

STATE OF MICHIGAN
IN THE SUPREME COURT

FREDIE STOKES,
Plaintiff-Appellee,

vs

DAIMLERCHRYSLER CORPORATION,
a Self-insured,

Defendant-Appellant.

Supreme Court:

Court of Appeals:
268544

Lower Court: WCAC
Docket No: 020388

PLAINTIFF'S ANSWER TO DEFENDANT'S
APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

132648-

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COUNTER-STATEMENT OF BASIS FOR JURISDICTION

Plaintiff accepts defendant's statement of the basis for this Court's jurisdiction.

STATEMENT OF QUESTION PRESENTED

IS A REMAND OF THIS MATTER UNNECESSARY WHERE IT COULD NOT CHANGE THE RESULT PREVIOUSLY REACHED, AND BECAUSE THE COURT OF APPEALS AFFIRMED THE WCAC'S FACTFINDING.?

Plaintiff-Appellee answers "YES."
The Court of Appeals answered "YES."

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**PLAINTIFF'S ANSWER TO DEFENDANT'S
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NOW COMES Plaintiff-Appellee FREDIE STOKES, by and through his attorneys, and respectfully requests that this Honorable Supreme Court deny defendant's application for leave to appeal, stating as grounds the following:

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

(Numbers in parentheses without further reference shall denote pages of the transcript of proceedings held on June 10, 2002. "Rem" refers to the transcript of proceedings on remand held on October 7, 2003. The medical depositions shall be referred to as follows:

"M" Philip Mayer, M.D.
"P" Arturo Paz, M.D.)

This case returns to this Court, after its prior denial of defendant's application for leave to appeal prior to decision by the Court of Appeals. The order denying that application directed the Court of Appeals to grant leave to appeal and render a prompt opinion, which has now been accomplished. Defendant does not challenge any of the legal reasoning of the Court's opinion, but suggests that it should have remanded the case rather than simply affirming the award of benefits. Plaintiff submits that such a remand is unnecessary and would be pointless under the circumstances.

On or about November 13, 2000, plaintiff Freddie Stokes filed his application for mediation or hearing against defendant DaimlerChrysler Corporation, claiming a November 8, 1999 date of injury occurring in the following manner:

“Years of twisting, turning, bumpy rides with flexion and extension of the neck have caused and created disabling conditions of the neck and upper back.” (4,5)

Plaintiff was born on September 4, 1951 (13,43). He started working for defendant on June 9, 1971 (14), and spent his entire tenure at the Warren Truck Plant, where pick-up trucks were assembled (17). For the last 27 years he worked for defendant, plaintiff drove some type of hi-lo like vehicle (16).

For seven or eight years, plaintiff drove a mule, hauling materials in and out of the plant (15). He next worked as a dock driver for about ten years (15). For the last five or six years of his employment with defendant, plaintiff was classified as a dispatch/driver (14). As part of this job, plaintiff unloaded trucks with a hi-lo (23).

About three or four years prior to his last day of work, plaintiff started to experience neck and arm symptoms (33). Not long before he stopped working for defendant, he reached the point where he could no longer turn around and look back (33-34). He also had trouble walking (34-35). Ultimately, he was no longer physically able to do his job (52), due to extreme neck and upper back pain (37).

Plaintiff's treating neurosurgeon, Dr. Arturo Paz, diagnosed "myelopathy," which he described as "a lesion in the spinal cord, the highest level in the neck, C-1/C-2. There was changes, rheumatoid changes, and instability at C-1/C-2. There was a possibility of a fracture of the odontoid and then that was the original impression on the visit of 12/16/99" (P 7). The odontoid, part of the second cervical vertebrae, is like a peg which interacts with C-1, with one's head rotating on the peg (P 8-9).

An MRI done at St. John Hospital on February 8, 2000 essentially confirmed the doctor's conclusion (P 11-12). Dr. Paz performed cervical spine surgery during February, 2000 (39,53; P 12).

In a decision mailed on August 27, 2002, Magistrate John J. Rabaut found that plaintiff suffered a disabling personal injury arising out of and in the course of his employment with defendant on November 8, 1999. The magistrate further held:

“Given that credible testimony and the testimony of both Drs. Paz and Mayer that plaintiff could not return to his job given the residuals of his cervical myelopathy (weakness, spasticity and loss of fine motor coordination) despite a good result from surgery I find that plaintiff is disabled from performing any of the duties of that job.” Magistrate Rabaut's August 27, 2002 Opinion, at 6.

At about the same time the magistrate was rendering this opinion, this Supreme Court rendered its decision in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), reinterpreting the statutory definition of “disability.” This decision was not expressly dealt with by Magistrate Rabaut in his original opinion.

Defendant filed a timely appeal with the Workers' Compensation Appellate Commission [“WCAC”]. In its order and opinion issued June 30, 2003, the WCAC remanded the case to Magistrate Rabaut on limited grounds. While upholding the magistrate's causal relationship holding, the Commission remanded “for reconsideration of the disability issue under the *Sington* standard.”

After the remand, defendant sought to compel plaintiff to meet with a vocational consultant of its choosing, and plaintiff refused (Rem 6). As a result, defense counsel apparently requested on two occasions, July 22 and September 25, 2003, that the magistrate compel plaintiff to attend the meeting and cooperate with its consultant (Rem 43-44). Defendant renewed its request at the time of the remand hearing on October 7, 2003, and again its request was denied (Rem 44).

The magistrate then proceeded to take proofs, as required by the WCAC's remand order. In that regard, plaintiff offered further testimony regarding his qualifications, training, and past experiences.

Plaintiff confirmed that he is a high school graduate (Rem 9, 14). He attended college for one year, but obviously did not obtain a degree (Rem 9-10). He was never in the military (Rem 22). Plaintiff's prior employment was all heavy in nature (Rem 19). He took no technical courses transferable to the workplace with the exception of woodworking, in which he had not engaged since high school (Rem 14-16). Plaintiff does not have any typing skills (Rem 26).

During periods of lay-off, plaintiff sometimes worked at his cousin's record shop as a stock person (Rem 22). He has not worked since his last day of work with defendant (Rem 22).

At the remand hearing, defendant presented the testimony of Robert B. Seals, a vocational case manager who does so-called labor market evaluations (Rem 32-33). Mr. Seals was not contacted by defendant until five days prior to the hearing (Rem 42). He was never provided with the previously-completed deposition testimony or any of defendant's employment records prior to the hearing date (Rem 42-43).

A hypothetical question was presented to Mr. Seals, which failed to describe plaintiff's physical limitations, but nevertheless asked Mr. Seals to express an opinion about purportedly available work within plaintiff's qualifications and training (Rem 34,38).

Mr. Seals responded:

"Well, at this point in time it would be nearly speculative on my part to render an opinion about his wage earning capacity. I would need to actually contact employers to survey what is out there. And to determine again, job availability and wages for those accompanying jobs.

"And actually, even prior to that I would probably need to complete what is called the transferable skills analysis..." (Rem 39-40).

In his opinion on remand, mailed on October 17, 2003, Magistrate Rabaut made the following determination:

“I accept plaintiff’s testimony that he cannot perform any of his previous jobs. In fact, I find that plaintiff’s training and qualifications limit him to physically strenuous work from which he is clearly disabled due to his significant spinal cord compression. Further, defendant failed to submit any evidence that any other job within his qualifications or training and that could provide plaintiff with his maximum wage earning capacity. Mr. Seal was credible, and he testified that he could only speculate with regard to plaintiff’s job abilities given that he had been unable to meet with plaintiff (by my order) or review plaintiff’s employment records or medical records. Therefore, his testimony, what little he was able to give, is irrelevant.”
Magistrate Rabaut’s October 17, 2003 Opinion, at 3.

The case then returned to the WCAC, which had retained jurisdiction.

The WCAC subsequently issued an order on September 8, 2005, indicating that the case would be considered *en banc*. Thereafter, the WCAC issued a split opinion on January 26, 2006. The majority opinion affirmed the magistrate’s finding of disability. It further held that plaintiff was not obliged to meet with defendant’s vocational consultant, and that the magistrate lacked the authority to order a meeting.

Defendant subsequently sought leave to appeal to the Court of Appeals, and then filed a “bypass” application with this Honorable Court. This led to the Court’s June 1, 2006 order, denying the bypass application but directing the Court of Appeals to grant leave and render an opinion.

Thereafter, in a split opinion dated October 26, 2006, the Court of Appeals affirmed the WCAC’s award of benefits, but vacated portions of its opinion to the extent they were inconsistent with the Court’s own opinion. In that regard, the Court overturned certain of the WCAC’s findings and deemed others unnecessary to its decision. More details will be provided in the argument to follow.

Defendant now seeks leave to appeal to this Honorable Court, which does not challenge any of the legal findings of the Court of Appeals¹, but instead simply asks that the case be remanded to the WCAC for further consideration. Plaintiff believes that a remand is unnecessary, and will only needlessly delay the already-prolonged resolution of this case. He files this answer in opposition to defendant's application accordingly.

ARGUMENT

A REMAND OF THIS MATTER IS UNNECESSARY AND COULD NOT CHANGE THE RESULT PREVIOUSLY REACHED, NOR IS IT REQUIRED BECAUSE THE COURT OF APPEALS AFFIRMED THE WCAC'S FACTFINDING.

Defendant correctly notes that the Court of Appeals did not completely affirm the WCAC, but instead reversed or vacated certain of its holdings. However, none of those alterations of the WCAC's opinion would change the result reached by that tribunal based upon the record before it, as the Court held:

“Similarly, we conclude that notwithstanding the overly broad sweep of the WCAC majority opinion, the WCAC's evaluation of the instant case is supported by the record and withstands review under controlling standards. The majority reviewed the testimony and affirmed the magistrate on the same basis, finding that plaintiff is totally disabled from all the jobs he held in the past, and there is ‘nothing in the record to suggest that plaintiff has the qualifications and training to perform *any other job* that pays wages equivalent, or greater than, to [sic] what he was earning for [sic] defendant.’ [Emphasis added (by the Court).]” Court of Appeals' Opinion, at 12.

This analysis is entirely appropriate, and leave to appeal should be denied accordingly.

As defendant has correctly stated, the Court of Appeals vacated two portions of the WCAC's opinion, noting that its analysis regarding partial disability and wage loss was simply not necessary (and was confusing as well):

¹Defendant purports to reserve such challenges for later assertion, should this Court grant leave to appeal. Defendant's Application, at 8, n2. Plaintiff, however, believes that a party is obliged to raise all applicable issues in its application, and may not simply leave others for later assertion.

“Defendant asserts that the WCAC erred as a matter of law by holding that plaintiff did not need to show his loss of wages was caused by his work-related injury and resulting disability. The majority having concluded that ‘it is obvious that plaintiff lost wages as a result of his work-related medical impairment,’ its lengthy discussion of the issue was unnecessary and confusing, and is therefore vacated. Similarly, the majority’s related discussion of the partial disability provisions is vacated for the same reasons.” Court of Appeals’ Opinion, at 15.

These matters do not require any further factfinding or other analysis by the WCAC.

With respect to the wage loss question, defendant does not suggest in its application that this was every truly an issue in this matter. In fact, during oral argument before the Court of Appeals, defense counsel acknowledged 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. As a result, the Court of Appeals’ removal of the issue, when it was not in contention in the first place, requires no further analysis by the WCAC. Instead, this is a matter for another day and another case in which the issue is actually in controversy.

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 Court of Appeals additionally took issue with three legal holdings by the WCAC. It held that the field of jobs relevant to the disability analysis was not necessarily limited to jobs held by the plaintiff in the past, further noted that a transferable skills analysis may be relevant to the question of disability, and held that discovery is available in workers’

compensation matters (within the magistrate's discretion). These are actually inter-related matters, none of which requires further analysis.

The Court of Appeals held that, in some cases, a magistrate may compel a claimant to submit to an interview with a vocational consultant:

"While the magistrate has authority to grant relevant discovery necessary for defendant to develop a defense under *Sington*, it does not automatically follow that defendant is entitled to have its vocational expert interview plaintiff.⁵ What form of discovery is necessary to enable a defendant to investigate an employee's qualifications and training and prepare a proper defense under *Sington* is a matter for the magistrate's discretion."

⁵ While MCL 418.385 specifically provides for the examination of claimants by the employer's medical experts, there is no statutory counterpart specifically providing for discovery interviews by vocational experts, and the necessary information will often be available in the employee's records, or obtainable through interrogatories." Court of Appeals' Opinion, at 13.

However, the Court further found that, given the facts of this case, the magistrate did not abuse his discretion in refusing to order an interview:

"While an interview will no doubt be appropriate in some cases, in the instant case, defendant had sufficient information in the form of prior testimony, a long-term work history with defendant, and considerable medical information, to narrow the focus of the additional information required so that it could be sought by interrogatory if necessary before trial, or obtained at trial to augment a preliminary transferable skills analysis based on the considerable information already available. In sum, we are satisfied, as were the magistrate and WCAC, that defendant's inability to conduct the requested interview did not lead to its failure to present a viable *Sington* defense." Court of Appeals' Opinion, at 13-14.

In other words, defendant was not precluded from obtaining an interview with its chosen vocational expert by any now-reversed finding of the WCAC regarding the availability of discovery. Instead, it was found that such an interview *could* have been granted, but was unnecessary given the facts and the magistrate's discretion.

Additionally, the Court of Appeals held that the reason the record contains no proof of any remaining jobs plaintiff could purportedly perform is not the magistrate's refusal to order an interview, but instead defendant's failure to take the steps available to it which might have yielded such proofs:

"Rather, defendant hired an expert and then provided him with none of the information that was available to defendant, such as plaintiff's employment records and his prior testimony. The expert conducted none of the research that would be necessary to present a transferable skills analysis, because he did not have the necessary information. However, much of the information was available to defendant through plaintiff's employment records and prior testimony. It appears from the colloquy at trial that had the preliminary work been done based on the available information, the magistrate would have permitted the expert time to integrate the additional information provided at trial into his opinion. The magistrate did not abuse his discretion in concluding that it was defendant's failure to properly pursue the issue with its expert, rather than the magistrate's prior denial of the request for an interview with plaintiff, that led to the failure to mount a viable *Sington* defense, and the WCAC did not err in affirming on this point. *Mudel, supra.*" Court of Appeals' Opinion, at 13.

In other words, the WCAC's finding, also now-reversed, that transferable skills analyses may not be part of the inquiry, did not preclude defendant from presenting such an analysis in this case. The magistrate did not deny defendant the right to a transferable analysis. Instead, as the Court of Appeals noted, defendant failed to avail itself of its opportunity to present one, by failing to act in advance of the hearing date, even when the magistrate flatly informed defense counsel that it would have to present any such evidence *on that date*:

"MAGISTRATE RABAUT: Okay. Just as a way of background, I think we probably should just set it out right away. With regard to the Sington hearing that we're here to do today, I have informed Defendant and – Mr. Powers that I thought it was appropriate for him to have the satisfactory action for him to have testimony from the vocational counselor. *Here today only.*" (ll 5) (emphasis supplied)

As the Court of Appeals noted, defendant had an opportunity to avail itself of a transferable skills analysis, but failed to take advantage of that chance by waiting until the last minute

to hire a vocational consultant and then failing to offer him any information whatsoever upon which he could render a non-speculative opinion. *Defendant has not challenged the Court of Appeals' ruling in that regard.*

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). The fact that the magistrate exercised his discretion to refuse a vocational interview, and that defendant failed to avail itself of the opportunity to present alternative evidence despite its possession of a great deal of information relative to plaintiff's abilities and skills, does not require a different result.

Nor is a new outcome necessitated by defendant's rumblings about plaintiff's high school education and the fact that he took college courses, but obtained no degree, nearly *three decades* before his last day of work. This is no demonstration of an ability to perform some other actual, specific job in the *current* marketplace.

Given proof that plaintiff could not return to any of the jobs he previously held, or any other job that required a degree of physical exertion, and in the absence of any proof suggesting that other work was both suitable to plaintiff's qualifications and training and within his current ability to perform, the Court of Appeals had no alternative but to find him disabled. A remand to the WCAC would be pointless. What other result could be reached below, given the state of the proofs in this matter? The WCAC obviously cannot speculate as to what proofs defendant might have presented, had it acted in an expeditious fashion.

Defendant is apparently happy, or at least not inordinately unhappy, with the legal underpinnings of the Court of Appeals' opinion. Those underpinnings preclude any other result based upon the record in this case, as already interpreted by the magistrate and the WCAC. Leave to appeal should be denied accordingly.

RELIEF

WHEREFORE Plaintiff-Appellee FREDIE STOKES respectfully requests that this Honorable Court deny defendant's application for leave to appeal, and further requests any other relief to which he may be entitled.

Respectfully submitted,



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Dated: January 11, 2007

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STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

PROOF OF SERVICE

DARYL ROYAL, being first duly sworn, deposes and says that on the 11th day of January, 2007, he deposited in the United States Mail at Dearborn, Michigan, a copy of Plaintiff's Answer to Defendant's Application for Leave to Appeal, addressed to:

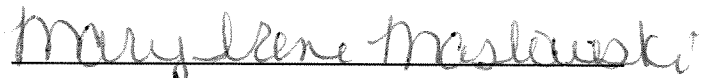
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with sufficient postage affixed.



DARYL ROYAL

Subscribed to and sworn before me, a Notary Public, this 11th day of January, 2007.



MARY IRENE MASLOWSKI
NOTARY PUBLIC WAYNE CO., MI
MY COMMISSION EXPIRES Apr 29, 2008

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January 11, 2007

Supreme Court
Clerk of the Court
925 West Ottawa
Lansing, Michigan 48915

HAND DELIVERED

Re: Fredie Stokes v DaimlerChrysler Corporation
Supreme Court No: 132648
Court of Appeals No: 268544

Dear Clerk:

Enclosed for filing in the above captioned matter, please find the original and seven copies of plaintiff's answer to defendant's application for leave to appeal and proof of service thereof.

Thank you for your anticipated cooperation.

Very truly yours,


DARYL ROYAL

DR/mim

Encl.

cc: Gerald M. Marcinkoski

