STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE WORKERS' COMPENSATION
APPELLATE COMMISSION AND THE COURT OF APPEALS

SCOTT M. CAIN,

Plaintiff-Appellee,

vs

WASTE MANAGEMENT, INC. and
TRANSPORTATION INSURANCE COMPANY,

Defendants-Appellees,

and

SECOND INJURY FUND,

Defendant-Appellant.
_____/

Supreme Court: 125180

Court of Appeals: 242123

Lower Court: WCAC 98-0390

SCOTT M. CAIN,

Plaintiff-Appellee,

vs

WASTE MANAGEMENT, INC. and
TRANSPORTATION INSURANCE COMPANY,

Defendants-Appellants,

and

SECOND INJURY FUND,

Defendant-Appellee.
_____/

Supreme Court: 125111

Court of Appeals: 242104

Lower Court: WCAC 98-0390

AMICUS CURIAE BRIEF ON BEHALF OF MICHIGAN TRIAL LAWYERS ASSOCIATION

DARYL ROYAL (P33161)
Attorney for *Amicus* MTLA
22646 Michigan Avenue
Dearborn, Michigan 48124-2116
(313) 730-0055

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STATEMENT OF BASIS FOR JURISDICTION

Amicus MTLA does not dispute this Court's jurisdiction over the instant matter.

STATEMENT OF QUESTIONS PRESENTED

I

MAY THE "LOSS OF INDUSTRIAL USE" STANDARD BE APPLIED TO CLAIMS OF SPECIFIC LOSS UNDER MCL 418.361(2), AND SHOULD *PIPE v LEESE TOOL & DIE CO*, 410 MICH 510; 302 NW2D 526 (1981) NOT BE OVERRULED ACCORDINGLY?

Amicus MTLA answers "YES."
The WCAC answered "YES."
The Court of Appeals answered "YES."
Plaintiff answers "YES."
Defendants answer "NO."

II

MAY TOTAL AND PERMANENT DISABILITY BENEFITS UNDER MCL 418.361(3)(b) BE AWARDED ON THE BASIS OF PLAINTIFF'S SPECIFIC (ANATOMICAL) LOSS OF ONE LEG AND HIS SPECIFIC (INDUSTRIAL USE) LOSS OF THE OTHER LEG?

Amicus MTLA answers "YES."
The WCAC answered "YES."
The Court of Appeals answered "YES."
Plaintiff answers "YES."
Defendants answer "NO."

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AMICUS CURIAE BRIEF ON BEHALF OF MICHIGAN TRIAL LAWYERS ASSOCIATION

STATEMENT OF INTEREST

MICHIGAN TRIAL LAWYERS ASSOCIATION ["MTLA"] is a state-wide bar association. The membership of MTLA primarily represents victims of injuries,

including those who suffer injuries in the workplace. MTLA seeks permission to file its *amicus curiae* brief because the issues to be resolved by this matter are likely to have a far-reaching impact on the clients of its membership. MTLA believes that it can help this Court arrive at an appropriate and just interpretation in this case and others like it.

STATEMENT OF FACTS

Your *amicus curiae* MICHIGAN TRIAL LAWYERS ASSOCIATION adopts the Statement of Facts contained in the briefs filed by plaintiff in these matters.

STANDARD OF REVIEW

This Court reviews questions of law, including matters of statutory construction, de novo. *DiBenedetto v West Shore Hospital*, 641 Mich 394; 605 NW2d 300 (2000).

INTRODUCTION

The Workers' Disability Compensation Act ["WDCA"] provides for what is typically described as "general disability," defined as "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." MCL 418.301(4). However, there are other, more specialized types of disabilities also recognized by the WDCA. Two are the "specific loss" and "total and permanent disability."

A "specific loss" typically compensates an employee for the "loss" of a member, or a portion thereof. The requisite losses, sometimes called "scheduled losses," are enumerated in MCL 418.361(2), as follows:

> "In cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:

"(a) Thumb, 65 weeks.
"(b) First finger, 38 weeks.
"(c) Second finger, 33 weeks.
"(d) Third finger, 22 weeks.
"(e) Fourth finger, 16 weeks.

"The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of ½ of that thumb or finger, and compensation shall be ½ of the amount above specified.

"The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand.

"(f) Great toe, 33 weeks.
"(g) A toe other than the great toe, 11 weeks.

"The loss of the first phalange of any toe shall be considered to be equal to the loss of ½ of that toe, and compensation shall be ½ of the amount above specified.

"The loss of more than 1 phalange shall be considered as the loss of the entire toe.

"(h) Hand, 215 weeks.
"(I) Arm, 269 weeks.

"An amputation between the elbow and wrist that is 6 or more inches below the elbow shall be considered a hand, and an amputation above that point shall be considered an arm.

"(j) Foot, 162 weeks.
"(k) Leg, 215 weeks.

"An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.

"(l) Eye, 162 weeks.

"Eighty percent loss of vision of 1 eye shall constitute the total loss of that eye."

As noted, once a requisite "loss" is established, benefits are payable for an enumerated period, which varies based upon the nature and extent of the loss. These

benefits are payable irrespective of any wages the claimant may earn during the stated period. See, *e.g., Hutsko v Chrysler Corp*, 381 Mich 99; 158 NW2d 874 (1968).[1]

Total and permanent disability is established upon the "loss" of more than one member (or in cases involving incurable insanity or imbecility). The "losses" in question are listed in MCL 418.361(3):

> "Total and permanent disability, compensation for which is provided in section 351 means:
>
> "(a) Total and permanent loss of sight of both eyes.
>
> "(b) Loss of both legs or both feet at or above the ankle.
>
> "(c) Loss of both arms or both hands at or above the wrist.
>
> "(d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).
>
> "(e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.
>
> "(f) Incurable insanity or imbecility.
>
> "(g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury."

When such a loss is established, disability is presumed for 800 weeks from the date of injury. MCL 418.351(1).[2]

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[1]By contrast, a claimant seeking general disability benefits must prove both a physical limitations *and* an accompanying wage loss. MCL 418.301(4); *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002).

[2]"The conclusive presumption of total and permanent disability shall not extend beyond 800 weeks from the date of injury and thereafter the question of permanent and total disability shall be determined in accordance with the fact, as the fact may be at the time."

Significantly, the legislature has stated that *both* provisions, regarding specific losses *and* total and permanent disability, "recognize human factors substantially in addition to the wage loss concept..." MCL 418.354(16). This fact should not be lost or disregarded in construing either MCL 418.361(2) or MCL 418.361(3).

ARGUMENT I

THE "LOSS OF INDUSTRIAL USE" STANDARD MAY BE APPLIED TO CLAIMS OF SPECIFIC LOSS UNDER MCL 418.361(2), AND *PIPE v LEESE TOOL & DIE CO*, 410 MICH 510; 302 NW2D 526 (1981) SHOULD NOT BE OVERRULED ACCORDINGLY.

The key to the construction of MCL 418.361(2) is the meaning of the word "loss," which appears repeatedly throughout that provision and the total and disability provision, MCL 418.361(3). In that regard, one might assume from reading the defense briefs that the statutes actually use the word "amputation," not the word "loss." However, "loss" may have other meanings as well.

In that regard, a "loss" may indeed constitute a *physical* loss, as in the case of an amputation. However, it could actually mean a *functional* loss as well. The word "loss" simply is not specific enough to rule out either interpretation.

In fact, as far back as 1918, this Court recognized that *either* type of loss would suffice to establish a specific loss. In *Lovalo v Michigan Stamping Co*, 202 Mich 85, 89; 167 NW 904 (1918), the Court dealt with an individual who had sustained the amputation of four fingers, but not his entire hand. Nevertheless, the Court found that he had suffered the "loss" of the hand where its "primary service" was lost:

> "In common terms the human hand consists of the palm, fingers, and thumb, being in combination peculiarly adapted physiologically to the functions of prehension, or grasping, which is their primary service; locomotion and support being of scant importance as contradistinguished from the lower order of animals. In that sense and for such losses plaintiff has lost his right hand."

This is obviously the institution of a "loss of industrial use" standard for specific losses, going back over *eight decades*. This standard has stood the test of time, and formed the basis for the currently utilized "primary service in industry standard" set forth in *Pipe v Leese Tool & Die Co*, 410 Mich 510; 302 NW2d 526 (1981). The phrase "primary service" was actually used by the *Lovalo* Court in 1918.

Clearly, this is *not* a situation, as intimated by defendants, in which the concept of "loss of industrial use" in a specific loss context was imported from the total and permanent disability statute, MCL 418.361(3). In fact, the reverse happened, as demonstrated by *Rench v Kalamazoo Stove & Furnace Co*, 286 Mich 314; 282 NW 162 (1938). In that case, the Court considered a claim for total and permanent disability, and actually adopted the loss of industrial use standard from *Lovalo* and *West v Postum Co, Inc*, 260 Mich 545; 245 NW 561 (1932), two specific loss cases. In other words, the concept of a loss of industrial use was borrowed from the specific loss analysis, and imported into total and permanent disability claims.[3]

Defendants, however, are simply unable to concede that "loss" could possibly mean anything other than "amputation." This myopic insistence upon a single form of loss, to the exclusion of any others, fatally weakens their arguments, as does a further review of the actual language of MCL 418.361(2) and MCL 418.361(3).

Defendant Second Injury Fund ["SIF"] emphasizes that the word "amputation" actually appears in the specific loss provision, and this is so. However, it appears in limited contexts, while the word "loss" is consistently used throughout. The use of the differing words suggests that a different meaning was intended for each, and demonstrates that the legislature was fully capable of using "amputation" where that is what it meant. That this word is *not* utilized in most instances in the statute

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[3]The legislature ultimately added this precise phrase to the total and permanent disability statute in 1956. 1956 PA 195.

suggests that it was not intended to be applied in most instances. Instead, where the exact location of the amputation is set forth with respect to a physical loss between the elbow and wrist or between the knee and foot, it is simply done to create some precision as to the extent of the physical loss and the "specific" loss it has occasioned.

With respect to the total and permanent disability statute, MCL 418.361(3), the SIF claims that, where "loss" was intended to mean something other than "amputation," the legislature included a modifier ["total," "permanent," and/or "incurable"].[4] However, this is actually an acknowledgment that "loss" may *not* mean "amputation" in all provisions of the statute, which is inconsistent with the most basic tenet of the defense arguments.

It simply makes no sense to contend that the legislature intended the word "loss" to mean one thing in one part of the statute, and another things when used elsewhere in the same provision. "It is reasonable to conclude that words used in one place in a statute have the same meaning in every other place in the statute." *Little Caesar Enterprises v Dep't of Treasury*, 226 Mich App 624, 630; 575 NW2d 562 (1977). Either "loss" means "amputation," or it doesn't. Defendants themselves admit it doesn't, at least not always.

Consequently, a finding that the loss of industrial use standard is sufficient to prove specific loss is consistent not only with the period case law, but also with the language of the statute itself, the touchstone of statutory construction.

Defendant SIF claims that such a result would be inconsistent with this Court's earlier decision in this same matter. *Cain v Waste Mgt, Inc*, 465 Mich 509; 638 NW2d 98 (2002) ["*Cain I*"]. More specifically, the SIF noted that this Court previously found that plaintiff had not lost the industrial use of his non-amputated leg, and contends that a finding of such a loss now would be inconsistent. However, the

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[4]Defendant SIF's Brief, at 16.

finding in this Court's previous decision was premised not upon whether a "loss" pursuant to the specific loss statute could include "loss of industrial use," but instead upon its belief that specific loss and total and permanent disability claims have different underlying bases – one focused upon the loss itself, and the other concerned itself with the functional result of the loss. *Cain I*, at 520-524.[5] As a result, the previous finding that plaintiff did not lose the industrial use of his leg pursuant to the total and permanent disability statute does not mean that he could not have lost that use pursuant to the specific loss provision.

The standard set forth in *Pipe, supra*, is consistent with the statute and decades of legislative and judicial development thereof. It should be retained and reaffirmed accordingly, as should the loss of industrial use standard as applicable to specific loss claims.

ARGUMENT II

TOTAL AND PERMANENT DISABILITY BENEFITS UNDER MCL 418.361(3)(b) MAY BE AWARDED ON THE BASIS OF PLAINTIFF'S SPECIFIC (ANATOMICAL) LOSS OF ONE LEG AND HIS SPECIFIC (INDUSTRIAL USE) LOSS OF THE OTHER LEG.

In referring to the type of injury necessary to sustain a finding of total and permanent disability, the legislature chose to use the word "loss," not the word "amputation." In fact, "amputation" appears nowhere in MCL 418.361(3), which governs total and permanent disability claims.

Defendants' suggestion that "amputation" is the only possible meaning of "loss" has already been dealt with at length in Argument I, above, and the contentions

[5]*Amicus* MTLA does not entirely agree with that belief, as shall be noted in Argument II, below.

included there will not be rehashed here. However, *Amicus* MTLA will here address arguments specific to the total and permanent disability statute.

MCL 418.361(3)(a)-(f) lists six "losses" that constitute total and permanent disability:

> "(a) Total and permanent loss of sight of both eyes.
>
> "(b) Loss of both legs or both feet at or above the ankle.
>
> "(c) Loss of both arms or both hands at or above the wrist.
>
> "(d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).
>
> "(e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.
>
> "(f) Incurable insanity or imbecility."

A seventh category of total and permanent disability is also included, added after the first six by 1956 PA 195:

> "(g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury." MCL 418.361(3)(g).

Defendants contend that, because "loss of industrial use" is only mentioned in subsection (g), it cannot be found to be applicable to the other categories. There are two problems with this analysis.

First, the idea of a "loss *of industrial use*" is not the only potentially new concept introduced by subsection (g). While subsections (a) through (f) deal with losses of corresponding members (two legs, two arms, etc.), subsection (g) also acknowledges that the loss of two disparate members (*i.e.*, an arm and a leg) is also sufficient to support a finding of total and permanent disability. It could well be that this was the intended difference when the legislature added subsection (g) in 1956.

It could also have merely been that it wanted to make clear that its prior enumeration of categories was not intended to eliminate the compensability of loss of industrial use. See, *e.g.*, *Miller v Sullivan Milk Products, Inc*, 385 Mich 659, 665; 189 NW2d 304 (1971).

Furthermore, the phrase "loss of industrial use" almost certainly encompasses all amputations and most, if not all, functional losses as well. Consequently, this "catch-all" language is not the limitation defendants contend it is.

Additionally, "loss" and "loss of industrial use" are not necessarily equivalent. If they were, there might be no need to modify the final "loss" to be one "of industrial use." Instead, "loss" is a broader term, not grounded in the need to be industrially based or demonstrated.

The "of industrial use" language was considered critical by this Court in its prior opinion in this matter, *Cain v Waste Mgt, Inc*, 465 Mich 509; 638 NW2d 98 (2002) ["*Cain I*"]. In *Cain I*, this "industrial use" qualifier was used to arrive at a "corrected" standard, taking into account the effects of adaptive/prosthetic devices which might still permit the use of the injured member in industrial endeavors.

However, this modifying language is absent from the losses described in the first six categories of total and permanent disability. The more broad term "loss" is used instead, suggestive of a less limited interpretation. The added phrase "of industrial use" should be not imported into the language of these subsections any more than the word "amputation" should be. The legislature used neither term, and this Court should not write in a provision the Legislature has not seen fit to include. *Paselli v Utley*, 286 Mich 638; 282 NW 849 (1938). Consequently, the "loss" of the limb should be enough to satisfy MCL 418.361(3)(b), whether that loss is physical (via, for

example, amputation) or functional, and without regard to its remaining industrial usefulness.[6]

This also answers defendants' argument that the Court of Appeals erred in finding loss of industrial use of the left leg, where this Court had previously reversed such a finding. In its prior opinion, this Court dealt only with the ramifications of subsection (g), and not subsection (b), now under consideration.

Amicus MTLA further believes, however, that the focus on the "of industrial use" phrase is unfortunate in any event, with respect to any subsection. Such an emphasis ignores the "human factors" deemed significant by the legislature when excluding specific loss or total and permanent disability benefits from coordination with other employer-funded benefits:

> "This section shall not apply to payments made to an employee as a result of liability pursuant to section 361(2) and (3) for the specific loss period set forth therein. It is the intent of the legislature that, because *benefits under section 361(2) and (3) are benefits which recognize human factors substantially* in addition to the wage loss concept, coordination of benefits should not apply to such benefits." MCL 418.354(16) (emphasis supplied).

These "human factors" are essentially ignored if the analysis instead focuses primarily on functionality in employment or industry. This statute, and the "human factors" it acknowledges as substantial, were not taken into account in *Cain I*, but MTLA submits that they should have been. If these factors are given their deserved primacy, even MCL 418.361(3)(g) would permit an award in this matter.

Corrective devices should be deemed irrelevant, given the "human factors" involved in a specific loss or total and permanent disability situation. In that regard, workers' compensation statutes are to be liberally construed in favor of the injured

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[6]This distinction is also applicable to the specific loss statute, which speaks only of "loss" and not "loss of industrial use." This should end defendant Waste Management's attempts to extend the ruling in *Cain I* to the specific loss context.

worker, given their remedial nature. See, *e.g., Paschke v Retool Industries,* 445 Mich 502, 511; 519 NW2d 441 (1994); *Bower v Whitehall Leather Co*, 412 Mich 172, 191; 312 NW2d 640 (1981). Certainly, when "human factors" are an acknowledged part of the analysis, this maxim is of particular value. This obviously *is* a remedial statute.

Defendant SIF has, however, denigrated the use of this axiom of statutory construction in this matter, deriding it as a "dice-loading" approach.[7] However, the SIF's citation to *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220; 666 NW2d 199 (2003), as supportive of its position is simply wrong. As the SIF correctly notes, *Rakestraw* had to do with "entry level requirements within the Worker's Disability Compensation Act..."[8] However, those "entry level requirements" were quite limited, and clearly do not extend to the issue in this matter:

> "Whatever the efficacy of this rule of construction, its application is logically justifiable only where the employer's responsibility is established: where the employee proves the injury is work-related.[12] We believe it is inappropriate to utilize the 'liberal construction' standard when the issue being considered is the initial qualifying matter of whether the claimed injury falls within the WDCA regime. That decision, nearly jurisdictional in nature, is not to be tilted for or against either party as it is made solely for the purpose of determining whether the worker's compensation system will entertain the claim. Accordingly, we conclude that this approach to interpretation of the statute is inapplicable, and the resulting construction flawed.
>
> ---
>
> "[12] Once an employee has established the existence of an injury that arises out of and in the course of employment, the 'liberal construction' standard could arguably be applicable in determining, for example, the extent of the employee's injuries or his ability to return to work after rehabilitation..." *Rakestraw, supra*, at 233-234.

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[7]Defendant SIF's Brief, at 17-18.

[8]Defendant SIF's Brief, at 18.

Quite obviously, the *Rakestraw* Court was not discrediting the use of the "liberal construction" standard in cases like this one. Instead, the fundamental inquiry to which it referred, whether the claimant's injury arose out of and in the course of employment so as to confer jurisdiction on the workers' compensation system, is well past dispute in this matter. Furthermore, as noted above, the substantial importance of "human factors" in the analysis, MCL 418.354(16), demonstrates the remedial nature of the statutes under consideration and propriety of the "liberal construction' standard to this case.

As a result, the "corrected" standard would not apply to MCL 418.361(3)(b), or to any statute using the word "loss" rather than the phrase "loss of industrial use." Furthermore, even this latter phrase should be construed in combination with the "human factors" acknowledged by the legislature, so as to preclude a "corrected" standard even in that instance.

CONCLUSION

The specific loss and total and permanent disability provisions are an exception to normal concepts of disability within the WDCA. The legislature has acknowledged that they "*are benefits which recognize human factors substantially* in addition to the wage loss concept..." MCL 418.354(16). Consequently, any consideration of the standards applicable should take that into account.

Accordingly, where the statute refers solely to a "loss," that word should be deemed to be inclusive of *any* loss, whether physical or functional. "Loss" is simply not always the equivalent of "amputation." If plaintiff has sustained any loss of his leg, he is entitled to a finding of the specific loss of that leg. If he has lost two legs, he is totally and permanently disabled pursuant to either MCL 418.361(3)(b) or MCL 418.361(3)(g). This is so even where one "loss" might be anatomical, and the other

functional. This is consistent with *Pipe v Leese Tool & Die Co*, 410 Mich 510; 302 NW2d 526 (1981), and there is therefore no need to overrule that case.

RELIEF

WHEREFORE *Amicus Curiae* MICHIGAN TRIAL LAWYERS ASSOCIATION respectfully requests that this Honorable Court affirm the decision of the Court of Appeals, and/or effectuate the standards described directly above.

Respectfully submitted,

MICHIGAN TRIAL LAWYERS ASSOCIATION

BY: DARYL ROYAL (P33161)
Attorney for *Amicus* MTLA
22646 Michigan Avenue
Dearborn, Michigan 48124-2116
(313) 730-0055

Dated: September 16, 2004