STATE OF MICHIGAN

COURT OF APPEALS

NORMAN E. CARSON,

Plaintiff-Appellant,

v

BANDIT INDUSTRIES INC and ACUITY MUTUAL INSURANCE CO,

Defendants-Appellees.

UNPUBLISHED
September 30, 2021

No. 350257
MCAC
LC No. 18-000012

ON REMAND

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

PER CURIAM.

In 2019, plaintiff, Norman Carson, applied to this Court for leave to appeal a decision by the Michigan Compensation Appellate Commission (MCAC),[1] raising three questions related to his claim for workers' compensation benefits under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. We denied leave as to the first two questions, but granted it as to the third.[2] Because it appeared to us that the recently decided case of *Fisher v Kalamazoo Regional Psych Hosp*, 329 Mich App 555; 942 NW2d 706 (2019) was dispositive of the issue we granted leave to appeal on, we sua sponte directed the parties to file supplemental briefs addressing whether *Fisher* applied retroactively.[3] Thereafter, in an unpublished opinion, we affirmed the MCAC in

[1] "The MCAC has been replaced, in part, by the Workers' Disability Compensation Appeals Commission. Executive Reorganization Order No. 2019-13." *Omer v Steel Technologies, Inc*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket No. 161658); slip op at 1 n 3.

[2] *Carson v Bandit Indus Inc*, unpublished order of the Court of Appeals, entered January 2, 2020 (Docket No. 350257).

[3] *Carson v Bandit Indus Inc*, unpublished order of the Court of Appeals, entered November 5, 2020 (Docket No. 350257).

part, reversed in part, and remanded for further proceedings.[4] Carson then filed an application for leave to appeal in our Supreme Court. In lieu of granting leave, the Supreme Court vacated our opinion and remanded to us to consider as on leave granted the first two issues raised in the application for leave to appeal that Carson filed in this Court in 2019.[5] Specifically, the Supreme Court directed us to consider the following two questions as on leave granted:

> I. Did the appellate commission violate MCL 418.861a(3) when it reversed the magistrate's finding of a work-related injury?
>
> II. Did the appellate commission misapply the legal standard articulated by the Supreme Court in *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003) in finding that the plaintiff failed to demonstrate a work-related injury? [*Carson v Bandit Indus Inc*, 961 NW2d 148 (2021), clarified by *Carson v Bandit Indus Inc*, 961 NW2d 491 (2021).]

And, because our decision on the above issues may impact our prior determination regarding the third issue—which relates to recoupment of overpaid workers' compensation benefits—the Supreme Court also directed us to "reconsider the recoupment issue and address the arguments presented by the parties in this Court with respect to that issue." *Id*. We *sua sponte* ordered supplemental briefing to address the issues now before this Court.[6] We now affirm, but remand for further proceedings relating to the calculation of the amount of recoupment.

I. BASIC FACTS

In our prior opinion, we set forth the underlying facts:

> In 2013, Bandit Industries hired Carson as a welder. Carson's job duties required him to kneel, bend, twist, and lift up to 100 pounds. On April 22, 2014, Carson was lifting a heavy part when he felt a pop in his back. Carson testified that he then felt pain and burning in his back and legs. The next day, when he reported the incident to his supervisor, he was referred to a physician[, Dr. Schrauben]. [Dr. Schrauben] evaluated Carson two days later, recommended physical therapy and placed a 30-pound lifting restriction on Carson. Because Carson continued to experience pain, his primary care physician referred him to a spine specialist[, Dr. Bleiberg]. [Dr. Bleiberg] eventually diagnosed Carson with radiculopathy and recommended that Carson be off of work as of August 2014. Thereafter, Bandit Industries voluntarily began paying wage-loss benefits to Carson.

---

[4] *Carson v Bandit Indus Inc*, unpublished per curiam opinion of the Court of Appeals, entered December 17, 2020 (Docket No. 350257).

[5] *Carson v Bandit Indus Inc*, 961 NW2d 148 (2021), clarified by *Carson v Bandit Indus Inc*, 961 NW2d 491 (2021).

[6] *Carson v Bandit Indus Inc*, unpublished order of the Court of Appeals, entered August 9, 2021 (Docket No. 350257).

> In October 2014, plaintiff was evaluated by another physician [Dr. Sczecienski], who did a medical examination at the behest of Bandit Industries. [Dr. Sczecienski] opined that there were degenerative changes in Carson's lumbar spine, and concluded that the April 2014 work incident may have aggravated Carson's degenerative disk injuries. In July 2015, Bandit Industries arranged for Carson to submit to a second medical examination, this time with a different physician selected by Bandit Industries. The new physician[, Dr. Mayer,] concluded that there was no neurological evidence of radiculopathy, that Carson had low back pain with no neurological involvement, and that Carson could return to work without restriction. Unsurprisingly, Bandit Industries opted to rely on the recommendation arising from the second medical examination. On September 2, 2015, Carson filed an application for mediation or hearing—Form A against Bandit Industries, alleging that he had sustained a work-related injury to his lower back on April 22, 2014. A response to the application was filed on October 2, 2015. Thereafter, on April 19, 2016, Bandit Industries' insurance carrier filed a petition to recoup benefits overpaid to Carson between August 5, 2014 and August 14, 2015.
>
> A trial was held in December 2017. Carson was confronted by surveillance footage depicting him performing work for his brother's business, Carson Lawn Services. The surveillance footage depicted Carson performing the following activities: weed whacking, branch trimming, and mowing grass on a tractor. Carson admitted that almost immediately after he stopped working for Bandit Industries, he started helping his brother's business on a "limited" basis. He estimated that he did so for approximately 10 hours per week. He claimed that, primarily, his work for his brother consisted of training new employees. Carson also testified that he received no monetary compensation from his brother for his assistance with the business. Carson admitted that he did not tell any of his treating physicians of the lawn-care work he was performing for his brother's business. [*Carson*, unpub op at 1-2.]

The magistrate found that Carson's testimony was "perfectly credible," accepted the opinions of Dr. Bleiberg and Dr. Sczencienski, and accepted the findings of Dr. Schrauben. The magistrate did not credit the opinions of Dr. Mayer. The magistrate found that Carson had sustained a work-related injury on April 22, 2014, that he had a continued low back condition related to the personal injury that occurred at work, that he had a retained wage earning capacity, and that recoupment was not warranted because Carson did not receive payment for assisting his brother's lawn-care business. Defendants appealed the magistrate's opinion to the MCAC.

On review, the MCAC deferred to the magistrate's credibility determinations, but concluded that the finding that there was a work-related injury was not supported by competent, substantial, and material evidence under MCL 418.861a(3) because, contrary to the requirements in *Rakestraw* and *Fahr v Gen Motors Corp*, 478 Mich 922; 733 NW2d 22 (2007), the evidence did not show that Carson's injury was medically distinguishable from his preexisting condition. Alternatively, the MCAC concluded that Carson was not entitled to workers' compensation benefits because of his failure to disclose the lawn-care work that he performed for his brother after April 22, 2014. As a result, the MCAC reasoned Carson was precluded by MCL 418.222(6)

from "proceeding under" the WDCA. The MCAC also concluded that Carson's failure to report the volunteer work he performed for his brother's lawn-care business constituted fraud, so recoupment of workers' compensation benefits was not barred by *Whirley v JC Penney Co, Inc*, 1997 Mich ACO 247, overruled by *Fisher*, 329 Mich App 555 (2019) (proclaiming that, in the absence of employee fraud, an employer or carrier could not recoup overpaid workers' compensation benefits paid to that employee).

II. STANDARDS OF REVIEW

This Court recently set forth the multilayered standards of review applicable to the administrative review of the magistrate's decision by the MCAC and the judicial review of the MCAC's opinion. See *Omer v Steel Technologies, Inc*, 332 Mich App 120, 133-134; 955 NW2d 575 (2020), vacated in part on other grounds ___ Mich ___ (2021). The *Omer* Court explained:

> The MCAC reviews "the magistrate's findings of fact under the 'substantial evidence' standard. . . ." *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 698; 614 NW2d 607 (2000). Substantial evidence is "such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion." MCL 418.861a(3). The MCAC must consider as "conclusive" the findings of fact made by a workers' compensation magistrate, as long as those facts are "supported by competent, material, and substantial evidence on the whole record." *Id*.; see also *Findley v Daimlerchrysler Corp*, 490 Mich 928, 928; 805 NW2d 833 (2011).
>
> The MCAC has *limited* fact-finding power. It may substitute its own factual findings for those of the magistrate when a "qualitative and quantitative analysis" of the record yields a different result. MCL 418.861a(13); see also *Mudel*, 462 Mich at 699-700. However, the MCAC's factual review of the magistrate's opinion is not de novo. Rather, it "involves reviewing the whole record, analyzing all the evidence presented, and determining whether the magistrate's decision is supported by competent, material, and substantial evidence." *Mudel*, 462 Mich at 699. In other words, the MCAC must begin by considering the "whole record" to determine whether the evidence considered by the magistrate meets the legislative standard of "competent, material, and substantial evidence." If it does, further review exceeds the MCAC's authority. The MCAC is not empowered to " 'set aside findings merely because alternative findings also could have been supported by substantial evidence on the record.' " *Agueros v Bridgewater Interiors LLC*, 2020 Mich ACO 4, p. 2, quoting *In re Payne*, 444 Mich 679, 692, 514 NW2d 121 (1994).
>
> This Court must treat the MCAC's factual findings as conclusive if there is any competent record evidence supporting them. *Mudel*, 462 Mich at 701. But we are empowered to review de novo questions of law embedded within a final order. MCL 418.861a(14); *Stokes* [*v Chrysler LLC*], 481 Mich [266,] 274[; 750 NW2d 129 (2008)]. "[A] decision of the [MCAC] is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000). [*Id*.]

III. ANALYSIS

1. APPLICATION OF THE STANDARD OF REVIEW

Carson argues that the MCAC violated the standard of review set forth in MCL 418.861a(3) when it reversed the magistrate's finding that he sustained a work-related injury on April 22, 2014. We disagree.

The MCAC recited the correct standard of review and repeatedly noted that it was deferring to magistrate's credibility determinations. Despite that deference, the MCAC concluded that the magistrate's finding of a work-related injury was not supported by competent, material, and substantial evidence on the whole record because the evidence presented by Carson did not satisfy the legal requirements—set forth by our Supreme Court in *Rakestraw*—necessary to prove a work-related injury. *Rakestraw* interpreted a since-amended version of MCL 418.301(1); however, as explained further below, the interpretation in *Rakestraw* remains binding. MCL 418.301(1) provides that workers' compensation benefits shall be paid to an employee who "receives a personal injury arising out of and in the course of employment by an employer who is subject to [the WDCA] at the time of injury," and it further provides that a personal injury under the WDCA is "compensable if work causes, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury." Application of MCL 418.301(1), as interpreted by *Rakestraw*, required Carson to prove that his injury was medically distinguishable from any preexisting medical conditions, i.e., from any pathology that existed prior to the injury. Yet, the magistrate's factual finding that Carson had met that burden made no attempt to show that Carson had satisfied that legal standard. Instead, the magistrate found:

> From both my review of the exhibits and the Plaintiff's testimony (who I again found to be perfectly credible) I think it is clear that the Plaintiff had a work related personal injury. In addition to testifying at trial relative to the injury, Plaintiff's history in the various medical records, including Drs. Bleiberg, Sczencienski, Schrauben, and Mayer, was perfectly consistent. The records clearly establish that the Plaintiff told each doctor that on or around April 22, 2014 he was in the process of moving heavy parts when he picked up a large stabilizer t repair it when he heard a pop in his back and pain going down the leg with pressure in his back. He immediately told his supervisor who did nothing about it, and told another supervisor the following day who send [sic] him [to] Dr. Schrauben. The medical history relative to the mechanism of injury was consistent throughout the records. I find that Plaintiff did indeed sustain a personal injury arising out of and in the course of employment.

Analyzing the above findings, the MCAC determined that the magistrate's path through the evidence only showed that an incident occurred on April 22, 2014, not that an injury occurred on that day. Because the magistrate's factual findings were insufficient to satisfy the legal requirements, the MCAC applied the standard of review set forth in MCL 418.861a(3) and determined that the magistrate's findings were not based upon competent, material, and substantial evidence.

Thereafter, having determined that the findings were insufficient, the MCAC engaged in limited, permissible fact-findings by reviewing the evidence that the magistrate found credible and determining that it showed a preexisting condition (as reflected by the MRI and the discogram), but that there was no evidence that the alleged injury was medically distinguishable from that preexisting condition. In this regard, it bears repeating that the MCAC is permitted to engage in *limited* factfinding. *Omer*, 332 Mich App at 133. Specifically, MCL 418.861a(13) requires the MCAC's review of the evidence to "include both a qualitative and quantitative analysis of that evidence in order to ensure a full, thorough, and fair review." And, MCL 418.861a(14) provides that findings of fact by the MCAC "acting within its powers, in the absence of fraud, shall be conclusive." If the MCAC had no fact-finding powers, then there would be no need for its factual findings to be conclusive in the absence of fraud. Thus, as recognized in *Omer*, 332 Mich App at 133 and by our Supreme Court in *Mudel*, 462 Mich at 699-700, the MCAC may substitute its own factual findings for those of the magistrate "when a 'qualitative and quantitative' analysis of the record yields a different result. We conclude that in this case, where the magistrate did not make factual findings sufficient to satisfy the legal requirements and where the MCAC deferred to the magistrate's credibility determinations, the MCAC's factual findings were appropriately made.

In sum, the MCAC correctly applied the standard of review in MCL 418.861a(3), and then engaged in permissible, but limited fact-finding in accordance with MCL 418.861a(13). Carson's claim of error is without merit.

2. APPLICATION OF THE LEGAL STANDARDS IN MCL 418.301(1)

Next, Carson asserts that the MCAC misapplied the relevant legal standards when determining that he failed to demonstrate a work-related injury. More specifically, he contends that the inquiry as to whether an employee sustained a compensable personal injury is governed by MCL 418.301(1), which was amended in 2011,[7] and not by *Rakestraw*, which was decided in 2003. Yet, as explained by our Supreme Court in *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016), this Court remains bound to follow its interpretation of a since-amended statute unless the intervening amendment "clearly . . . superseded" the Supreme Court's interpretation. In *Rakestraw*, our Supreme Court held that to be eligible for workers' compensation benefits, "an employee must establish that he has suffered 'a personal injury arising out of and in the course of employment.' " *Rakestraw*, 469 Mich at 225, quoting MCL 418.301(1). The Court explained that "symptoms such as pain, standing alone, do not establish a personal injury under the statute. Rather, a claimant must also establish that the symptom complained of is causally linked to an injury that arises 'out of and in the course of employment' in order to be compensable." *Id*. Furthermore, "when an employee claims to have suffered an injury whose symptoms are consistent with a preexisting condition, the claimant must establish the existence of a work-related injury that extends beyond the manifestation of symptoms of the underlying preexisting condition." *Id*. at 117 (quotation marks and citation omitted).

Under the version of MCL 418.301(1) that was applicable when *Rakestraw* was decided, the claimant was not required to prove that his or her injury was "medically distinguishable" from a preexisting condition. See *id*. at 231. Yet, the *Rakestraw* Court nevertheless imposed such a

[7] See 2011 PA 266.

requirement, holding that "a claimant attempting to establish a compensable, work-related injury must prove that the injury is medically distinguishable from a preexisting nonwork-related condition in order to establish the existence of a 'personal injury' under § 301(1)." *Id*. at 222. Given that both *Rakestraw* and the current version of MCL 418.301(1) require the claimant to prove that his or her injury is medically distinguishable from a preexisting condition, we conclude that the since-amended statute does not clearly supersede *Rakestraw*, so this Court—and the MCAC—remain bound by the Supreme Court's interpretation of MCL 418.301(1) set forth in *Rakestraw*. As a result, we discern no legal error in the MCAC's decision to apply *Rakestraw*.

Next Carson argues that *Rakestraw* was inapplicable because he did not have a preexisting condition. The MCAC, however, noted that a December 22, 2014 discogram found degenerative changes at L2-L3 and L3 and L4, and that a June 12, 2014 MRI of Carson's back revealed mild degenerative disc disease at L3-4, L4-5, and L5-S1. It stated that "the degenerative changes were pre-existing the incident of April 22, 2014, since they were discovered by MRI less than two months after the incident." Because the June 12, 2014 MRI is competent evidence to support the MCAC's finding, we must accept that finding of a pre-existing condition as conclusive. See *Mudel*, 462 Mich at 701; MCL 418.861a(14).

On appeal, Carson asserts that his degenerative disc disease was not a preexisting condition because he had no symptoms, i.e., back pain, associated with that condition prior to the alleged date of his work-place injury. Whether his degenerative back disease was a preexisting condition within the meaning of the WDCA is a question of law, so we may review it. See MCL 418.861a(14). However, we discern no basis in the WDCA for Carson's claim that a preexisting condition only exists if the claimant experienced symptoms related to that condition prior to the date of the injury. To support his claim, Carson directs this Court to an internet article defining pre-existing conditions as they relate to health insurance.[8] We decline to apply that definition, however. When interpreting a statute, the first step is to look to the language used by the legislature and, if "the plain and ordinary meaning of statutory language is clear, judicial construction is neither required nor permitted." *Pace v Edel-Harrelson*, 499 Mich 1, 7; 878 NW2d 784 (2016). Here, MCL 418.301(1) provides that "[a] personal injury under this act is compensable if work causes, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any *pathology that existed prior to the injury*." (Emphasis added). Here, under the plain and ordinary meaning of the statute, Carson's degenerative disc disease is a pathology that existed prior to the alleged injury in this case. Consequently, it is a preexisting condition within the meaning of the WDCA. Moreover, as noted in *Rakestraw*, the claimant must prove that an injury occurred at work; it is insufficient for a claimant to simply show that he or she first experienced symptoms of a condition while at work. See *Rakestraw*, 469 Mich at 232-233. Specifically, the *Rakestraw* Court rejected an interpretation of MCL 418.301(1) that would allow "a symptom of a condition that does not arise out of and in the course of employment, but that fortuitously manifests itself during the work day," to be compensable under the WDCA." Accordingly, we discern no legal error in the MCAC's decision to treat the degenerative disc

[8] Lisa Smith, Investopedia, *Health Insurance: Paying for Pre-Existing Conditions*, < https://www.investopedia.com/articles/pf/09/covering-medical-costs.asp > (accessed September 16, 2021).

disease as a preexisting condition despite Carson not reporting any symptoms associated with that condition prior to April 22, 2014.

Carson next asserts that even if his disc degeneration was a preexisting condition, he need not show that it is medically distinguishable from his work-related injury. In support, he directs this Court to a 2005 opinion by the MCAC. We declined to afford any weight to that decision however, as it is contrary MCL 418.301(1), which expressly requires proof that the work-related injury be "medically distinguishable from any pathology that existed prior to the injury."

Next, Carson asserts that he can demonstrate that his injury is, in fact, medically distinguishable from his preexisting condition. In support, he notes that in *Omer*, this Court held that "to prove disability a claimant need not even hire an expert." *Omer*, 332 Mich App at 143; see also *Stokes*, 481 Mich at 282 (stating that "there are no absolute requirements, and a claimant may choose whatever method he sees fit to prove an entitlement to workers' compensation benefits."). Both *Omer* and *Stokes*, however, were cases addressing whether a claimant could establish disability under the WDCA, not whether the claimant could establish that he or she sustained a work-related injury. Moreover, although he directs this Court to evidence in the lower court record that he believes supports a showing that his injury was medically distinguishable from his preexisting degenerative disc disease, we are not permitted to make our own factual findings. Instead, our review of the MCAC decision requires that we treat the MCAC's factual findings as conclusive if there is *any* competent record evidence to support them. *Murdel*, 462 Mich at 701. Because the MCAC's finding is, in fact, supported by competent record evidence, we must treat it as conclusive.

In conclusion, based on our limited, judicial review of the MCAC's decision, we conclude that the MCAC did not err by applying *Rakestraw* and that its finding that Carson failed to demonstrate his alleged injury was medically distinguishable from his preexisting condition was supported by competent evidence. As a result, there is no basis for this Court to reverse the MCAC's decision that Carson failed to demonstrate a personal injury compensable under the WDCA.

3. RECOUPMENT

Having considered the first two issues raised in Carson's application for leave to appeal in this Court, we now turn to the Supreme Court's directive that we reconsider the issue of recoupment. We are cognizant that the Supreme Court order has directed us to "address the arguments presented by the parties in [the Supreme Court] with respect to that issue." *Carson*, 961 NW2d at 491.

On appeal, Carson argues that the MCAC's interpretation of MCL 418.222(3) is "plainly wrong." MCL 418.222(3) provides:

> (3) The application for mediation or hearing shall be as prescribed by the bureau and shall contain factual information regarding the nature of the injury, the date of injury, the names and addresses of any witnesses, except employees currently employed by the employer, the names and addresses of any doctors, hospitals, or other health care providers who treated the employee with regard to

> the personal injury, the name and address of the employer, the dates on which the employee was unable to work because of the personal injury, *whether the employee had any other employment* at the time of, or su*bsequent to, the date of the personal injury* and the names and addresses of the employers, and any other information required by the bureau. [Emphasis added.]

MCL 418.222(6) provides that "[t]he willful failure of a party to comply with this section shall prohibit that party from proceeding under this act." Carson contends that the proper interpretation of "employment" in MCL 418.222(3) does not include unpaid volunteer work. We decline to reach the issue because whether Carson violated or did not violate MCL 418.222(3) has no bearing on whether defendants are entitled to recoupment.

An employer or carrier may file an action to recoup workers' compensation benefits that are overpaid to an employee. See *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 559; 710 NW2d 59 (2005). Here, given that Carson did not meet his burden of demonstrating a work-related injury as required by MCL 418.301(1), he was not entitled to the payment of any workers' compensation benefits, so all the benefits that he received constituted an overpayment of benefits. As a result, without regard to whether he violated or did not violate MCL 418.222(3), there was a legal basis for defendants' recoupment action. But see MCL 418.833(2) (imposing a one-year-back limitation on an employer or carrier's right to recover in an action for recoupment).

Carson also argues that the MCAC's recoupment decision was unrelated to a finding of employee-fraud and was instead dependent solely upon a finding that he violated MCL 418.222(3). We disagree. In its opinion, the MCAC held that even if it had not reversed the magistrate's determination that Carson had established a work-related injury under MCL 418.301(3), it "*would have been compelled to reverse based upon plaintiff's failure to comply with MCL 418.222 . . . .*" (Emphasis added). Thus, the MCAC viewed Carson's alleged failure to comply with MCL 418.222(3) as a bar to his ability to recover workers' compensation benefits under the WDCA, not as a reason for permitting defendants to recoup overpaid benefits.

It was only after the MCAC discussed this alternate basis for reversing the magistrate's determination that Carson was entitled to benefits under the WDCA that the MCAC addressed whether defendants' petition for recoupment had been properly denied by the magistrate. In that section of the opinion, the MCAC found that Carson committed fraud by failing to disclose to his doctors, therapists, and vocational experts that he had been engaged in lawn-care work. This finding of fraud was not dependent upon whether Carson received monetary compensation for his labor; rather, it was dependent upon him representing to multiple healthcare professionals that he was incapable of performing any work despite the fact that he was performing physical labor on an ongoing basis for his brother's business. Given that the finding of fraud was unrelated to whether or not Carson complied with MCL 418.222(3) by reporting all "employment" subsequent to his injury, we decline to adopt Carson's interpretation of the MCAC's opinion as being limited solely to a finding that he violated MCL 418.222(3). Instead, we must analyze whether the MCAC's determination that recoupment was warranted because Carson committed fraud is impacted by the *Fisher* Court's rejection of *Whirley* and its employee-fraud requirement).

Whirley required an employer or insurance carrier seeking recoupment of overpaid workers' compensation benefits to prove that the employee obtained those benefits by engaging in fraud. *Whirley v JC Penney Co, Inc,* 1997 Mich ACO 247. In *Fisher*, 329 Mich App at 561, however, this Court rejected the employee-fraud requirement set forth by the MCAC in *Whirley.* Consequently, *Whirley*'s employee-fraud requirement is no longer a limitation on an employer or carriers right to recoup workers' compensation benefits.

Fisher was decided after the MCAC reached its decision in this case. As a result, in our prior opinion, we evaluated whether *Fisher*'s rejection of the employee-fraud requirement from *Whirley* should be applied retroactively. We noted that the principles regarding the retroactive application of caselaw were set forth in *Clay v Doe*, 311 Mich App 359, 362-363; 876 NW2d 248 (2015), which held:

> "Generally, judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved." *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620, 722 NW2d 922 (2006). "A court may limit the retroactive effect of a judicial decision . . . if 'injustice might result from full retroactivity.' " *People v Quinn*, 305 Mich App 484, 489, 853 NW2d 383 (2014), quoting *Pohutski v City of Allen Park*, 465 Mich 675, 696, 641 NW2d 219 (2002). In making a decision whether to apply caselaw retroactively, a court looks to: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Quinn*, 305 Mich App at 489 (citation and quotation marks omitted). In a civil suit, the court also looks to "whether the decision [to be applied retroactively] clearly established a new principle of law." *Pohutski*, 465 Mich at 696.

See *Carson*, unpub op at 5. We concluded that *Fisher* did not create a new principle of law or overrule binding caselaw, that the *Fisher* Court examined the statutory language and recognized that the only legislatively-imposed restriction on recoupment was set forth in MCL 418.833(2), and that there were no changes in the statutory language between the time when *Whirley* was issued and when *Fisher* recognized that there was no legal basis for the employee-fraud requirement from *Whirley*. *Carson*, unpub op at 5. Consequently, we applied the general principle that gives "judicial decisions . . . full retroactive effect" and we applied *Fisher* retroactively. *Id*., quoting *Doe*, 311 Mich App at 364. We continue to find our analysis regarding the retroactive application of *Fisher* to be correct. Accordingly, as relevant in this case, we will apply *Fisher* retroactively.

Furthermore, on reconsideration of the issue of recoupment, we once again conclude that because an employer or carrier may recoup overpaid or improperly paid workers' compensation benefits from an employee without regard to whether that employee obtained the benefits as a result of fraud, the issue of whether the MCAC erred by finding Carson's actions fraudulent is moot. See *id*., quoting *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000). As in our prior opinion, we affirm the MCAC's reversal of the magistrate's opinion and order denying Bandit Industries' claim for recovery of benefits overpaid to Carson, and we remand for calculation of the amount Bandit Industries may recoup from Carson On remand, the MCAC shall determine the proper amount of overpaid benefits that Bandit Industries may recover from Carson, taking care to apply the one-year restriction in MCL 418.833(2). The

parties may raise other issues relevant to the calculation of the amount Bandit Industries may recover in its recoupment action.

Affirmed and remanded for calculation of the amount Bandit Industries may recoup from Carson. We do not retain jurisdiction. No taxable costs are awarded. MCR 7.219(A).

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ James Robert Redford