

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 132648

COA NO.: 268544

WCAC NO.: 02-000388

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STATEMENT OF QUESTIONS ADDRESSED BY *AMICUS CURIAE*

- I. WHETHER THE COURT OF APPEALS' OPINION IN THIS CASE IMPROPERLY SHIFTED LONGSTANDING BURDENS OF PROOF AND IMPROPERLY RELIEVED THE PLAINTIFF OF BURDEN OF PROVING THAT HE WAS DISABLED FROM ALL JOBS WITHIN HIS QUALIFICATIONS AND TRAINING AS REQUIRED BY *SINGTON V DAIMLER CHRYSLER CORPORATION*, 467 MICH. 144 (2002)?**

Plaintiff-Appellee, would answer, "No."

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

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

LEGAL ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY RELIEVED THE PLAINTIFF OF THE BURDEN OF PROVING THAT HE WAS DISABLED FROM ALL JOBS WITHIN HIS QUALIFICATIONS AND TRAINING AS REQUIRED BY *SINGTON V DAIMLER CHRYSLER CORPORATION*, 467 MICH. 144 (2002).

The Court of Appeals decision in this case erroneously ignores this court's edict in *Sington v Daimler Chrysler Corporation*, 467 Mich. 144 (2002), and the unified statutory scheme set forth in the central disability sections MCL 418.301(4), 361(1), and 371.

In order to fully appreciate the legal errors contained within the Court of Appeals' decision, a brief explanation regarding the plaintiff's necessary burden of proof and the proper inquiry necessitated by a harmonious interpretation of the central disability provisions of the Workers' Disability Compensation Act is helpful.

Initially, it is important to recognize the fundamental tenant of workers' compensation law that the burden of proof is on the plaintiff to establish all of the elements of his or her claim to be entitled to workers' compensation benefits. *Aquilina v General Motors Corp.*, 403 Mich 206 (1978); MCL 418.851.

The focus is no longer on medical restrictions or the loss of ability to perform particular work; rather, the focus is the employee's inability to earn within qualifications and training. The Court of Appeals decision in this case would improperly allow the plaintiff to meet his burden of proof by essentially showing the inability to perform particular work.

In 1987, the legislature expanded the spectrum of jobs to be utilized for determining whether a claimant could still earn maximum wages within his or her wage earning capacity. Therefore, §301(4) utilized the language, "suitable to [the employees] qualifications and training." Thus, the current statutory definition of disability necessitates that all jobs need to be

examined to determine whether an employee's ability to earn has been impaired by the work-place injury.

The Court of Appeals has ignored the legislature's statutory definition of disability and this court's analysis of same. See *Sington, supra*. The language "suitable" to qualifications and training requires a broader analysis and inquiry, with suitable being the operative word. It requires proof beyond the inability to perform past work or particular work. For example, an available job in the real world that the plaintiff has never performed, may still be suitable to an injured employee's qualifications and training, i.e. an available job the employee is capable of obtaining and performing. The Court of Appeals' Opinion would erroneously ignore this job, and the plaintiff's burden to establish the inability to perform same, due to a work related injury.

The scope of the disability inquiry and a threshold disability claim mandates that the employee establish the inability to perform all jobs as an element of a workers' compensation claim to be entitled to workers' compensation benefits. *Aquilina, supra; Sington, supra; §301(4)*.

Moreover, *Sington* requires as an element of a workers' compensation claim that any limitation in an employee's maximum wage earning capacity, and also wage loss, must be causally related to the work-related injury. See *Sington, supra*. In order to further appreciate the burden of proof necessary to establish a limitation of maximum wage earning capacity and wage loss, one needs to look at all central disability sections of the Workers' Disability Compensation Act. Sections 301(4), 361(1), and 371 are fully with accord and when one examines the elements necessary to establish a threshold claim of disability contained with each of those sections, the plaintiff's burden of proof becomes clear.

This court's 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 and is completely harmonious with all Sections of the Workers' Disability Compensation Act as noted above. Of import, the focus is on all jobs and the plaintiff's burden to establish the necessary proofs related to the inability to perform all jobs.

Specifically, §301(4) requires the plaintiff to establish a limitation in maximum wage earning capacity in all work suitable to his or her qualifications and training and also requires that it be related to a personal injury or work-related disease. Further, 301(4) provides that the establishment of a disability does not create a presumption of wage loss. Thus, it is implicit to recognize that §301(4) requires more of a plaintiff than a limitation in maximum earning capacity, but also requires the plaintiff to establish beyond a preponderance of the evidence a wage loss.

The plaintiff may only establish a wage loss by proving the inability to perform (or obtain) all the jobs within his or her qualifications and training, including those that pay lesser wages, thus establishing a prima facie wage loss.

Simply put, a plaintiff must prove a limitation in wage earning capacity and must also prove the limitation resulting from a work place injury. Section 301(4) mandates that before a plaintiff successfully proves a disability, he must also establish wage loss related to a work-related injury necessary for a proper calculation of wage loss benefits. Section 371(1) further supports the harmonious interpretation of the Workers' Disability Compensation Act and the *Sington* definition of disability, more to the point, the plaintiff's burden of proof. Specifically, §371 defines wage loss as a percentage of the average weekly wage at the time of the injury that equals the proportion of earning capacity and the employments at the time of injury, when

considering the nature of the injury. Thus, §371(1), allows for the possibility that the plaintiff's retains something less than maximum earning capacity as a result of the injury, that lesser earning capacity being wage loss. In other words, the plaintiff needs to prove in addition to a limitation in maximum wage earning capacity, that he has not retained the ability to earn wages pursuant to §301(4); §361(1); and §371(1).

The Court of Appeals' opinion, as noted above, attempts to limit the elements necessary for a prima facie case of disability to a particular type of work (i.e. one job) rather than on the plaintiff's ability to earn within his qualifications and training. As such the Court of Appeals' decision has improperly shifted the burden of proof.

The above harmonious interpretation requires the plaintiff to prove a work-related limitation of maximum earning capacity and a work-related wage loss. It further mandates as an element of the disability inquiry that all jobs must be considered. That includes jobs that pay less and jobs that may not necessarily be of a particular work, but may in fact be within one's qualifications and training. That includes a transferable skills analysis as noted by the Court of Appeals. Unfortunately, the Court of Appeals indicated that the claimant did not need to prove the inability to perform all jobs within one's qualifications and training that may be available in the ordinary marketplace based upon transferable skills. The Court of Appeals erred in that regard because one can see the central disability sections in the Workers' Disability Compensation Act and this court's decision in *Sington*, set forth the plaintiff clearly has the burden to prove all elements of the claim by a preponderance of the evidence and that includes all jobs, both from an earning capacity standpoint and also a wage loss standpoint.

It is imperative that the Court of Appeals' decision be modified to reflect the plaintiff's burden of proof regarding all elements of a work disability compensation claim and all elements necessary to entitlement of workers' disability compensation benefits.

If the Court of Appeals' decision regarding the issue of wage loss and residual earning capacity (i.e. post injury earning capacity) if left as is, then the courts will be allowed to overlook requirements as "harmless error," and then employers, such as Alticor, will be responsible for payment of wage loss benefits even in situations where an 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. Further, employers would be responsible for wage loss benefits even when the employee has a post injury earning capacity.

From a practical standpoint, based on the Court of Appeals' decision, the magistrates are not requiring from the plaintiff, and are not allowing the defendant to submit evidence, of post injury earning capacity. Alticor submits that if an employee was making \$500, at the time of injury and a \$450 job exists that the employee is capable of performing, the employee must show the inability to perform or obtain that job due to the injury. At a minimum regardless of the burden of proof, the employer should be allowed to present evidence of a real world available job at "\$450" that the injured employee is capable of performing. The Court of Appeals' decision left as is, ignores §301(4), 361, and 371, that requires an employee to prove wage loss and a lack of post injury earning capacity.

Even if one were to accept the Court of Appeals' decision regarding shifting of burdens of proof, that the plaintiff did not need to establish the inability to perform all jobs and completely disregarded the concept of wage loss and post injury earning capacity, the defendants must still be allowed the opportunity to rebut a prima facie case of disability. Thus, it must be

recognized as it is statutorily recognized in §361(1) and §301(4), that an employer must be allowed the ability to present evidence regarding earning capacity and the ability to earn wages in the ordinary marketplace within an employee's qualifications, training and experience. That includes jobs of equal or greater pay, but also those of lesser pay as explicitly recognized by the central disability sections and a harmonious interpretation of same.

As this court is aware, the scope of discovery is a primary issue of dispute in this case and it must be further recognized that the elements of proof in *Sington* make it critical to develop a plaintiff's qualifications and training, as well as medical limitations and how those limitations affect the plaintiff's ability to find work and earn wages. Unfortunately, employers are placed at a disadvantage because they are not allowed to depose a plaintiff (prior to trial) and are essentially limited to access of the plaintiff's qualifications and training, other than the nature of work performed at the time of injury. Critical to the evaluation of detailed proofs and an employer's opportunity to rebut is the ability to look into the employee's full employment history, including wages earned at each job and the physical demands of the jobs and the skills that are required; transferable skills, including non-work activities that show an ability to work and earn wages in the ordinary marketplace; the employee's ability to work at other jobs and the availability of work in that marketplace; and further history of subsequent employment and/or applications for employment after an injury and the reasons for why the employee is not working.

The employer has limited control over the above information and it is implicate that this court delineate and provide a clear rule of law that exchange of the above information is necessary to the disability inquiry, and that the parties need to be afforded the opportunity to develop proofs consistent with the elements pertaining to earning capacity and wage loss. By

that, it should be recognized that a plaintiff or employee should be allowed under appropriate circumstances to issue interrogatories, interviews, and a face-to-face vocational assessment.

Disability and elements related thereto are a central issue in virtually every workers' compensation case and Alticor, on behalf of all Michigan employers, submits that it is imperative that plaintiffs and employers be provided with the relevant discovery tools necessary to develop a claim or defense under *Sington*; if not, then regardless of the apportioning of burdens of proof regarding disability, then the employer will be at a distinct disadvantage because it will never have the opportunity to develop rebuttal proofs and/or a defense to a prima facia case of disability.

The Court of Appeals burden shifting analysis in this case has focused on particular work versus all jobs within one's qualifications and training. The Court of Appeals' decision in this case has essentially barred the defendant and employers from discovery because it has limited the plaintiff's prima facia case of disability to particular work. By properly requiring the employee to establish all elements of his or her claim by a preponderance of the evidence including the inability to perform all jobs, related to a work-related injury (and the loss of ability to perform a particular work), the employee's necessary proof to show the inability to earn within the qualifications and trainings brings all sections related to disability in the Workers' Disability Compensation Act in full accord. Limiting the burden of proof and/or shifting same, would effectively limit discovery and therefore effectively limit an employer's ability to present a defense against any work-related claim.

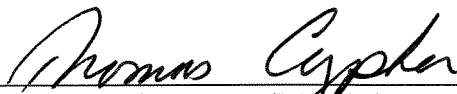
WHEREFORE, Alticor and Michigan employers respectfully request that this court modify the Court of Appeals' decision regarding the plaintiff's burden of proof consistent with the above arguments, which will ensure a fair playing field for Michigan employees and

employers alike, which is most certainly in the best interests of all parties involved, including Michigan's economy.

Respectfully submitted,

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Dated: June 7, 2007.

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