

STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

FREDIE STOKES,

PLAINTIFF-APPELLEE,

V

**DAIMLER CHRYSLER CORPORATION,
A SELF-INSURED,**

DEFENDANT-APPELLANT.

SUPREME COURT NO.: 130667

COA NO.: 268544

WCAC NO.: 02-000388

MANCINI, SCHREUDER, KLINE & CONRAD, P.C.
BY: Roger R. Kline (P26661)
Attorneys for Plaintiff-Appellee

LACEY & JONES
BY: Gerald M. Marcinkoski (P32165)
Attorneys for Defendant-Appellant

Daryl Royal (P33161)
Attorney of Counsel to Roger R. Kline

BLEAKLEY, CYPHER, PARENT, WARREN &
QUINN, P.C.
BY: Thomas H. Cypher (P12425)
Attorneys for *Amicus Curiae*, Alticor

BRAUN, KENDRICK, FINKBEINER, P.L.C.
BY: Scott C. Strattard (P33167)
Attorneys for *Amicus Curiae*, General Motors

MOTION TO FILE *AMICUS CURIAE* BRIEF AND STATEMENT OF INTEREST

SUBMITTED BY:

BLEAKLEY, CYPHER, PARENT, WARREN & QUINN, P.C.
BY: Thomas H. Cypher (P12425)
Attorneys for *Amicus Curiae*, Alticor
120 Ionia Avenue, SW, Suite 300
Grand Rapids, Michigan 49503
(616) 774-2131

Alticor, a Fortune Five Hundred Company, based in Ada, Michigan, hereby requests to file an *Amicus Curiae* Brief in support of and supplemental to the position of Defendant-Appellant, Daimler Chrysler Corporation. In support of its motion, Alticor states as follows:

1. Alticor, is a Fortune Five Hundred Company based in the State of Michigan. Alticor has a large number of employees as well as numerous subsidiaries that also employ a large number of individuals within the State of Michigan. Alticor wants to ensure that its due process rights are not infringed upon given its substantial participation in the Michigan Workers' Compensation system.
2. Alticor, its subsidiaries and every employer in Michigan has suffered a severe violation of its due process rights following the Court of Appeals decision in *Stokes v Daimler Chrysler Corporation*, issued on October 26, 2006, and reissued on October 31, 2006, converting the court's decision to an authored opinion by Judge Helene White. Alticor has suffered direct impact as a result of pending workers' compensation claims following the *Stokes* decision, wherein the decision completely contradicts and improperly ignores well-established and fundamental tenants of workers' compensation law, as well as several decisions from this court, namely *Sington v Daimler Chrysler Corporation*, 467 Mich. 144 (2002).
3. The Court of Appeals' decision in *Stokes* has had a profound and negative impact upon Alticor and all Michigan employers. The Court of Appeals majority erroneously held that the plaintiff did not need to establish all elements of disability as required by prior decisions of this court. *See Aquilina v General Motors Corp.*, 403 Mich. 206 (1978). Specifically, the Court of Appeals held that employees do not have to prove an inability to perform all jobs within their

qualifications, training and experience, which includes “transferable skills.” Furthermore, the Court of Appeals majority erroneously failed to require that the plaintiff establish ongoing wage loss be due to a work-related injury. Furthermore, the Court of Appeals failed to address the plaintiff’s residual earning capacity and ability to earn wages.

Lastly, and most importantly the Court of Appeals decision, if allowed to stand, would violate due process and equal protection requirements and deny the employer the ability to submit proofs regarding the employee’s ability to earn actual wages in the real world.


Therefore, Alticor and all Michigan employers may now be liable for wage loss benefits, even when there is wage loss due to nonoccupational reasons, or when there is a residual earning capacity and the employee is only partially disabled. That is completely inconsistent with the Workers’ Disability Compensation Act, unjust, and extremely prejudicial to Michigan employers.

WHEREFORE, for the reasons stated above, Alticor respectfully requests that this honorable court grant its motion to file an *Amicus Curiae* Brief in this cause of action and any other relief that this court deems equitable and just under the circumstances.

Respectfully submitted,

**BLEAKLEY, CYPHER, PARENT,
WARREN & QUINN, P.C.**

Dated: January 29th, 2007.

By 
THOMAS H. CYPHER (P12425)
Attorneys for *Amicus Curiae*, Alticor
120 Ionia Avenue, SW, Suite 300
Grand Rapids, Michigan 49503
(616) 774-2131

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

FREDIE STOKES,

PLAINTIFF-APPELLEE,

V

**DAIMLER CHRYSLER CORPORATION,
A SELF-INSURED,**

DEFENDANT-APPELLANT.

SUPREME COURT NO.: 130667

COA NO.: 268544

WCAC NO.: 02-000388

MANCINI, SCHREUDER, KLINE & CONRAD, P.C.
BY: Roger R. Kline (P26661)
Attorneys for Plaintiff-Appellee

LACEY & JONES
BY: Gerald M. Marcinkoski (P32165)
Attorneys for Defendant-Appellant

Daryl Royal (P33161)
Attorney of Counsel to Roger R. Kline

BLEAKLEY, CYPHER, PARENT, WARREN &
QUINN, P.C.
BY: Thomas H. Cypher (P12425)
Attorneys for *Amicus Curiae*, Alticor

BRAUN, KENDRICK, FINKBEINER, P.L.C.
BY: Scott C. Strattard (P33167)
Attorneys for *Amicus Curiae*, General Motors

***AMICUS CURIAE* BRIEF ON BEHALF OF ALTICOR**

SUBMITTED BY:

BLEAKLEY, CYPHER, PARENT, WARREN & QUINN, P.C.
BY: Thomas H. Cypher (P12425)
Attorneys for *Amicus Curiae*, Alticor
120 Ionia Avenue, SW, Suite 300
Grand Rapids, Michigan 49503
(616) 774-2131

TABLE OF CONTENTS

	Page Number
Jurisdictional Statement	3
Index of Authorities	4
Statement of Questions Addressed by <i>Amicus Curiae</i>	5
Standard of Review	6
Statement of Facts	8
Legal Arguments:	
I. The Court of Appeals has erroneously shifted longstanding burdens of proof that previously required the plaintiff to establish all elements of disability pursuant to a preponderance of the evidence, erroneously failed to require that an employee prove wage loss in every case due to a work-related injury, and erroneously failed to examine plaintiff's residual wage earning capacity.	9
Relief of Requested	16
Proof of Service	17

JURISDICTIONAL STATEMENT

This court has jurisdiction over this matter pursuant to MCL 418.861a(14) and MCR 7.203(b)(3).

Before this court is the Court of Appeals' decision in *Stokes v Daimler Chrysler Corporation*, issued on October 26, 2006. Thereafter, the Michigan Court of Appeals issued an order on October 31, 2006, which converted the court's initial decision to an authored opinion by Judge Helene White. This matter is currently pending before the Michigan Supreme Court.

INDEX OF AUTHORITIES

CASES	Page Number
<i>Aquilina v General Motors Corp.</i> , 403 Mich 206 (1978)	6,10
<i>Braddock v Bellrose</i> , 1994 ACO#525	13
<i>Culp v Wismer & Becker</i> , 1997 WCAB 8	14
<i>Farrington v Total Petroleum</i> , 442 Mich 201 (1993)	6
<i>Goff v Bil-Mar Foods, Inc.</i> , 454 Mich 507, 512-514 (1997)	7
<i>Haske v Transport Leasing, Inc., Indiana</i> , 455 Mich. 626 (1997)	12,13
<i>Holden v Ford Motor Company</i> , 439 Mich 257 (1992)	6
<i>Ketham v Lear Seating</i> , 2003 ACO#205	12,13
<i>MERC v Detroit Symphony Orchestra</i> , 393 Mich 116 (1974)	6
<i>Mudel v Great Atlantic & Pacific Tea Company</i> , 462 Mich 691 (2000)	6
<i>Peacock v General Motors Corporation</i> , 2003 ACO#274	11,12,13
<i>Riley v Bay Logistics</i> , 2004 ACO#227	13
<i>Sington v Daimler Chrysler Corporation</i> , 467 Mich. 144 (2002)	9,10,11,12,13 14,16
<i>Stokes v Daimler Chrysler Corporation</i> , 2006 ACO#24	3,9,10,14
 STATUTES AND COURT RULES	
MCLA § 418.361(1)	13,14,15
MCLA § 418.371(1)	12,14,15
MCLA § 418.861a(13)	6
MCLA § 418.861a(14)	3,7
MCLA § 418.861a; MSA 17.237 (861a (3))	6
MCR 7.203(b)(3)	3

STATEMENT OF QUESTIONS ADDRESSED BY *AMICUS CURIAE*

- I. WHETHER THE COURT OF APPEALS HAS ERRONEOUSLY SHIFTED LONGSTANDING BURDENS OF PROOF THAT PREVIOUSLY REQUIRED THE PLAINTIFF TO ESTABLISH ALL ELEMENTS OF DISABILITY PURSUANT TO A PROPONDERANCE OF THE EVIDENCE, ERRONEOUSLY FAILED TO REQUIRE THAT AN EMPLOYEE PROVE WAGE LOSS IN EVERY CASE DUE TO A WORK-RELATED INJURY, AND ERRENOUSLY FAILED TO EXAMINE PLAINTIFF'S RESIDUAL WAGE EARNING CAPACITY?**

Plaintiff-Appellee, would answer, "No."

Defendant-Appellant, Daimler Chrysler Corporation, would answer, "Yes."

Amicus Curiae, Alticor, would answer, "Yes."

STANDARD OF REVIEW

The Magistrate's Decision must be supported by competent, material, and substantial evidence on the whole record as required under MCLA 418.861 a (3); MSA 17.237 (861 a (3)). This is also consistent with the Michigan Constitution (Art. IV §28, 1963). *See Aquilina v General Motors Corporation*, 403 Mich 206 (1978); *Farrington v Total Petroleum*, 442 Mich 201 (1993).

Pursuant to MCL 418.861a(13), the Appellate Commission reviews the findings of a magistrate to determine whether they were supported by competent, material, and substantial evidence on the whole record. Such review requires both a quantitative and qualitative analysis of the evidence. MCL 418.861a(13). "Substantial evidence" in this context means such evidence, considering the whole record, as a reasonable mind would accept as adequate to justify the conclusion. *Holden v Ford Motor Company*, 439 Mich 257 (1992); *MERC v Detroit Symphony Orchestra*, 393 Mich 116 (1974).

In the case of *Mudel v Great Atlantic & Pacific Tea Company*, 462 Mich 691 (2000), the Supreme Court further clarified the standard of review in a worker's compensation case. In that case, the Supreme Court affirmed its finding in *Holden v Ford Motor Co.*, 439 Mich 257 (1992). In other words, it confirmed that the Appellate Commission must review the magistrate's decision under the "substantial evidence" standard. The Court held that the "'substantial evidence' standard, governing the WCAC's review of the magistrate's findings of fact, provides for review which is clearly more deferential to the magistrate's decision than the de novo review standard previously employed. Nevertheless, the WCAC has the power to engage in both a 'qualitative and quantitative' analysis of the 'whole record,' which means that the WCAC need not necessarily defer to all the magistrate's findings of fact." The statute grants the Appellate

Commission fact-finding powers, and permits it to substitute its own findings of fact for those of the magistrate, if the Appellate Commission accords different weight to the quality or quantity of evidence presented.

In contrast, the Court of Appeals and Supreme Court must review the Appellate Commission's Decision under the "any evidence" standard. If there is any evidence supporting the Appellate Commission's factual findings, and if the Commission did not misapprehend its administrative appellate role, then the courts must treat the Appellate Commission's factual findings as conclusive.

Michigan Appellate Courts have the power to review questions of law in any final order of the WCAC de novo. *Goff v Bil-Mar Foods, Inc.*, 454 Mich 507, 512-514 (1997); MCL 418.861a (14); MSA 17.237 (861a) (14).

STATEMENT OF FACTS

Alticor accepts and adopts the Statement of Facts presented by Defendant-Appellant, Daimler Chrysler Corporation in its Application of Leave to Appeal.

LEGAL ARGUMENT

I. THE COURT OF APPEALS HAS ERRONEOUSLY SHIFTED LONGSTANDING BURDENS OF PROOF THAT PREVIOUSLY REQUIRED THE PLAINTIFF TO ESTABLISH ALL ELEMENTS OF DISABILITY PURSUANT TO A PROPONDERANCE OF THE EVIDENCE, ERRONEOUSLY FAILED TO REQUIRE THAT AN EMPLOYEE PROVE WAGE LOSS IN EVERY CASE DUE TO A WORK-RELATED INJURY, AND ERRENOUSLY FAILED TO EXAMINE PLAINTIFF'S RESIDUAL WAGE EARNING CAPACITY.

The Court of Appeals decision erroneously ignores the Supreme Courts' edict in *Sington* that an employee, in order to prove disability, must establish by a preponderance of the evidence the inability to perform all jobs within the employee's qualifications, training, and experience that pay maximum wages. The *Stokes* decision would allow the plaintiff to establish a compensable disability without having to prove the inability to perform all jobs within one's qualifications, training and experience that could be performed with "transferable skills." The Court of Appeals, initially and correctly, explained that the language used in *Sington* takes a broad view of the injured employee's "qualifications and training." In other words, the Court of Appeals reversed the Appellate Commission's decision and held that qualifications and training is not limited to only the jobs performed in the past or an employee's resume, but rather includes any job the injured employee could actually perform upon hiring. The Court of Appeals was also correct when it additionally found that "transferable skills" is relevant to the disability inquiry. The court acknowledged that a transferable skills analysis may yield credible testimony that there is actual employment the employee is capable of performing upon hiring, regardless of whether the employee ever performed the job before.

That being said, the court erroneously determined that the plaintiff need not establish the inability to perform work within one's transferable skills. Prior to the majority's determination

in *Stokes*, it has been a well established and fundamental tenant of workers' compensation law that a plaintiff must establish all elements of a case by a preponderance of the evidence. *Aquilina v General Motors Corp.*, 403 Mich. 206 (1978); MCL 418.851. The dissenting opinion by Judge Saad correctly recognized that the burden of proof includes the burden of showing disability under Sington and the Supreme Court's order in *Rea v Regency Olds/Mazda/Volvo*, 450 Mich. 1201 (1995). In particular, the dissent correctly recognized that the Supreme Court had previously explained and required the "1987 definition of disability in the Workers' Disability Compensation Act [the present version of §301(4)] requires a claimant to demonstrate how a physical limitation affects wage earning capacity in work suitable to the claimant's qualifications and training." (*Stokes, supra*, citing *Rea, supra*). Because transferable skills are relevant to the analysis of determining an employee's qualifications and training, which the majority opinion by the Court of Appeals in *Stokes* recognized, the plaintiff must have the burden to establish the inability to perform all work within one's qualifications, training and experience that includes "transferable skills." Perhaps out of some misperceived and misguided sense of fairness, the Court of Appeals erroneously shifted the burden of proof with respect to transferable skills to the defendant.

The Court of Appeals decision must be reversed in the respect that it requires the defendant to provide evidence regarding transferable skills. Because transferable skills is part of the disability analysis, the plaintiff must be required to establish that element of a compensable disability, and that the employee's transferable skills does not yield the ability to perform a job within one's qualifications, training and experience. While the *Amicus* Alticor certainly agrees that all employers should be allowed to offer evidence of transferable skills and work available within one's qualifications, training and experience to rebut a prima facie case of disability, this

court's prior decisions in *Aquilina, supra*; *Sington, supra*; and *Rea, supra*, require the plaintiff to first establish the inability to perform all jobs within one's qualifications and training, and that includes any job where transferable skills would allow the performance of same upon hiring.

Additionally, as noted by the defendant in this case, the Court of Appeals vacated the appellate commission's decision that held an employee need not show that the loss of wages was caused by a work-related injury. Further, the Court of Appeals majority vacated all provisions in the appellate commission's decision regarding partial disability.

Unfortunately, the Court of Appeals failed to reaffirm and apply the principals to the case at bar that the plaintiff must prove wage loss causally related to a work-related injury. *Sington*, specifically established that under §301(4), a magistrate must find a causal link between any limitation of wage earning capacity and the workplace injury.

In fact the Supreme Court demonstrated one aspect of the causation element. Mr. Sington suffered an injury to his left shoulder in a work-related accident. However, he also suffered a right shoulder injury that was not related to his job. Even more tragically, the plaintiff suffered a stroke. The stroke was not caused by his job. In evaluating Mr. Sington's disability, the Supreme Court stated that the only wage earning capacity limitations applicable were those related to the left shoulder because they were work related; limitations from other injuries were irrelevant. Initially, following *Sington*, the WCAC further explored the causation element in *Peacock v General Motors Corp.* and *Stanton v Great Lakes Employment*, 2002 #251.

Essentially, the commission recognized the Supreme Court's pronouncement in *Sington* that poor economic conditions that caused limitations to wage earning capacity failed to demonstrate disability. In those instances, plaintiffs must first prove that their injuries were the cause of their wage limitation and not the employer's inability to have work available.

In short, the Court of Appeals failed to reaffirm and enumerate the requirement that a limitation of earning capacity must be directly related to a work-related injury. It is particularly troubling in that the workers' compensation system could be completely overburdened by requiring employers to pay for benefits in every single case where a work-related injury occurs. The Court of Appeals majority decision would seem to indicate that the failure to establish a work-related wage loss connection is "harmless error." Alticor submits that the workers' compensation system is designed to compensate for a limitation of earning capacity and wage loss, when those limitations are related to the work-related injury, not some non-work related reason. The court should modify the Court of Appeals' decision to reflect that requirement.

The Court of Appeals majority completely ignores the statutory and common law requirement that plaintiff prove wage loss in every case. Specifically, *Sington*, requires a plaintiff to prove wage loss in every case. Following the court's ruling in *Sington*, the WCAC initially issued several decisions expounding on that requirement. See *Ketham, supra*; *Peacock, supra*. Those decisions mandated arithmetic consideration of average weekly wage before the injury compared with the ability to earn wages after the injury be conducted. In other words, any wage loss benefit must include a reduction for the work plaintiff can perform post injury. In addition, if the plaintiff has non-occupational injuries that caused an inability to perform work, then his wage loss would not be related to his injury and his benefit rate should be zero. The presumption of §371 creates an additional requirement that plaintiff show wage loss directly related to a work-related injury.

This requirement was discussed in *Sington* wherein this court explained the independent obligation of a plaintiff to prove a wage loss. The court noted the statutory distinction between wage loss and disability. It then offered a detailed explanation of *Haske, supra*, decisions'

improper mingling of the concepts. The court emphasized that disabled workers may not suffer a wage loss. The example followed: if a worker suffered a serious injury the day preceding retirement with the intention of never working again, the worker might be disabled under the statute. However, the court explained that the worker would not have a wage loss because even if the injury had not occurred, the worker would not have earned any wages after retirement.

Initially, the Appellate Commission, consistent with *Sington*, discussed in *Ketham* and *Peacock*, the statutory mandate that requires every claimant to prove a wage loss as a pre-requisite to wage loss benefits. *Ketham* separated wage loss from disability and mandated some initial showing from the claimant that a wage loss exists. Following *Ketham*, the WCAC issued *Peacock* which reiterated the claimant held the burden of proving a wage loss and explained the arithmetic examination necessary for finding a wage loss. The case simply stated that pre-injury wages must be compared against post injury ability to earn wages. Most importantly, the WCAC consistently required the separate showing of a wage loss and residual earning capacity. In *Riley v Bay Logistics*, 2004 ACO #227, the commission stated:

However, in order to receive benefits, plaintiff also has to establish wage loss as required under Section 361. He or she does so by proving either an inability to perform (or to obtain because such jobs were not reasonably available) all of the jobs within his or her qualifications and training that pay lesser wages, establishing a prima facie wage loss (for the purposes of Section 361).

These decisions indicate that the law reverted to its pre-*Haske* status following *Sington*. The decisions also suggest that the WCAC initially resurrected *Braddock v Bellrose*, 1994 ACO #525. In that case the WCAC directly required a claimant to prove that the work-place injury caused wage loss. In so doing, the commission held that physical incapacity to work does not establish wage loss. The commission further explained that the claimant must “submit evidence to establish the necessary direct link between wage loss and the work-related injury.” *Braddock*

at 2333. Finally, the commission required magistrates to determine whether the lack of effort, refusal to apply, or any other factor causes continued unemployment.

The majority decision in *Stokes* completely disregards the prior rulings of the appellate commission and the Supreme Court's decision and pronouncement of the wage loss requirements set forth in *Sington*.

The Court of Appeals failed to consider and properly recognize that historically, even pre-*Sington*, a wage loss was a requirement. For example, in *Culp v Wismer & Becker*, 1997 WCAB 8, the commission specifically directed that non-occupational injuries that cause an inability to obtain employment sever the link between the work-related injury and wage loss. In that case, Culp suffered a work-related knee injury. It caused his inability to perform certain work. Afterwards, several non-occupational diseases prevented him from obtaining or performing any work. The commission held that since the non-occupational diseases caused his wage loss, Culp's benefit rate was zero. The commission reasoned that the diseases severed the link between Culp's wage loss and his work-related injury.

If the Court of Appeal's decision regarding the issue of wage loss and residual earning capacity is left as is, and the courts are allowed to overlook those requirements as "harmless error," then employers would be responsible for payment of wage loss benefits even in situations where the employee's wage loss is directly attributable to a non-occupational reason, or even cases involving post injury intentional and willful misconduct resulting in termination. Furthermore, §361 and §371 specifically acknowledge the possibility that the plaintiff may retain the earning capacity to earn less than the maximum capacity. The lesser earning capacity is called wage loss. The Court of Appeals' decision must be reversed and modified to reflect that an employee needs to prove he has not retained some earning capacity less than maximum

earning capacity by showing wage loss. Section 301(4) specifically states, “establishment of a disability does not create a presumption of wage loss.” The plaintiff in this case did not so meet that requirement and the defendant was completely deprived of the opportunity to represent evidence of residual earning capacity. It is not “harmless error”, as the Court of Appeals would describe it, to deny the defendant employer in this case to present evidence of residual earning capacity, rather it is a violation of due process and it is inconsistent with this court’s prior determinations regarding residual wage earning capacity. Further, it is inconsistent with the plain language of the Workers’ Disability Compensation Act. (See MCL 301(4); MCL 371(1); and MCL 361). The *Amicus Curie* Alticor, respectfully submits that the majority opinion from the Court of Appeals must be modified consistent with the above, and remanded for further proceedings, to all the defendant, employer, to submit proofs regarding the plaintiff’s earning capacity in the ordinary marketplace, i.e. the real world. The employer in this case was improperly and erroneously denied the opportunity to submit proofs, regarding the plaintiff’s residual earning capacity, and the Court of Appeals decision, left as is, would deem this flagrant violation of due process, a “harmless error”. Whether an injured an employee has a residual earning capacity, post injury, is a central question in most every workers’ compensation case, and to deny employers the opportunity to submit proofs on this critical disability issue, would be inconsistent with decades of jurisprudence, prejudicial, and detrimental to the integrity of the workers’ compensation system.

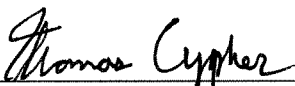
RELIEF REQUESTED

WHEREFORE *Amicus Curiae* Alticor respectfully requests that this honorable court reverse and modify the Court of Appeal's decision that erroneously shifted the burden of proof from the plaintiff to the employer to establish the inability to perform or obtain all jobs within the employee's qualifications or training (including transferable skills). Further, enumerate and reaffirm this court's decision in *Sington* that the plaintiff must prove a work-related wage loss in every case. Most importantly, Alticor requests that this matter be remanded to allow the employer the opportunity to submit proofs, regarding the plaintiff's ability to earn real wages in the real world, that represent residual earning capacity.

Respectfully submitted,

**BLEAKLEY, CYPHER, PARENT,
WARREN & QUINN, P.C.**

Dated: January 29th, 2007.

By 

THOMAS H. CYPHER (P12425)
Attorneys for *Amicus Curiae*, Alticor
120 Ionia Avenue, SW, Suite 300
Grand Rapids, Michigan 49503
(616) 774-2131