

STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE WORKERS' COMPENSATION APPELLATE COMMISSION

FREDIE STOKES,

Plaintiff-Appellee,

v

DAIMLERCHRYSLER CORPORATION,
a Self-Insured,

Defendant-Appellant.

S.C. NO.: 132648

C.A. NO.: 268544

L.C. NO.: WCAC 02-000388

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DEFENDANT-APPELLANT'S REPLY TO PLAINTIFF'S ANSWER TO DEFENDANT'S
APPLICATION FOR LEAVE TO APPEAL

COPY OF WCAC DECISIONS REFERRED TO IN THIS REPLY

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ISSUE

FIRST, SHOULD THE COURT ISSUE AN OPINION EXPLICITLY ADOPTING JUDGE SAAD'S DISSENT, AS IT IS NOW OBVIOUS THE COMMISSION MAJORITY WILL PERSIST IN A LEGALLY ERRANT VIEWPOINT EXPRESSED IN ITS *EN BANC* OPINION IN THIS CASE? SECOND, PLAINTIFF ARGUES THIS CASE SHOULD NOT BE REMANDED BECAUSE AT THE PRIOR HEARING THERE WAS AN "ABSENCE OF ANY PROOF THAT PLAINTIFF COULD STILL PERFORM WORK SUITABLE TO HIS QUALIFICATIONS" AND TRAINING. WAS THE "ABSENCE OF ANY PROOF" AT THE PRIOR HEARING DUE TO THE TRIAL MAGISTRATE WRONGFULLY REBUFFING DEFENDANT'S ATTEMPTS TO PROFFER PROOFS ON THE QUESTION? IS JUDGE SAAD IN DISSENT CORRECT IN SAYING THE ADMINISTRATIVE DECISIONS IN THIS CASE "EFFECTIVELY PREVENTED DEFENDANT FROM PREPARING AND PRESENTING A DEFENSE UNDER *SINGTON?*"

STATE OF MICHIGAN
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ON APPEAL FROM THE WORKERS' COMPENSATION APPELLATE COMMISSION

FREDIE STOKES,

S.C. NO.: 132648

Plaintiff-Appellee,

C.A. NO.: 268544

v

L.C. NO.: WCAC 02-000388

DAIMLERCHRYSLER CORPORATION,
a Self-Insured,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY TO PLAINTIFF'S ANSWER TO DEFENDANT'S
APPLICATION FOR LEAVE TO APPEAL

Pursuant to MCR 7.302(E), defendant, DaimlerChrysler Corporation, replies to plaintiff's answer opposing defendant's application as follows:

STATEMENT OF FACTS

(Numbers preceded by "II" refer to the pages of the October 7, 2003 remand proceedings held before Magistrate Rabaut.)

Defendant has applied for leave to appeal the Court of Appeals' published decision, released on October 26, 2006. Plaintiff answered defendant's application January 11, 2007.

Plaintiff's answer warrants a reply.

ARGUMENT

FIRST, THE COURT SHOULD ISSUE AN OPINION EXPLICITLY ADOPTING JUDGE SAAD'S DISSENT AS ITS OWN, AS IT IS NOW OBVIOUS THE COMMISSION MAJORITY WILL PERSIST IN A LEGALLY ERRANT VIEWPOINT EXPRESSED IN ITS *EN BANC* OPINION IN THIS CASE. SECOND, PLAINTIFF ARGUES THIS CASE SHOULD NOT BE REMANDED BECAUSE AT THE PRIOR HEARING THERE WAS AN "ABSENCE OF ANY PROOF THAT PLAINTIFF COULD STILL PERFORM WORK SUITABLE TO HIS QUALIFICATIONS" AND TRAINING. THE "ABSENCE OF ANY PROOF" AT THE PRIOR HEARING WAS DUE TO THE TRIAL MAGISTRATE WRONGFULLY REBUFFING DEFENDANT'S ATTEMPTS TO PROFFER PROOFS ON THE QUESTION. AS JUDGE SAAD IN DISSENT SAYS, THE ADMINISTRATIVE DECISIONS IN THIS CASE "EFFECTIVELY PREVENTED DEFENDANT FROM PREPARING AND PRESENTING A DEFENSE UNDER *SINGTON*."

Defendant contends it was effectively prevented from showing plaintiff's alleged disability, under the first sentence of MCL 418.301(4), is responsible for his complete loss of wages, under the second sentence of MCL 418.301(4).¹ The extent to which plaintiff's "wage loss" may or may not be attributable to his alleged disability will determine his level of weekly wage loss payments (if any), e.g., the appropriate partial disability rate. *Sington v Chrysler Corp*, 467 Mich 144, 160-161, including n 11; 648 NW2d 624 (2002).²

¹ MCL 418.301(4) provides: "As used in this chapter, 'disability' means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss."

² The "wage loss" question and the "partial disability" question are "related" as recognized by *Sington* and by the Court of Appeals in this case. *Stokes v DaimlerChrysler Corp*, ___ Mich App ___; ___ NW2d ___ (2006) (CA No. 268544, rel'd October 26, 2006), slip op at p 15; see also, *Riley v Bay Logistics, Inc*, 2004 ACO #24; *Peacock v General Motors Corp*, 2003 ACO #274.

Plaintiff's resistance to defendant's request for a remand on this point is predictable, but defendant finds remarkable the reason plaintiff offers. Plaintiff argues a remand is unwarranted because:

The partial disability analysis was equally unnecessary, in light of the complete absence of any proof that plaintiff could still perform lesser-paying jobs, or any job, suitable to his qualifications and training. Regardless of the interpretation one might accord the partial disability statute, MCL 418.361(1), it may not be applied if there is no proof that a claimant could still work. By virtue of its affirmance of the factual findings of the magistrate and WCAC that there was no relevant work plaintiff could still do, further consideration of the issue of partial disability clearly was unnecessary.

* * *

The absence of any proof that plaintiff could still perform work suitable to his qualifications requires a finding that he is disabled. MCL 418.301(4). (Plaintiff's answer, p 7 and p 10, respectively).

The reason why there is an "absence of any proof that plaintiff could still perform work suitable to his qualifications" and training, including the "absence of any proof that plaintiff could still perform lesser-paying jobs . . . suitable to his qualifications and training," is because the trial Magistrate wrongfully rejected defendant's attempts to proffer such proofs.³ The Magistrate would not allow a pre-trial, discovery meeting between plaintiff and the vocational expert designed to gather relevant and fresh information on the scope and marketability of plaintiff's skills for presentation at the remand hearing (II 4-6). And, the Magistrate then refused to continue the case

³ Plaintiff in his answer says defense counsel at the Court of Appeals' oral argument said "that this had never been a disputed matter, and that it was raised in defendant's pleadings in the appellate courts solely in response to the WCAC's opinion inserting the issue into the case." (Plaintiff's answer, p 7). Defendant does not believe plaintiff accurately recalls the exchange, but the salient point is: Where defendant was prevented from presenting its vocational evidence in a meaningful way so as to demonstrate there are lesser paying jobs (or equal paying jobs) suitable to plaintiff's qualifications and training, the issue was not ripe for the Court of Appeals to decide **on the present record**. Defendant continues to seek to make that record.

after the vocational expert testified that, having just heard plaintiff's complete description of his qualifications and training, the expert needed time to proffer a realistic opinion on plaintiff's wage earning capacity, including consideration of "a transferable skills analysis" the Court of Appeals now acknowledges is appropriate (II 39-44). [*Stokes v DaimlerChrysler Corp*, ____ Mich App ____; ____ NW2d ____ (2006) (CA No. 268544, rel'd October 26, 2006), slip op at p 11: "A transferable skills analysis may yield credible testimony that there is actual employment that the employee's qualifications and training makes the employee capable of performing upon hiring, although the employee has never performed it before."] Without such an analysis, the expert admitted he could only "speculat[e]" on plaintiff's employability (II 39). Speculative testimony is improper and ineffectual in workers' compensation. *Kroon v Kalamazoo County Road Comm*, 339 Mich 1, 7; 62 NW2d 641 (1954); *Wiltse v Borden's Farm Products Co*, 328 Mich 257, 264-265; 43 NW2d 842 (1950).⁴

The approach to this issue below has been driven by a legally errant view of "wage loss" and "partial disability." That view holds: Once the claimant proves a work-related limitation of wage earning capacity so as to be deemed "disabled," complete "wage loss" attributable to that disability is to be presumed (unless wages are actually being earned post-injury). The corollary of this view is that proof demonstrating the existence of lesser paying, available jobs suitable to the claimant's restrictions, qualifications, and training, *i.e.*, a so-called "residual wage earning capacity" for purposes of assessing partial disability benefits under MCL 418.361(1), is irrelevant (see, *e.g.*, II 43).

⁴ As noted by proposed *amici curiae*, Michigan Self-Insurers' Association, Michigan Manufacturers Association, and Michigan Chamber of Commerce, the Magistrate's ruling did not reflect a "principled outcome," particularly as demanded by such Commission opinions as *Nessel v Schenck Pegasus Corp*, 2003 ACO #272.

The law is actually the opposite. The second sentence of § 301(4) says proof of disability does *not* create a presumption of wage loss attributable to that disability. Instead, it is a matter requiring proof. *Sington* recognized this explaining that the second sentence of § 301(4) means that – after proving disability in the first sentence – the claimant then has the obligation to demonstrate his or her disability is the reason for the wage loss. *Sington*, 467 Mich at 160 [“the second sentence reflects an understanding that there may be circumstances in which an employee, despite suffering a work-related injury that reduces wage earning capacity, does not suffer wage loss.” (Footnote omitted).]. If proofs demonstrate that the reason for the wage loss is something other than the work injury (*e.g.*, avoidance of other suitable, available work), there is no *compensable* disability because: “An injured employee is only entitled to worker’s compensation benefits if the work-related injury resulted in a wage loss.” *DiBenedetto v West Shore Hospital*, 461 Mich 394, 405-406; 605 NW2d 300 (2000).⁵ The amount of wage loss linked to the work injury may engage the partial disability provision as recognized in *Sington*. *Sington*, 467 Mich at 160 n 11. *Sington* explained it is plaintiff’s obligation to prove the level of wage loss attributable to the disability because the statute says it may not be presumed. The overarching provision of the Worker’s Disability Compensation Act allocating burdens of proof, MCL 418.851, also says in pertinent part:

A claimant shall prove his or her entitlement to compensation *and benefits* under this act by a preponderance of the evidence. MCL 418.851 (second sentence, emphasis is defendant’s).

⁵ See also, *Sobotka v Chrysler Corp*, 447 Mich 1, 26; 523 NW2d 454 (1994) [BOYLE, J., lead opinion]; *Pulley v Detroit Engineering & Machine Co*, 378 Mich 418, 427; 145 NW2d 40 (1966); *Hood v Wyandotte Oil & Fat Co*, 272 Mich 190, 193-194; 261 NW 259 (1935); *Lauder v Paul M. Wiener Foundry*, 343 Mich 159, 168-169; 72 NW2d 159 (1955); *George v Burlington Coat Factory*, 250 Mich App 83, 87-88; 645 NW2d 722 (2002); *Greenman v Ralston Purina Co decided sub nom Rangel v Ralson Purina Co*, 248 Mich 128, 141; 638 NW2d 187 (2001); *Sell v Mitchell Corp*, 241 Mich App 235, 257; 615 NW2d 748 (2000); *Culp v Wismer & Becker*, 1997 ACO No. WCAB-8.

Therefore, a remand is necessary here to correct the legally errant view in the decisions below. The remand is necessary because plaintiff's wage loss from his alleged disability cannot, by statute, be presumed. And, a remand is necessary because plaintiff's absence of wages does not necessarily equate with total disability (as presumed in this case) because there may be plentiful lesser paying suitable work at which plaintiff is "able to earn" that would dictate a partial rate of compensation, rather than the total rate awarded. MCL 418.361(1); *Sington*, 467 Mich at 160-161.

Recent developments now make it clear that the Commissioners on the Workers' Compensation Appellate Commission who were part of the radical *en banc* majority in this case will still not assent to this view of the law. Recall the *en banc* majority said it was "deeply troubled" by *Sington*'s discussion of the second sentence of § 301(4) and partial disability. (Commission's opinion, p 89). And, since the Court of Appeals merely "vacated" the *en banc* majority's discussion of wage loss and partial disability as "unnecessary," the Commission intends to persist with its legally errant view of wage loss and partial disability. *Stokes*, slip op at p 15.

For example, subsequent to the filing of defendant's application in this case, Chairperson Glaser at the Commission, who *sua sponte* ordered the *en banc* hearing in this case and was part of the *en banc* majority, recently reiterated her allegiance to the most radical posture struck in the *en banc Stokes* opinion, *i.e.*, the Commission's disavowal of *Sington*'s discussion of the second sentence in § 301(4). Recall the *en banc* majority held: "We are deeply troubled by the example in *Sington*, *supra* at 160..." *Stokes v DaimlerChrysler Corp*, 2006 ACO #24, slip op at p 89; "(W)e do not mean to say that an employee must causally relate the loss of wages to the injury at work." *Id.*, slip op at p 69; "There is no causation element in the proof of wage loss." *Id.*, slip op at p 84. The Chairperson recently continued her disagreement with Chief Justice Taylor, author of

the *Sington* opinion, on this point and again expressed preference for the decision overruled in *Sington*. In *Martin v Eaton Corporation*, 2007 ACO #4 (attached), the Chairperson said:

The example relied on by Justice Taylor [in *Sington*] to describe a reduction in wage earning capacity, but no wage loss, did not involve a theoretical “wage earning capacity”, but rather no wage loss, because the employee would never have earned further wages, even if he had not been injured. **While we do not necessarily embrace the result announced in such a rare occurrence**, it is not inconsistent with the interpretation set forth by *Haske*, that the amount of benefit to the employee, who has demonstrated a disability, is based on actual wages and not a theoretical ability to earn. There was no example given [in *Sington*] of an injured employee, who had established a reduction of wage earning capacity, but had no wage loss because of a hypothetical ability to earn wages despite the injury.⁴

⁴ I think that it is highly unlikely that the Supreme Court would overrule, not only *Haske* but also 70 years of jurisprudence on the issue of whether ability to earn means to earn actual wages, without specifically stating that position. *Martin*, slip op at p 16 (bracketed words and emphasis is defendant’s).

The Chairperson’s point in the footnote above was later developed in her opinion to announce:

When the Worker’s Compensation Act is read as a whole, the only consistent reading of the 361 language “able to earn”, is actual wages. *Martin*, slip op at p 19.

Defendant finds some of the discussion in the first quotation above as confusing as parts of the original *en banc* opinion, but the important point is that the Chairperson continues to contradict *Sington*. Directly contrary to the Chairperson’s conclusion in the second quotation above, *Sington* clearly explained:

... there obviously is a distinction between “wages earned” and “wage earning capacity.” See *Post* at 181. It is simply inaccurate to state that “capacity to

earn wages and wages earned will rarely differ.”
Sington, 467 Mich at 170-171.

Chairperson Glaser is not only contradicting *Sington* with her conclusion but historic Michigan case law stretching back well before *Sington*. Michigan Courts have sharply made the distinction between, on the one hand, wages earned and, on the other hand, wage earning capacity/ability to earn. Seventy-two years ago, this Court said:

What is meant by the term “wage-earning capacity after the injury?” It is not limited to wages actually earned after an injury, for such a holding would encourage malingering and compensation is not a pension. *Hood v Wyandotte Oil & Fat Co*, 272 Mich 190, 192; 261 NW 259 (1935).

Other examples of this Court and the Court of Appeals through the years insisting on the distinction include the following:

The applicability of § 361 [the partial disability provision] does *not* hinge on whether the employee has actually returned to some form of work. *Juneac v ITT Hancock Industries*, 181 Mich App 636, 641; 450 NW2d 22 (1989) (bracketed words and emphasis are defendant’s).

* * *

It will be noted that the proviso in question refers to “wage earning capacity.” Obviously such expression does not necessarily have reference to wages actually received. *Babcock v General Motors Corp*, 340 Mich 58, 65; 64 NW2d 917 (1954).

* * *

His post-injury earnings do not necessarily determine the fact of his disability. *Medacco v Campbell Foundry Co*, 48 Mich App 217, 222; 210 NW2d 359 (1973).

* * *

[P]laintiff fails to take into account the Legislature's reason for determining that wage-earning capacity, rather than actual wages earned, is the criterion by which entitlement to benefits is measured. *Leizerman v First Flight Freight Service*, 424 Mich 463, 473; 381 NW2d 386 (1985).

The Chairperson is not alone in her defiant posture. Commissioner Ries – author of the *Stokes en banc* majority decision – recently repeated in a concurring opinion in *Jones v DaimlerChrysler Corp*, 2006 ACO #294 (attached),⁶ his most incendiary point from the *en banc* opinion in this case: “In the second sentence of MCL 418.301(4), where “wage loss” is mentioned, there are no words of causation.” *Jones*, slip op at p 8.⁷

Therefore, because the Court of Appeals in this case merely vacated the Commission's *en banc* rulings on wage loss and partial disability as unnecessary, the Chairperson and the author of *Stokes* persist in their legally errant view expressed in that *en banc* opinion on wage loss and partial disability. That continuing insistence is wrong and it matters. Mr. Stokes' establishment of disability did *not* create a presumption that his loss of wages is necessarily due to that disability. His wage loss can be due to something else, *e.g.*, avoiding lesser paying suitable work at which he is “able to earn.” MCL 418.361(1). Defendant must have a meaningful opportunity to prove Mr. Stokes is avoiding suitable, available work for reasons other than his work-related cervical condition. To the extent he is realistically employable at lesser paying work, *that* portion of his wage loss is *not* defendant's responsibility under workers'

⁶ *Jones* was released on the day defendant's application was filed in this case and, therefore, could not have been referenced in defendant's application. *Martin*, as indicated, was released after defendant filed its application.

⁷ Elsewhere, Commissioner Ries has also revealed his view that the Court of Appeals' decision in this case has not necessarily undone his wage loss/partial disability view. [*E.g.*, “Although some portions of the Appellate Commission opinion in *Stokes* were vacated as ‘unnecessary,’ the result in *Stokes* was affirmed as ‘amply supported by the record.’ It will be determined on yet another day whether the ‘unnecessary’ portions of *Stokes* were incorrect.” *Campbell v Sorensen Gross Construction Co, Inc*, 2006 ACO #323, slip op at p 17 (attached).]

compensation law. To the extent he is realistically employable at equal paying suitable work he is not even disabled.

Defendant believes it is now necessary to ask the Court to issue an opinion that specifically adopts Judge Saad's dissent as its own. Compare, *Camburn v Northwest School District (After Remand)*, 459 Mich 471; 592 NW2d 46 (1999); *Helder v Sruba*, 462 Mich 92; 611 NW2d 309 (2000); *People v Sexton*, 461 Mich 746; 609 NW2d 822 (2000). If this Court does not explicitly reject the *en banc* majority's legally errant views as identified by Judge Saad, then the Commission's view on wage loss and partial disability will continue. And, in the absence of unmistakable clarity on this point, the workers' compensation system will continue to operate such that a claimant's proof of "disability" will create a presumption of total wage loss due to that disability, contrary to the second sentence of § 301(4) and *Sington*. And, trial Magistrates will continue – as in this case – to reject as irrelevant defense offers of proof on the existence lesser paying work suitable and available to the claimant.

RELIEF

WHEREFORE, defendant-appellant, DaimlerChrysler Corporation, a Self-Insured, respectfully requests the Supreme Court to issue a decision adopting the Court of Appeals' dissenting opinion as its own and, in keeping with the dissent, remand this case to the Magistrate. Defendant-Appellant also requests any other relief the Court deems appropriate.

Respectfully submitted,

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