilovic) was being treated unfairly and he threatened to quit. He was mad because he

was denied a supervisor job. Mr. Plont testified that the policy is for complaints to go "up" to a supervisor, and not to co-workers on the shop floor. However, this conduct was not a basis for termination according to Mr. Plont. It was the totality of the three incidents that resulted in termination. He told a co-worker that the quality supervisor was going to quit and that he had disdain for Monroe supervisors. The statements were from co-workers, not supervisors. These incidents were also part of the report (personnel file) dated May 19, 2019. A report that was created after Mr. Adilovic was terminated.

Mr. Plont was questioned about the alleged threat by Mr. Adilovic to Dr. Stratton, a treating physician at Med-1. The May 19, 2017 reason for termination was for threatening Dr. Stratton, a Med-1 physician. The note states that Mr. Adilovic was a threatening man and should not be pushed per Mr. Plont. Mr. Adilovic was officially terminated for threatening a doctor at Med-1. A management committee made the decision to terminate Mr. Adilovic's employment. Mr. Plont was the person who delivered the notice of termination to Mr. Adilovic. Mr. Plont had been discussing this with the Director of Operations, Norman Day. Together, they made the decision to terminate based on the totality of the incidents. They concluded that Mr. Adilovic's conduct and attitude represented an unprofessional pattern that required termination. No single event, standing alone, led to his termination. It is a basic three-and-out process. The write-up is the discussion process.

Respondent's cross examination of Mr. Plont. Mr. Plont explained the proces of evaluation and termination. Mr. Adilovic refused to sign the first and second warning notice. They discussed his injury as well. Mr. Plont went down to the manager's office, had a discussion there, and then returned to the shop floor and fired Mr. Adilovic.

Mr. Plont had been a police officer for five years and had investigation training that he uses in his human resource job. Mr. Adilovic was an inventory auditor. Mr. Plont filled out the Employer's Basic Report of Injury. Mr. Adilovic was picking up a box of totes. Twenty boxes would not likely be lifted at one time. One generally lifts two or three at a time. Two or three boxes generally weigh six pounds.

According to Mr. Plont, Mr. Adilovic told him that he (Adilovic) bent over to pick something up but had not actually picked it up when he was

injured. The heaviest object on the shop floor is a full tote that weighs 10-20 pounds, and which is moved approximately five feet. Men and women preform this job.

Mr. Adilovic applied for but did not get the assembly supervisor position. Med-1 initially gave Mr. Adilovic restrictions where he was sorting needles. He could have done this light duty job permanently had he not been terminated. At Lakeland, Mr. Adilovic was checking labels because the totes were often mislabeled. Mislabeled totes or bags result in a "spill" in their jargon.

The threat to Dr. Stratton was not the sole determiner for termination. Mr. Adilovic acted unprofessionally and all these actions led up to termination. On further questioning by Petitioner, Mr. Plont testified that the pattern of unprofessional conduct was based on information given to Mr. Plont by others.

Jasmin Adilovic, direct examination. He was born in Bosnia and became a US citizen in 2006. His IRS filing status in 2017 was married filing joint. His son, Aldar, was in school in May 2017. His son had no income and relied on his parents for support. His wife had a job as a sales manager. Aldar was born on XX-XX-XXXX and was 19 years old in XXXXX 2017 and in good health. Mr. Adilovic was educated in Bosnia. He earned a batchelor's degree in electronics in Bosnia in 1989.

Mr. Adilovic testified in detail about all of the jobs he had performed in the past. He worked as a police officer in Bosnia in a small town for two years. This job ended when the war started. He served in the war but offered no details about his service or his physical or mental condition during that time. He left Bosnia in 1995 for Germany. He worked for BASF in Germany, making videotapes as a production manager until 1998. He then moved to the United States.

He moved to California where he assembled and repaired computers. He was required to lift 70 to 80 pounds on this job. He started that job at $8-10 per hour. He required a translator for that job. His next job was at RK Electric where he installed cables on poles for homes and for industrial buildings. This was a hard job. He earned $12 to $22 per hour, and regularly worked overtime. His next job was for a company named Orbital, in California, as a field engineer installing GPS systems in police busses and

the like. He earned $30 per hour. This was his highest paying job.

He worked for CompRenew in 2005. He worked on computers, and advanced to supervisor and then to manager. This job had a 100-pound lifting requirement. Supervisors were not required to lift maximum weights. He earned $19 per hour on this job. His next job was for Sanna Transport. This was a one-man operation dispatching semi-trucks over the US. He worked at that job from 2007 to 2009.

After Sanna, he worked for MNX doing the same type of job. He managed the entire operation. He was not an employee but a contractor. He was paid $900 per week. He worked there from 2009 to 2013. His next job was for MTS. This was a transportation business logistics broker for MTS freight haulers. This was a sitting job in a cubicle. He earned $19 per hour. He worked this job from 2013-2015. He next worked for Express Employment, a temp agency, where he was placed at Praxis as a production leader. There was no lifting requirement at that job. His next job was at Monroe, LLC.

Monroe, LLC, is an inventory auditor. This is a fast-paced environment. He took over the job of two people. He weighed and packaged product and then put the packages on the shelves and moved the shelves. The bags weighed 10-20 pounds. In the back room they kept supplies that had to be brought onto the shop floor. The supply containers could weigh over 50 pounds, but this job took place once a week.

When he hired into Monroe, he had never experienced low back pain. He acknowledged a medical note about left leg tingling. He suffers from PTSD and depression from the Bosnian war. He has anxiety attacks. He testified that all of his physical complaints were caused by anxiety attacks. He had his tonsils removed and underwent a deviated septum surgery. He was not required to take a medical or physical exam before coming to work at Monroe. He had no medical restriction before working at Monroe. His PTSD and anxiety required no psychological restrictions before he came to work at Monroe. He started work at Monroe on March 15, 2017 and was terminated on April 27, 2017. He testified that he worked without complaints until April 17, 2017.

On April 17, 2017, Mr. Adilovic was working with small containers (Totes) on moveable shelves. These were two foot totes. They fit one into

another. Ten totes were stuck into one another and picked up as a stack. He was picking up 15-20 as a stack when he was injured. He needed to lift the stack of totes to his station to fill them for an order. He was lifting 15-20 pounds when he felt the pain. He was just going down, and when he stood up holding the totes, he felt a stabbing pain in his lower back on the left side. This was terrible pain–a ten on a scale of one to ten. The pain ran down his left leg. The symptom was pain. A co-worker asked if he was alright. He managed to get to his station. He was holding on to his station and was looking for a supervisor, the molding supervisor. The supervisor offered to send Mr. Adilovic home but Mr. Adilovic asked to see a doctor instead. Another manager came back and told him to see Mr. Plont. He never saw Mr. Plont. He went home without help from anyone from the company. He called Dr. Weighner's office. His receptionist told him to get paperwork from his employer and then to go to occupational health at Metro Health and see a doctor. The nurse there asked for the name of the company and he gave her the Monroe HR manager's card. She told Mr. Adilovic that the HR Manager does not know anything about his injury. The HR manager called back and told her to send Mr. Adilovic to Med-1. He then went to Med-1 for examination and treatment.

Med-1 told him to go back to work with restrictions that day. Monroe put him at a table to inspect small parts which was a sit down job, but he could not do the job with his symptoms. He needed medication. The next day he went to work and did the light duty based on his restrictions. The next week he went to Lakeland Finishing, a customer of Monroe, LLC as part of a team to address a product problem.

He was instructed to join the group on the trip to Lakeland Finishing to help solve a mislabeled product problem. He objected due to pain and restrictions, but he agreed to try. His supervisor told him that he could just stay where he was at the Monroe facility. Mr. Adilovic looked for another supervisor for clarification. Another person, the plant manager, told him he had to go even though he was on restrictions and on medications. The plant manager told him that he had to go. Only Monroe people were there and they had to re-label mislabeled product. Mr. Adilovic told the plant manager that he could not do this job because he was on restrictions. The plant manager told Mr. Adilovic that if he could not do the job at Lakeland, he was to return to Monroe. He returned to Monroe and looked for Mr. Plont. He reported to Mr. Plont, who sent him back to work at Monroe. Mr. Adilovic denied telling Mr. Plont that he could do more.

Mr. Adilovic performed the same light duty work during the first week of May. He denied telling anyone that Monroe management was treating him poorly, that they were suspicious and were not treating him fairly or properly. On May 8, 2017, the day of his termination, he did his usual job, and then was called into the HR manager's office. Mr. Plont was there with the molding manager and a woman. Mr. Plont read Mr. Adilovic's "first and last warning" and that Mr. Adilovic was talking on the floor, said he was going to sue the company, and that he threatened to injure the doctor. He refused to sign the memos because they were untrue. He was sent back to his station.

There was no more talk about termination, just that it was his last warning. He went outside for his break and was returning to his job and Mr. Plont, the HR Manager, and the molding manager were in the hallway listening to Mr. Adilovic's music player. They told Mr. Adilovic he was terminated because he threatened the doctor. They refused to let him in the door again.

Mr. Adilovic testified that he saw Dr. Stratton at Med-1 on May 3, 2017. On May 2, 2017 a different doctor put him on medications and off work for one week. Mr. Plont sent him back to Med-1 on May 3, 2017 where he was examined by Dr. Stratton. He took an x-ray and told Mr. Adilovic to leave. His treatment note was to return to work with the same restrictions. Mr. Adilovic called Mr. Plont and told him that he was coming back to work.

Mr. Adilovic testified that Dr. Stratton said he was the boss here and that "we do not send people home." Mr. Adilovic testified that he never threatened Dr. Stratton. He denies telling Dr. Stratton "I am a dangerous man." "We all get what we deserve" is what Mr. Adilovic said to Dr. Stratton. Mr. Adilovic denied telling Mr. Plont that he threatened Dr. Stratton.

Mr. Adilovic testified that workers' compensation paid physical therapy bills (even after his termination). He was told he would not get benefits because he threatened Dr. Stratton. He worked in the summer of 2017 for Uber and Lift. He was searching for jobs. These jobs do not call for movement and are sit down jobs. He cannot sit for a long time due to leg pain.

Since his injury at Monroe, his low back pain gets worse day-by-day and everyday he has "radicular pain" in his left leg. He does not fall because he is careful. He cannot even shave himself because he cannot stand for a long time. He visited St. Mary's emergency room on June 10, 2017. He testified that after days of pain he went to the emergency room due to a suicidal thought. It hurts to see his wife suffer.

He has been in pain ever since the injury. He saw a doctor in September 2018 for a flare up in pain. He cannot sleep more than two hours at night. He has seen Dr. Weighner, various treaters, Dr. Hyatt (IME), had an EMG, MRI and was examined by Dr. Bleiberg. His medications prevent him from focusing and from concentrating. He takes Tylenol and Ibuprofen. His wife needs to help him shave, shower and dress. He drives a bit but not for a long time.

Mr. Adilovic testified regarding his attempts at reemployment. The details appear in his Exhibit 9 which are printouts from the Indeed website. He testified that there are five job searches every Sunday. He is looking for anything similar to his past work. He is looking for any job. He gets emails with rejections. No live person has responded to his emails. **He cannot do the job at Monroe as an inspector**, and cannot do any of his former jobs either.

Mr. Adilovic testified that Dr. Bleiberg has given him restrictions of no lifting over 10 pounds, limited standing, sitting with the ability to lay down at will. He lies down every day for a couple of hours and it eases the pain in his lower back. Mr. Adilovic did not make a claim for unemployment benefits.

Jasmin Adilovic cross examination.

Mr. Adilovic never served in the military in Bosnia. The light duty job at Monroe fit within his work restrictions. He did the light duty job sorting needles until he was terminated. He worked at a table with a sit-stand option working with very small parts. He stopped doing the light duty job because he was terminated. The physical therapy treatments were helping him at times.

On June 5, 2017, he stood up from a couch and experienced stabbing pain in both sides of his back. He visited Spectrum Health, Broadmore. In September 2018, he visited a Spectrum Health emergency room complaining

of low back pain for three days. There was a wax and wane effect, but it had been getting worse lately. He had an EMG study on his low back and legs.

With respect to the June 2018 Spectrum emergency room visit, Mr. Adilovic testified that he had been depressed lately with respect to his relationhip with his son. He denied an attempted suicide attempt by hanging. His alcohol use had increased leading up to this incident.

Mr. Adilovic testified that when he applies for jobs, he discloses that he has a restriction of laying down during the day. He is not aware of any job that would permit him to lay down during the day. He takes the prescription medications prescribed to him by Dr. Weighner. He wants to see a specialist but he cannot afford to do so.

Petitioner's Deposition Testimony-Medical and Vocational.

Philip Weighner, MD. Dr. Weighner was deposed on December 5, 2018. The transcript contains 43 pages of testimony, his chart and his credentials as exhibits. Dr. Weighner is a board certified internal medicine physician who offered testimony in an orthopaedic/neurologic case. Dr. Weighner treated Mr. Adilovic. Dr. Weighner's primary contribution to this record is to confirm the diagnosis of degenerative disc disease in Mr. Adilovic's spine which set the stage for the application of section 301(2) of the Act. Dr. Weighner was not requested to testify about the "significant contribution" requirement of section 301(2). Dr. Weighner was a treating physician but proclaimed no qualification as an expert in an orthopaedic or neurologic case. He candidly admitted that he did not review the MRI films and could not read them if requested to do so.

Marvin Bleiberg, MD. Dr. Bleiberg was deposed on June 10, 2019. The transcript contains 69 pages of testimony and his IME report. Dr. Bleiberg is a board certified physiatrist and is qualified to offer expert testimony in this case. Dr. Bleiberg supports Petitioner's case.

James M. Fuller, MA, CRC. Mr. Fuller was deposed on June 13, 2019. The transcript contains 38 pages of testimony, his credentials and report. He is qualified to offer expert testimony in this case.

Respondents' Deposition Testimony-Medical and Vocational.

Grant J. Hyatt, MD. Dr. Hyatt was deposed on May 28, 2019. The transcript contains 56 pages of testimony and his reports. Dr. Hyatt is qualified to offer expert opinion testimony in this case. Dr. Hyatt examined Petitioner on behalf of Respondents on December 5, 2018 and issued reports dated December 5, 2018, March 11, 2019 and May 24, 2019. Dr. Hyatt's testimony supports Respondents' case.

Michael Fontaine. Mr. Fontaine was deposed on September 17, 2019. The transcript contains 31 pages of testimony and 3 exhibits, the witness' credentials and two reports. Mr. Fontaine is qualified to offer expert testimony in this case. He performed a vocational assessment on May 28, 2019 on Respondents' behalf and issued two reports.

Trial Exhibits.

Petitioner's Trial Exhibits.

Exhibit 1 (31 pages): Personnel Records. This mixed exhibit contains workers' disability compensation calculations; the Employer's Basic Report of Injury; the documentary letters that support the decision to terminate Mr Adilovic's employment; payroll records (the parties stipulated to an average weekly wage); unemployment payment records for periods prior to Mr. Adilovic's employment at Monroe; notices of dispute and related documents.

Exhibit 2 (16 pages): Orthopaedic Associates records. These records pertain to Mr. Adilovic's treatment at Orthopaedic Associates on June 28, 2017. Mr. Adilovic admitted to being a smoker but denied alcohol use. He tested positive for a problem with his balance, depression and anxiety. Straight leg raising tests were normal bilaterally. Lumbar range of motion testing elicited pain bilaterally. Lower extremity reflexes were normal. There was diminished sensation across multiple dermatomes on the left lower limb. Manual muscle testing was normal on the right, with give way noted on the left side throughout without pain inhibition. The diagnosis was acute left-sided low back pain with left-sided sciatica. Mr. Adilovic denied a history of back problems. His examination was reported as "non-physiologic with reported loss of sensation in a non-anatomical pattern." "He also demonstrates ratcheted [sic] give way without pain inhibition throughout the left lower limb. These notes were authored by Patrick G. Ronan, MD.

Exhibit 3 (107 pages): Med-1 Records. This exhibit consists of a

large stack of unorganized records. Included in this record is the report of an MRI study performed at Mercy Health St. Mary's on May 11, 2017. The **findings** include: "There is mild disc desiccation and posterior disc bulging at L4-5 and L5-S1 without significant central canal stenosis. There is mild bilateral neural foraminal stenosis at L4-5 with moderate right and marked left neural foraminal stenosis at L5-S1 secondary to concentric disc bulging." "There is mild facet arthrosis at L4-5. The diagnostic **impression** was: Mild degenerative disc disease at L4-5 and L5-S1. Mild neural foraminal stenosis is seen bilaterally at L4-5 with moderate right neural foraminal stenosis at L5-S1 and marked left neural foraminal stenosis at L5-S1." Lumbar spine plain film identified mild bony productive changes in the end plates of L3, L4 and L5.

Exhibit 4 (91 pages): Spectrum Health Medical Group records. The note for treatment on June 26, 2017 note that Mr. Adilovic's pain and other symptoms are now traveling down his right leg. The back pain is worse and basically constant. Many of the physical examination findings that were reported as negative previously are now being reported as positive. The diagnosis was "Acute lumbar spine injury due to lifting event; MRI positive L5-S1 disc with left L5-S1 neural foraminal stenosis causing motor nerve deficits; bilateral "sciatica due to broad based bulging disc." This note was authored by Harold A. Rummery, DO. The remainder of this exhibit contains duplicate Hulst Jepsen physical therapy notes. The remainder of this exhibit consists of past medical treatment and duplicate records. The pre-Monroe treatment records do not support or advance Mr. Adilovic's case.

Exhibit 5 (125 pages): Mercy Health St. Mary's records. These records chronicle Mr. Adilovic's treatment for PTSD, anxiety and alcohol abuse. Summarizing these records does not advance his case and, given that this will become a public record, I choose not to make these personal treatment records public given that they do not advance the case.

Exhibit 6 (21 pages): Mercy Health Neurosurgery records. These records chronicle Mr. Adilovic's treatment for PTSD, anxiety and alcohol abuse. Summarizing these records does not advance his case and, given that this will become a public record, I choose not to make these personal treatment records public given that they do not advance the case.

Exhibit 7 (187 pages): Spectrum Health Blodgett records. These are continuing post event treatment notes which at times lend support to his

claims and at times detract from them. There is much duplication in this exhibit without seemingly any attempt to cull the records. This exhibit does not advance the case.

Exhibit 8 (5 pages): Paul T. Twydell, DO records. Dr. Twydell is a neurologist who performed an examination and EMG study for Mr. Adilovic on January 11, 2019. Dr. Twydell's qualifications were not included in the exhibit. His history was that Mr. Adilovic "was lifting up heavy containers at work and while trying to stand, he got a sharp back pain." The motor testing was 5/5 for both legs with give-way weakness throughout the left leg. The EMG study was interpreted as abnormal. There is an acute or subacute left L5 radiculopathy with prominent active denervation throughout the L5 myotome. This explains the patient's back pain and radiating pain into the left leg."

Exhibit 9 (62 pages): Job search logs and related records. This exhibit contains copies of job logs through the Indeed Apply system, and a number of negative responses. These records provide little detail of the nature of the jobs save for a brief job description. There are several negative replies which are characteristic of this search system.

Respondents' Trial Exhibits.

Exhibit A (1 page): Mercy Health St. Mary's MRI report 5/11/17. This report describes degenerative disc disease of the lumbar spine. There was no prior study for a comparison. The impression was mild degenerative disc disease at L4-5 and L5-S1; mild neural foraminal stenosis seen bilaterally at L4-5 with moderate right neural foraminal stenosis at L5-S1 and **marked** left neural foraminal stenosis at L5-S1.

Exhibit B (32pages): Hulst Jepsen Physical Therapy Notes 5/23/17 to 7/7/17.

Visit	Treatment Notes
1 5/23/17	Jasmin is a 46 year old male who reports lifting a plastic container at work and feeling a sharp pain in low back shortly after. He reports LLE and low back pain and difficulty moving, especially sitting after the incident. He reports continued LLE N&T and pain to toes. Jasmin states he is a production leader and is currently off work with no set return date at this time. Jasmin presents with s/s consistent with lumbar radiculopathy affecting his L side. He will benefit from skilled PT to address listed deficits and return to an improved level of function.

2 5/24/17	Jasmin reports current home exercises decreases LLE pain. H states his R and L low back still hurt.
3 5/26/17	Radiculopathy, lumbar region, low back pain; Muscle wasting and atrophy, not elsewhere classified, left thigh. Jasmin reports he saw a new doctor and his condition is much worse then [sic] he thought. He states he is afraid his back is going to get worse.
4 5/30/17	Jasmin states his LLE is getting weaker and feels like its [sic] "floating." He also reports he is getting pain in his L groin.
5 5/31/17	Jasmin states R sideglide started causing worsening of R sided back pain, and also worsening of LLE pain after doing this multiple times at home.
6 6/6/17	Jasmin reports his pain is no better since last session. He reports f/u with his doctor, and he is awaiting scheduling of an appointment with a neurosurgeon. He states he is gaining weight since his injury.
7 6/8/17	Jasmin reports compliance with wearing LSO brace.
8 6/13/17	Jasmin reports his low back pain has increased, but is [sic] LLE pain has decreased.
9 6/15/17	Jasmin reports he did not have pain for the first time since his injury after last session.
10 6/16/17	Jasmin reports he had difficulty sleeping last night due to his back pain.
11 6/20/17	Jasmin reports 25% improvement since starting PT. He reports his pain levels have decreased and he is moving on and off surfaces easier, and able to withstand prolonged positions longer. He reports pain with prolonged sitting and walking remain irritating. [sic].
12 6/22/17	Jasmin states he is stressed and tired, and doesn't feel like doing any exercise.
13 6/27/19	Jasmin states his low back pain has decreased since he started taking an anti-inflammatory.
14 6/28/17	Jasmin states his pain in his L leg and back continues to lessen. He states he needs to leave early due to an appointment.
15 6/30/17	Jasmin has no new complaints
16 7/7/17	Jasmin reports he continues to have numbness in LLE down to his foot.

Exhibit C (3 pages): Jasmin Adilovic Investigation Report undated on which it is written hired 3/15/17; fired 5/8/17. This report contains several sections which are "Initial reporting" "Material Employee reports unprofessional behavior" "Injury conversation and threats toward Dr. Stratton" and "Follow-up after Adilovic's termination." A fair reading of this report does not support a finding of a retaliatory discharge for exercising one's worker's disability compensation act rights. Moreover, it does not support a finding of a pretext discharge undertaken to cut the chain of causation from the personal injury to wage loss. This report supports a finding that Mr. Adilovic was terminated for insubordination.

Mr. Adilovic is a proud man. A man who has held a large number of responsible positions/jobs over the years and who had been a supervisor of others. It is clear from a close reading of the entire record, that Mr. Adilovic experienced great difficulty adjusting to a fast-paced but somewhat menial job of packaging very light dashboard needles all day long. He requested a promotion to supervisor. His request was denied. He became frustrated and began to complain. His complaints did not follow the chain of command set by his employer. He complained about his employer at a customer's location. Finally, he was either insubordinate or threatening to a Med-1 physician who returned him to light duty work.

Mr. Adilovic was an at-will employee. Under Michigan law, he could quit his job at any time without reason or explanation. As an at-will employee, his employer could terminate his job for any reason or no reason. The record contains no evidence that there was an employment contract, express or implied, written or unwritten that created a so-called "just cause" standard. No statutory or common law provision was asserted to change Mr. Adilovic's status from an "at-will" employee.

Mr. Adilovic presumably claims that his discharge was in retaliation from seeking benefits under the Act. He was given medical attention and physical therapy for several weeks. The details of the physical therapy treatment are set forth in this opinion. The details of a retaliatory discharge claim are not to be found in the record because jurisdiction for that claim lies in the appropriate district or circuit court. MCL 418.301(11). Therefore I make no specific findings on that claim. Mr. Adilovic was discharged for insubordination based on this record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Legal Standards for Magistrates' Opinions.

The Petitioner has the burden of proof to establish a compensable worker's compensation claim by a preponderance of the evidence for each element of the claim, including the issues presented by him or her in the case. Respondent has the burden of proof to establish by a preponderance of the evidence supporting its defenses and the issues presented in its case.[6] In

[6] MCL 418.851; *Aquilina v General Motors Corp*, 403 Mich 206, 267 NW2d 923 (1978).

Woody v Cello-Foil Products, 450 Mich 588, 546 NW2d 226 (1996), the Michigan Supreme Court articulated the guideline for a magistrate's opinion under section 847(2) of the Act as follows:

> *[C]onclusory findings are inadequate because we need to know the path taken through the conflicting evidence, the testimony adopted, the standards followed, and the reasoning used to reach [the] conclusion.* 450 Mich 597.

The Board of Magistrates has been instructed that the appellate tribunal does not possess the power to disregard the weight given to testimony by a Magistrate while performing fact-finding. *Spohn v Wyandotte Industries, Inc.*, 2006 ACO № 306, *citing Mudel v Great Atlantic & Pacific Tea Co.*, 462 Mich 691, 614 NW2d 607 (2000). Moreover, the appellate tribunal has maintained a long-standing position that it will not displace the Magistrate's choice between conflicting evidence, including medical opinions, where there is a reasonable basis for such a choice. *Id.*

The Board of Magistrates is not in the policy business. The policy has been set by the legislature and governor. The Board of Magistrates' mission is to administer the Act in accordance with the policy created by others as expressed by the words of the Act, the Administrative Rules promulgated thereunder, and as interpreted by the appellate courts. If the appellate courts move the target, then the Board of Magistrates must improve its aim.

Credibility. A magistrate is often required to make determinations regarding witness credibility. These determinations, if reasonable, demand deference by the appellate commission. A magistrate need not deal with witness credibility "like a light switch, turning it either on or off." *Isaac v Masco Corporation,* 2004 ACO № 81.

Even though expert testimony is presented by deposition transcript as opposed to live testimony:

> *The magistrate's choice of which medical expert opinion or opinions to adopt is within his or her discretion and we defer to that choice, if it is reasonable. The magistrate need not adopt expert opinions in their entirety but may give differing*

> *weight to different portions of testimony. And, although a magistrate may give preference to a treating expert's opinion, [he or] she need not do so. Doty v General Motors Corp.*, 2011 ACO № 108.

Issues, Findings and Conclusions.

This case rises and falls on the "burden of proof" aspect of the Michigan Workers' Disability Act of 1969 [Act]. The party who advances a claim or a defense to a claim has the burden of proving the claim or defense by a preponderance of the evidence. In this case. Mr. Adilovic bears the burden of proving that he meets the standards set forth in section 301(1) and section 301(2) of the Act. Whether he sustained his burden with respect to section 301(1) of the Act is problematic which is explained below. However, it is clear that he made no attempt to meet his burden with respect to section 301(2) of the Act.

The MRI studies. The date of injury asserted in this case is April 27, 2017. No MRI study exists, on this record, prior to May 11, 2017 that can be used as a comparison study. There have been two MRI studies performed on Mr. Adilovic–May 11, 2017 and May 19, 2019. The first study (May 11, 2017) was performed within two weeks of the injury date.

The report for the **2017** study (Exhibit A states: *"Mild neural foraminal stenosis is seen bilaterally at L4-5 with moderate right neural foraminal stenosis at L5-S1 and marked left neural foraminal stenosis at L5-S1."*

The report for the **2019** study states: *"L4-5: Disc bulge flattens the ventral sac. Mild facet hypertrophy. Mild narrowing of the bilateral neuroforamina. L5-S1: Disc bulge and annular fissure. Mild facet hypertrophy. Moderate bilateral neuroforaminal narrowing."* The 2019 report "impression" is *"Mildly progressive lumbar spondylosis, outlined above. No compressive disc herniation. No significant spinal canal stenosis. Moderate bilateral neuroforaminal narrowing at L5-S1."*

An unbiased and objective comparison of these two reports leads to the conclusion that in 2017 there was a "marked" left neural foraminal stenosis at L5-S1 and that in 2019 this stenosis was characterized as "moderate." Assuming that "moderate" is better than "marked" one could conclude that this particular spinal pathology was getting better. One could also conclude that the difference may be a function of different radiologists reaching

different conclusions. However, a January 2019 EMG study by Dr. Twydell concluded that there is a left L5 radiculopathy with prominent active denervation throughout the dermatome. This EMG study strongly suggests that Mr. Adilovic's degenerative arthritic spine condition was aggravated by the specific event that caused a medically distinguishable pathology, namely L5 nerve damage and radiculopathy. The parties equally share the responsibility of not having the EMG study performed sooner.

Application of the Act. MCL 418.301(1) states in part that "A personal injury under this act is compensable if work causes, contributes to, or aggravates pathology in a manner so as to **create a pathology** that is **medically distinguishable** from any **pathology that existed prior** to the injury."

This statutory requirement is never easy to apply, and in this case presents a particularly difficult task for the fact-finder. Mr. Adilovic presented no history of previous injury or symptoms, presented no evidence of prior treatment of his degenerative arthritic low back condition, and had no prior diagnostic study to offer a logical path to the resolution of this issue.

The absence of prior radiographic studies is particularly problematic for the determination of a "distinguishable" pathology or condition. The immediate onset of symptoms he experienced when lifting at work certainly set the stage by creating a logical inference that something new must have occurred to change a previous asymptomatic back to a symptomatic back. Nevertheless, the absence of prior studies or examination of his back is a substantial obstacle. Was the bulging disc a degenerative phenomenon only or was it traumatic in origin? There is nothing to compare the status of Mr. Adilovic's low back immediately after the work event with the status of his low back immediately before the work event—save for symptoms.

The competing medical testimony (Dr. Bleiberg versus Dr. Hyatt) appears to focus on the contemporaneous development of a bulging disc at the L5-S1 level which put pressure on the nerve. This became a debate in which there is no clear winner. Neither medical witness was asked to opine about the injured L5 nerve (leading to the sciatica) as the new or "medically distinguishable" pathology. The focus was on the disc. As interesting (or frustrating) the above analysis may be, it is legally moot due to the intervention of MCL 418.301(2) which controls the outcome of this contested case.

MCL 418.301(2) states that "... conditions of the aging process, including ... degenerative arthritis, are compensable if contributed to or aggravated or accelerated by the employment in a **significant manner**." The 2011 amendments to the Act added "degenerative arthritis" to the list of conditions of the aging process. This is a degenerative arthritis case which must be analyzed and decided under section 301(2).

In *Martin v City of Pontiac School District*, 2001 ACO #118, an *en banc* decision, the appellate commission created a four factor test for determining what "significant manner" means.

> *Contribution is significant when it constitutes a vital component or when it contributes in a considerable amount towards the progression of the condition. The factors to consider are 1) the number of occupational and non-occupational contributors; 2) the relative amount of contribution of each contributor; 3) the duration of each contributor; 4) the extent of permanent effect that resulted from each contributor.* 2001 ACO #18, at 16.

Medical significance does not equate to legal significance. **Medical testimony** that fails to compare one event with other events offers little guidance. 2001 ACO #134, p.4

The *Martin* case took a further step by holding that the last event or contributor may **not** be taken into consideration when applying the four factor test for the reason that if it were considered, it would invariably lead to a finding of compensability. The last event or contributor is invariably the alleged work injury.

The "last event" holding of *Martin* was reviewed several years later in *Taig v General Motors Corp*., 2006 ACO #134. In that case, the appellate commission rejected the "last event" disclaimer advanced in the *Martin* case and held that all events must be considered. Moreover, "employment" in section 301(2) means all employments in which the employee was subject to the conditions that resulted in the disability. *Elliott v Peterson American Corp.,* 2003 ACO #18.

Of critical importance here, however, is the requirement that the four factor test is for the medical experts. *Reed v Oakland County Road Commn*, 2001 ACO #4. The law is clear on this point:

> *Where, however, the* ***medical testimony*** *does not satisfy the requirements of Martin and §301(2) the decision will be reversed because it is not based on competent, material and substantial evidence. Garges-Kibby v GHS Corp, 2003 ACO #134.*
> (emphasis supplied)

In this case, no attempt was made to obtain the medical testimony required to satisfy the four factor test of MCL 418.301(2). This omission is fatal to Mr. Adilovic's case. He did not sustain his burden of proof.

WORKERS' COMPENSATION BOARD OF MAGISTRATES

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Robert C. Timmons, Magistrate № 250G

Dated at Grand Rapids, Michigan
December 16, 2019.