

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

DAVID J. CARTER,
PLAINTIFF,

V

DOCKET #06-0034

SOUTHWEST STANDARD SERVICE, A/K/A/
SMITTY'S SOUTHWEST AMOCO,
CASUALTY RECIPROCAL EXCHANGE (INSOLVENT)/
MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION;
COTTAGE INN PIZZA OF GRAND BLANC,
MSX INTERNATIONAL, INCORPORATED AND
FEDERAL INSURANCE COMPANY;
SECOND INJURY FUND (DUAL EMPLOYMENT PROVISION),
DEFENDANTS.

APPEAL FROM MAGISTRATE HARRIS.

JAMES W. SMITH FOR PLAINTIFF,
MICHAEL J. RONEY FOR SMITTY'S SOUTHWEST AMOCO AND
CASUALTY RECIPROCAL EXCHANGE/MICHIGAN PROPERTY AND
CASUALTY GUARANTY ASSOCIATION,
DENISE L. CLEMMONS FOR MSX INTERNATIONAL
FEDERAL INSURANCE COMPANY,
DENNIS J. RATERINK FOR SECOND INJURY FUND
(DUAL EMPLOYMENT PROVISION).

OPINION

GRIT, COMMISSIONER

Defendants Southwest Standard Service, a/k/a/ Smitty's Southwest Amoco (Smitty's) and Casualty Reciprocal Exchange (Insolvent)/Michigan Property & Casualty Guaranty Association and the Second Injury Fund both filed timely appeals of Magistrate Harris' opinion and order, mailed January 30, 2006, granting an open award of benefits for a left upper extremity injury.

The magistrate found the plaintiff suffered a specific event injury on May 10, 2001, while working for Smitty's. On May 10, 2001, Smitty's was insured by Casualty Reciprocal Exchange, (CRE) a now insolvent carrier. Michigan Property & Casualty Guaranty Association

(MPCGA) became obligated to cover the bankrupt carrier's claims. Because Mr. Carter had three jobs at the time he was injured, and because he earned 80% or less of his average weekly wage at Smitty's, the Second Injury Fund-Dual Employment Provision, (SIF) was brought into the litigation. The magistrate ordered Michigan Property & Casualty Guaranty Association to pay benefits and the SIF to reimburse MPCGA 64.4% of the weekly indemnity payments.

MPCGA agrees the magistrate properly found the SIF was responsible to reimburse MPCGA for part of the wage loss benefits. MPCGA appeals the decision arguing the magistrate erred by:

- Finding the plaintiff was unable to return to work at MSX Corporation and/or Cottage Inn Pizza.
- Failing to find the plaintiff unreasonably refused reasonable employment offered by Smitty's.
- Failing to compel production of plaintiff's relevant income tax records.
- Failing to grant an offset for post-injury earnings.
- Miscalculating the average weekly wage and compensation rate.

The SIF appeals, arguing the magistrate erred by holding MPCGA eligible for reimbursement by the SIF and by ignoring the stipulations on the plaintiff's tax filing status and dependency.

We remand to allow for the production of the properly subpoenaed income tax records. If the income tax records reveal the wage calculations were incorrect, the magistrate is directed to make the appropriate findings on remand. In addition, we ask the magistrate to make a determination of whether or not the tax records reflect wages from the University of Michigan in the years 2003 or 2004, and if so, to order the appropriate offset. On remand the magistrate should determine if the tax records would change his findings on disability. We modify the order to reflect the correct tax filing status of single. We also modify the order to reflect zero dependents. On all other issues we affirm the magistrate's decision.

Case Summary

At the time of the injury Mr. Carter was working part-time at Smitty's, a towing service/garage/gas station, running a cash register, answering the telephone, stocking the cooler and helping the mechanic with simple tasks. Mr. Carter injured his left shoulder and arm on May 10, 2001, while under a car hoist, pushing on a bar, trying to pry off a rusted bolt. He had the sudden onset of pain in his neck down his arm to his hand. He suffered an additional injury to the shoulder during physical therapy. He has since developed a winged scapula secondary to a long

thoracic nerve injury. He tried unsuccessfully to return to accommodated work at Smitty's on two or three occasions. On each occasion he lasted approximately one to one and a half weeks, before he was taken off work because of increased symptoms.

At the time of his injury, Mr. Carter also worked part-time as a delivery person for Cottage Inn Pizza and full-time as a technical analyst for MSX International (MSX), doing research for the automobile industry. Mr. Carter tried unsuccessfully to return to his jobs at MSX and Cottage Inn Pizza after his injury.

The magistrate found as a result of the injury, Mr. Carter was unable to return to his jobs at MSX, Cottage Inn Pizza or Smitty's. He also found the plaintiff was limited to lifting no more than one or two pounds with the left arm, could not perform repetitive activities, could not sit for any length of time due to muscle spasms and pain from the winged scapula and had restrictions against overhead work with the right arm. Given those findings, the magistrate did not believe the plaintiff could return to any relevant employment activities, including his accommodated work at Smitty's and his jobs at MSX and Cottage Inn Pizza.

The magistrate also found that the plaintiff was employed at more than one employer at the time of his injury and that the SIF was liable to reimburse Smitty's carrier, MPCGA, for a portion of the wage loss benefits. The SIF argued at trial, as it does on appeal, that MPCGA is not statutorily entitled to reimbursement.

Standard of Review

This appeal presents both legal and factual challenges to the magistrate's decision. We review issues of law de novo. With regard to a magistrate's factual findings, the Commission's statutory directive is to perform a qualitative and quantitative review of the evidence and affirm the findings of fact made by the magistrate when they are supported by competent, material and substantial evidence on the whole record. MCLA 418.861a (3) and (13); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000).

I.

The defendant argues the magistrate erred in finding the plaintiff was not able to return to his job as an analyst at MSX or as a delivery driver for Cottage Inn Pizza. The magistrate issued the following relevant findings:

CREDIBILITY: I find plaintiff to be a credible witness. I rely on his testimony regarding job duties, limitations due to pain and disability, and his prior employment history. There were a few areas where he could not recall things, particularly with regard to tax matters and specific dates, and in those instances where documentation provides a more precise date or a different figure than plaintiff provided, I rely on the documents. In all other respects I accept his testimony completely as credible and reliable. As to other witnesses, I find one

expert credible, Dr. Trachtman, and one not, Dr. Drouillard. See finding 3 below. I find Kayleen Smith to be credible. I find Mr. Henry credible. I find Ms. Thompson to be somewhat credible but did not rely on her testimony much because to the extent it conflicts with that of Mr. Carter, whom I find completely credible, I give more weight to Mr. Carter.

* * *

CREDIBILITY: In this case I found Dr. Trachtman's testimony credible. I found Dr. Drouillard's testimony not credible by and large. I found Dr. Drouillard's opinion that plaintiff had only a congenital scapular misalignment, and his opinion that plaintiff had learned to do a "party trick" by making his scapula stick out, to be absolutely absurd. What Dr. Drouillard described as a party trick was described by other, competent providers and examiners, variously as "the most high riding scapula I have ever seen....severe winging scapula on the left...paralysis of the serratus anterior"¹ and as "very winged, both out and elevated. The symmetry of the shoulders is off secondary to the elevation of the scapula. There does appear to be some atrophy of the deltoid, triceps and biceps on the left."² Given this clear conflict in opinions, and based on what I saw in the courtroom during trial as well, I can put no credence whatsoever to Dr. Drouillard's opinions and conclusions. Even with his shirt on, the winging of plaintiff's scapula is so profound that it was easily visible in the courtroom during trial without plaintiff doing any maneuver like Dr. Drouillard described.

* * *

DISABILITY: Plaintiff is disabled from performing any of his work duties with Smittys, with MSX, and with Cottage Inn Pizza, and there is no other employment available to him that he can currently perform given his physical condition, pain, and limitations or restrictions, directly resulting from the work injury of 5/10/01 at Smittys. I found plaintiff's testimony to be credible and reliable, and based on his testimony as well as the examination and cross-examination of the medical experts in this case I find plaintiff currently unemployable and disabled. He is currently unable to use his left upper extremity in any meaningful way. For all practical purposes he functions with one arm and can be seen in the videos using his right arm to open and close his driver's side car door. He did carry a soda bottle in the left hand at one point and move the screen door of the patio doors with the left hand, but the medical evidence is clear that he cannot lift more than a pound or two with that arm, and that any repetitive activity with it is also contraindicated. He also cannot sit comfortably for any length of time due to the muscle spasm and the grossly winged scapula. He is also restricted from any work overhead with his right arm. He can do only essentially one-handed

¹ Dr. A George Dass, Orthopedic Surgeon, report of October 12, 2001.

² Dr. Trachtman's deposition, pp. 20-21.

keyboarding activity. Realistically, there is simply no real job in the real world that plaintiff can currently do with his levels of pain and his physical restrictions. In making the above findings I am mindful that Dr. Trachtman testified that he thought plaintiff could deliver pizzas. However, the job of pizza deliveryman necessarily entailed getting the pizzas from an overhead shelf, operating a motor vehicle, delivering several pizzas at the same time, cleaning the walls and mopping the floors during non-delivery times, and other duties—all of which require the use of two arms to complete successfully, with the possible exception of driving his car. The job at MSX involved keyboarding and consulting large manuals, which could not be done without use of both arms and lifting beyond his lift restrictions. The jobs at Smittys all involved lifting or two-handed activity except for the telephone answering, and that entailed sitting on a stool which the doctor admitted was probably not good for plaintiff's back. Further, there is no job that plaintiff has performed in the past, or which he is currently qualified to perform based on education, training, experience, licensure or certification, that given his current limitations he could obtain and perform. His universe of jobs is that of essentially unskilled or semi-skilled jobs such as tow truck operator, pizza delivery, factory welding and light assembly, foundry labor, research and keyboarding activity, light mechanic work, stock clerk, and telephone order taker/gas attendant. Plaintiff's maximum reasonable earning ability is represented by his aggregated wages in this matter, approximately \$800 per week, if he works a work week nearly twice as long as the average worker. His maximum reasonable earning ability, per hour, is established by his wage with MSX, and is approximately \$11 per hour. [Magistrate's opinion pgs 23, 24, 25, 26.]

The defendant points out the plaintiff was able to return to work at MSX for three weeks post-injury, before he was taken off the job by his physician, Dr. Bitner. The defendant argues Dr. Bitner issued a note in November of 2001 stating the plaintiff could return to his sit down job at MSX.

Dr. Bitner did not testify. Dr. Bitner's November 2001 note authorizing a return to work at MSX stands in contrast to Mr. Carter's testimony regarding his ability to work at MSX and other medical evidence imposing much more severe limitations on the plaintiff's use of his left arm. The magistrate based his opinion that Mr. Carter was unable to return to work at any of his previous employments on the credible testimony of the plaintiff and his reasoned choice of medical evidence which supported Mr. Carter's claims.

The defendant argues the magistrate should have found the plaintiff could return to a job delivering pizzas because the defendant's vocational rehabilitation consultant identified pizza delivery as one of the potential areas of job development for the plaintiff. The testimony of the vocational rehabilitation counselor, Ms. Thompson, contradicts Mr. Carter's testimony regarding his ability to work as a delivery driver. The magistrate made it clear that while he found the testimony of the vocational rehabilitation counselor credible, when the vocational counselor's testimony conflicted with the testimony of Mr. Carter, he found Mr. Carter's "completely

credible” testimony controlling. [Magistrate’s Opinion and Order, p. 23.] We also note the vocational counselor did not take into account the fact that Mr. Carter’s narcotic drug use might impair his ability to drive.

The magistrate directly addressed the statements made by Dr. Trachtman which suggested the plaintiff could return to work delivering pizza. The magistrate noted the plaintiff was not able to use his left upper extremity in any meaningful way. As the magistrate pointed out, even in the surveillance videotape, the plaintiff is seen opening and closing his driver’s side car door with his right arm. The magistrate found as fact, that except while driving, the job as a pizza delivery person required the use of both arms.

We find the magistrate provided a full analysis on why the plaintiff was not able to return to work at MSX or to work delivering pizza. While we agree with the defendant that there are some facts that suggest the plaintiff could work in one or both of these jobs, the magistrate made a reasoned decision, based on the testimony he found persuasive. The magistrate’s decision is supported by the requisite evidence.

II.

The defendant alleges the magistrate erred in failing to find the plaintiff could return to reasonable employment with the defendant. The plaintiff argues reasonable employment was not reoffered to him after he was taken off work, and more importantly, that the job working at the counter, answering the phone and taking messages, sporadically providing full service to gasoline customers and stocking the cooler was not within the plaintiff’s capacity to perform and therefore, not reasonable employment. MCL 418.301(9).

We agree the plaintiff’s physical limitations, as outlined by the magistrate, support the conclusion that the accommodated employment the plaintiff was performing at Smitty’s was not within his physical capacity to perform. The magistrate noted the plaintiff was not able to sit comfortably for any length of time because of muscle spasms and his grossly winged scapula. The defendant points out it tried to make Mr. Carter more comfortable by providing a different stool. The defendant also questioned Mr. Carter’s level of impairment because he was able to make telephone calls from his own cell phone. Those facts, even if true, do not negate the validity of the magistrate’s finding. We believe the defendant argues its interpretation of the facts, rather than any error by the magistrate. While there is some record support for the defendant’s position that the plaintiff could perform the accommodated work at Smitty’s, the magistrate made a reasoned choice between conflicting testimony and his conclusions are supported by competent, material and substantial evidence.

III.

The defendant properly issued and served a subpoena for the plaintiff’s income tax returns for the years 2001 through 2004. The plaintiff testified he filed income tax returns

during those years. Despite finding that the records were relevant and that the defendant was entitled to the records, the magistrate issued his decision without those records.

The magistrate never quashed the subpoena for the production of the income tax returns. The record shows the magistrate recognized the relevance of the requested records and directed the plaintiff to produce the records. The magistrate felt if the records were not forthcoming by January 10, 2005, he would have to assume the tax returns did not exist so he would be able to render a decision before the end of his term. The following discussion took place at the second and third trial dates:

MR. DOUD: And, and with regards to H and R Block, as I, as I mentioned before we went on the Record, they, they did tell Mr. Carter that they would get the records to him before the trial today, but we still don't have them. They are on their way. We will be more than happy to give everybody a copy as, as soon as we get here and David did try to call a bunch of different numbers today, and he was also on the phone to the IRS today as well to try and get this matter resolved, but we will get them to the court as soon as he gets them.

MAGISTRATE HARRIS: Okay. Anything else before we do Cross-Examination then? The, the order is that Mr. Carter will sign an appropriate authorization for the records in Texas since they're not really subject to a Michigan subpoena, and we will set another date when we're done here today for limited purposes and those will be the purposes of Cross-examination with respect to the tax records and income issues and the matter of Texas. Okay. [Trial Transcript 2, pp. 7-8.]

* * *

Here is where we are on this case. My appointment as a magistrate expires on January 25, 2005. Realistically, for me to finish up the Record in this case and to make a decision, it would take at a, at a bare minimum having everything done and finished no later than January the 18th, 2005. I don't intend to, to hold another hearing that late, but simply to have everything submitted and in front of me by that date.

I am going to assume for purposes of this Record that as of January 10, 2006, if there are no tax returns available, that I am going to go ahead and figure up an average weekly wage. If the parties are unwilling to stipulate to a wage based upon what we have, I will receive written arguments on the wage as of that date, but for purposes of diving into this and getting a wage calculated, I am going to assume that no tax returns were filed. That's, that's really all I can do. I can, I can simply go ahead without whatever information would've been in those returns and, and just use the records that we have at hand.

It's my understanding we do have some - - we do certainly have some records from MXS. We have records from what appears to be the job at Cottage

Inn. Although it says Trips to Win, I think that's the, that's the entity. That would leave us only lacking information regarding tips that may have allegedly been earned at Cottage Inn, and I assume it would also deprive Mr. Cianciosi of an ability to ascertain whether there was some subsequent employment for which plaintiff has not been forthcoming, but for some odd reason may have filed it as part of his tax returns. I, I think that's highly unlikely, but I'm, I'm going to afford Mr. Cianciosi a, a opportunity to Cross-Examine the plaintiff regarding any of those types of, of contingencies, but as of that date, I'm going to, as I say, just deem this matter submitted for decision and, and proceed without the tax records.

So Mr. Carter, if what you're telling us is true, that you've been working on trying to get these and that you've con - - tried to contact H and R Block and you've tried to contact and have been in contact with the IRS, it would behoove you to re-establish those contacts and do anything that you possibly can to get those records. Okay? [Trial Transcript 3, pp. 6-8.]

The income tax returns were never produced and magistrate signed his decision on January 20, 2006, prior to the expiration of his term. The defendant appeals, arguing that the magistrate was more concerned with expedience than fairness. The defendant argues as follows:

Accordingly, the Magistrate's priority was not in conducting a fair Trial, but was merely to get this Decision written before the expiration of his appointment as a Magistrate. Although the Magistrate concluded in the foregoing that if the records were not produced than he would assume that no records were filed, and that was all that he could do. In fact, that was not all that he could do, the Magistrate could have easily compelled the production of the income tax records by suspending Trial until such time that those records were received.

The failure of these records to be provided clearly impacts the accuracy of the Magistrate's determination of an average weekly wage. Moreover, in accordance with *Nessel v Schenck*, 2003 ACO 272, because *Sington, Supra* places a claimants qualifications, training and pre-injury wage earning capacity at the forefront of the disability determination, we believe some manner of Pretrial discovery to orderly and expeditious disposition of claims. We further believe that the bench and bar will benefit from the full exploration of the knee and scope of such discovery. In addition, the Workers' Compensation Appellate Commission determined that the elements of proof in *Sington* make it critical to develop Plaintiff's qualifications and training, as well as the medical limitations and how those limitations effect Plaintiff's ability to find work and earn wages. [Smitty's brief, pp. 17, 18.]

* * *

In the instant case, the Magistrate unreasonably denied access to this information based upon his own convenience, rather than judicial prudence.

To this date, the income tax records as promised by Plaintiff's counsel have yet to be produced. The failure of disclosure of these records clearly places the cloud of suspension over claimants own testimony. Additionally, the Magistrate's failure to act in a more assertive manner to compel production of these documents before the conclusion of Trial has clearly resulted in undue prejudice against Defendants. Clearly, the Magistrate is in a position to suspend Trial in order to compel the Plaintiff to produce the records that were sought by way of subpoena, such as suspension and/or adjournment of the proceedings would not have prejudiced any party. . . .

* * *

At a very minimum this case should be remanded to allow Defendant the opportunity to obtain a copy of Plaintiff's tax records and to review those records in accordance with the criteria set forth in *Sington* as well as to determine whether or not modification of the calculations of Plaintiff's average weekly wage is warranted. [Smitty's brief, p. 18.]

The plaintiff argues that he did submit "tax records" prior to the close of proofs.³ The "tax records" the plaintiff eventually provided were not in compliance with the subpoena. We do not know what the records represent, but they are clearly not income tax returns. They appear to be printed pages from a computer data base, perhaps from the tax preparer.

We recognize the magistrate's diligence and commitment fueled his determination to issue the decision prior to the end of his term. We also recognize the parties put the magistrate in a bind by not requesting the records earlier in time and by not producing the records once subpoenaed. However, we believe by not requiring the production of the subpoenaed tax returns, the magistrate erred. The magistrate proceeded as if no tax returns had ever been filed, which was contrary to the plaintiff's own testimony. The magistrate knew the documents existed and that they were potentially relevant. If the documents were lost or somehow unattainable, the magistrate's decision to proceed without them would not have been in error. However, these are tax returns, and it is highly unlikely the tax preparer, H & R Block, or the IRS, have lost Mr. Carter's income tax returns.

We remand for production of the plaintiff's subpoenaed 2001 through 2004 income tax returns. The magistrate shall re-open the record and admit the tax returns. The magistrate may take relevant testimony on the issues of the average weekly wage and disability, if warranted by the records. In his remand opinion, the magistrate should address whether the income tax returns alter his findings on the average weekly wage or disability.

³ The magistrate identifies these records in his opinion as Exhibit #11, although the copy of the records in the file is not marked.

IV.

The defendant received records from the University of Michigan, showing the plaintiff was employed from September of 2003 to April of 2004 in a work study program. The plaintiff denied he had ever worked for the University of Michigan. He testified he had to drop out of school in the fall of 2003 because of his complaints of pain. The defendant sought the IRS records addressed above to reconcile this conflict. The defendant contends if the plaintiff earned wages from the University of Michigan, it is entitled to an offset for those wages. In addition, the defendant argues that if the plaintiff was able to work in an office setting at the University of Michigan, it might impact on the magistrate's finding that he was unable to work at MSX in an office setting.

On remand the magistrate should determine if the tax records show any earnings from the University of Michigan, and if so, address the issues raised by the defendant in its appeal.

V.

Both MPCGA and the SIF appeal, alleging the magistrate erred in finding the plaintiff's tax filing status was married, filing joint and that he had two dependent children. At trial the defendants did not stipulate to the plaintiff's tax filing status or dependency. [Trial Transcript 1, p. 9.] At the start of his written opinion, the magistrate incorrectly summarized the parties' stipulations as including an agreement that the tax filing status was single and there were no dependents. [Magistrate's Opinion and Order, p. 2.] In his findings and on the green sheet order, the magistrate listed the plaintiff's IRS filing status as married, filing joint with two dependent children. [Magistrate's Opinion and Order, p. 29.]

The defendant SIF argues the magistrate was bound by the "stipulation" that the plaintiff's IRS filing status was single with no dependents. The transcript makes it clear the parties did not stipulate on the plaintiff's IRS filing status or dependency. We agree with the plaintiff that because there was no stipulation on these issues, the magistrate was free to make a determination on the plaintiff's IRS filing status and any claimed dependents.

While the magistrate was not bound by stipulations on the IRS filing status and dependency issues, he did err when he determined the plaintiff's IRS status was married filing joint and that he had two dependent children. The magistrate erred by granting the plaintiff a higher weekly rate than he was entitled to based on his IRS filing status at the time of the injury.⁴ The IRS filing status is determined as of the date of the injury, May 10, 2001. The plaintiff was not married until April of 2004. [Trial Transcript 2, p. 60.] The Court of Appeals has held that a marriage after an injury cannot be the basis for an increase in the weekly compensation rate. In *Schambers v National Redi Mix, Inc.* 244 Mich App 546, 551 (2001), the Court stated:

⁴ There were no proofs on the plaintiff's IRS filing status at the time of the injury. Accordingly we assign an IRS filing status of single.

This Court's function is to apply statutory law in the manner intended by the Legislature, as expressed in the language of the statutes. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402-403; 605 NW2d 300 (2000). Because we can find no clear statutory authorization for changing weekly wage-loss benefits as a result of a change in a claimant's marital or tax filing status, we hold that the WCAC erred in affirming the magistrate's order in this regard.⁵

The magistrate's finding on dependency cannot stand. There was no testimony that the plaintiff had minor children. Although we found a reference in the medical testimony that suggested the plaintiff had children⁶, we do not know if the children lived with Mr. Carter at the time of his injury or any time afterwards. We do not know if the children lived apart from Mr. Carter and if he provided support. The record does not support a finding that the children were conclusive dependents, because the record does not address where the children lived at any relevant point in time. The record does not support a finding of dependency in fact, because we do not know if Mr. Carter supported the children. MCL 418.354. The magistrate's findings on dependency are not supported by competent, material and substantial evidence.

We modify the order to reflect an IRS filing status of single with no dependents. The rate shall be adjusted to reflect the modification.

VI.

The last issue presented is whether or not the SIF must reimburse MPCGA for a portion of the wage loss benefits. MPCGA believes the magistrate was correct in ordering reimbursement. The SIF takes the position that the MPCGA does not meet the definition of an "insurer" under the Act and therefore is not entitled to reimbursement. The SIF also takes the position that reimbursing MPCGA is not consistent with the overall statutory scheme of the Workers' Disability Compensation Act and is not specifically authorized by statute. In the alternative, the SIF argues we should be persuaded by public policy reasons to deny reimbursement to the MPCGA.

We believe the magistrate made the correct decision in determining that the SIF had to reimburse MPCGA. The magistrate made the following relevant findings, which we adopt as our own, pursuant to MCL 418.861(a)(10):

COMPENSATION AND DUAL EMPLOYMENT ISSUES: Plaintiff is entitled to disability benefits payable under Section 418.372 of the Act since the wages in his Smittys employment were less than 80% of plaintiff's total average weekly wage. Under that statute, the "insurer or self-insurer is liable for that portion of the employee's weekly benefits as bears the same ratio to his or her total weekly

⁵ See also *Bullard v Golden Basket Family Restaurant*, 2004 ACO 82 and *Perryman v DaimlerChrysler*, 2004 ACO 38.

⁶ Dr. Trachtman's deposition, p. 18.

benefits as the average weekly wage from the employment which caused the personal injury or death bars to his or her total weekly wages.” And, the second injury fund is “separately but dependently liable for the remainder of the weekly benefits. The insurer or self-insurer has the obligation to pay the employee or the employee’s dependents at the full rate of compensation. The second injury fund shall reimburse the insurer or self-insurer quarterly for the second injury fund’s portion of the benefits due to[sic] employee....” Using this language, the SIF argues vigorously that since it is only obligated to reimburse an insurer or self-insured, and since the MPCGA is neither an insurer or self-insured, it has no separate but dependent liability in this case for any share of the disability benefits.

The SIF cites the case of *Sharpe v Angora Enterprises*, 185 Mich App 32, 460 N.W. 2d 261 (1990), asserting that it is directly on point. MPCGA cites MCL 500.7931 (2) which provides that MPCGA “shall be a party in interest in all proceedings involving a covered claim and shall have the same rights as the insolvent insurer would have had if not in receivership, including the right to appear, defend and appeal a claim in a court of competent jurisdiction; to receive notice of, investigate, adjust, compromise, settle, and pay a covered claim; and to investigate, handle and deny a non-covered claim.” MPCGA also cites case law, from Louisiana, *Louisiana Insurance Guaranty Association v State of Louisiana Worker’s Compensation Second Injury Board*, 552 So. 2d 805 (1989). That case reaches a contrary result to the *Sharpe* decision.

The Michigan Property and Casualty Guaranty Act of 1956 was enacted for the primary purpose of protecting the public against financial losses of policyholders or claimants due to the insolvency of insurers.⁷ The SIF, created by amendments to the 1912 worker’s compensation act, was created in a similar timeframe, 1955 and 1956. The SIF, as was the MPCGA, was created as a “scheme that spreads the risk of worker’s compensation among all the self-insured employers and carriers” in certain specified situations.⁸ In fact, as the Fund admits in its brief, the Fund is funded through assessments of self-insurers and insurers. Those insurers are, of course, the member companies of MPCGA.

Without doubt, had CRE not become insolvent, the Fund would be liable for its appropriate share of the dual employment benefits under the Act. Without a doubt, had Smittys not been insured, the Fund would not be liable—since Smittys would not have been legally operating under the Act as either a qualified self-insurer or and insured—based upon the holding in *Sharpe*, supra. Here, though, the facts are not those of the *Sharpe* case. In *Sharpe*, Angora was not operating legally under the framework of the WDCA.⁹ Rather, it was uninsured. Thus, it never contributed to the costs of the system, or of the administration of the SIF

⁷ *Yetzke v Fausak*, 194 Mich 414 (1992).

⁸ *McAvoy v HB Sherman Co*, 401 Mich 419 (1977).

⁹ Workers Disability Compensation Act.

through assessments, and for excellent policy reasons had no right to expect relief from a judgment through the SIF. True, the plaintiff bore the brunt of the *Sharpe* ruling, but there were excellent policy reasons why the SIF should not have been liable. Here, there are no such reasons. To hold as the SIF argues here actually relieves the SIF of an obligation they would clearly be required to pay had CRE not gone insolvent. The MPCGA member companies would bear the entire cost of a judgment that was intended to be spread amongst all the members of the workers compensation system who are assessed to fund the SIF.¹⁰ Those include not only the MPCGA members, but a host of self-insurers too. Those self-insurers are not members of the MPCGA it would appear. I hesitate to use the term “windfall” here, but it comes close to describing the financial outcome to SIF if its arguments prevail here.

Construing the two statutory provisions¹¹ *in pari materia* and considering the purposes of the language in both provisos, I find that the SIF shall reimburse MPCGA the dual employment benefits it is assessed under this award, that the MPCGA is entitled to this because it is in all respects acting and operating under the Act as an insurer, deriving its powers and duties to do so from MCL 500.7931. I can read the plain language of both statutes, and it appears that the clear intent is that if there is or was a qualified self-insurer or insurer, the SIF shall reimburse them appropriately and quarterly. It also appears that the sentence requiring the SIF to pay quarterly and to the insurer or self-insured was primarily to make clear that the SIF is “dependently liable” and is not to be put to the task and additional expense of making weekly benefits directly to injured workers.

As I close this discussion of the issues between SIF and MPCGA I want to make it clear that I believe the *Sharpe* case is distinguishable both factually and legally, and that I did not rely on the Louisiana decision cited by MPCGA, though I did read it. Relying on precedent from another jurisdiction, given the arcane and unique nature of each state’s system, is at best risky business. I have considered the balance of the arguments made by SIF in its well-written brief, and I find them wholly without merit. [Magistrate’s opinion and order pgs 26-29.]

The MPCGA was created by statute as part of the insurance code. MCL 500.7901. The MPCGA is made up of member insurance companies and is funded by assessments against the member insurance companies. When one of the member insurance companies goes bankrupt, the MPCGA steps in to pay the covered claims the bankrupt insurance company cannot pay. MCL 500.7931(1).

¹⁰ The Second Injury Fund (Dual Employment Provision) was enacted in 1980 in response to *Beuhler v University of Michigan*, 277 Mich 648 which awarded benefits only for the part-time employment in which plaintiff was injured. It is presumed that the legislative intent was that plaintiff should be paid disability based upon the aggregate wage loss, but to force one carrier to pay the entire loss without reimbursement would unfairly penalize the carrier whose rates were set based on wages earned and type of employment insured.

¹¹ MCL 418.372 and MCL 500.7931(2).

We start by pointing out the matters that are not in dispute. No one disputes Casualty Reciprocal Exchange (CRE) was Smitty's workers' compensation carrier when Mr. Carter was injured on May 10, 2001. No one disputes that CRE was a member insurance company of the MPCGA. Likewise, no one disputes that MPCGA is obligated to pay the award of benefits to Mr. Carter.

No one disputes the magistrate's calculations regarding the proportion of the average weekly wage Mr. Carter earned at his employments with Smitty's, MSX and Cottage Inn Pizza. No one disputes that at the time of his injury, Mr. Carter earned "80% or less" of his average weekly wage at Smitty's. No one disputes the plain language of the statute that provides when a claimant earns "80% or less" of his average weekly wage at the "employment that caused the personal injury," the SIF is triggered. MCL 418.372(1)(b). No one disputes that if CRE was still solvent, it would be entitled to reimbursement from the Dual Employment Provision of the SIF for the portion of Mr. Carter's weekly compensation rate that bears the same ratio as his earnings from MSX and Cottage Inn Pizza.

The SIF rests its argument on the statutory language in Section 372(2) which provides the SIF will "reimburse the insurer or self-insurer," for the SIF's "portion of the benefits due." The SIF argues that the MPCGA is not an *insurer* or *self-insurer*, and therefore not entitled to reimbursement from the SIF.

MPCGA responds by pointing out that it steps into the shoes of the insolvent CRE and has the same right to reimbursement CRE would have had, *if* CRE were still solvent. The SIF responds by arguing that the Insurance Commissioner revoked CRE's right to conduct business in Michigan in July of 2003, after CRE became insolvent. The SIF argues once CRE lost its authority to conduct business in Michigan, it was no longer an "insurer" and therefore neither CRE nor the MPCGA are entitled to reimbursement by the SIF.

Like the magistrate, we find no merit in the arguments raised by the SIF. We believe the plain language of the statute addresses the issues raised by the SIF. The insurance code provides that MPCGA:

...shall be a party in interest in all proceedings involving a covered claim and shall have the same rights as the insolvent insurer would have had if not in receivership..." MCLA 500.7931(2).

By the clear terms of the statute, MPCGA steps into the shoes of the insolvent CRE, as if CRE were still solvent. It is irrelevant that CRE has since lost permission to conduct business in Michigan. What does matter is that CRE was a member insurance company of MPCGA and that CRE was Smitty's workers' compensation carrier for the May 10, 2001 injury date.

MPCGA's current position is bolstered by a case it lost in the Court of Appeals, *Attorney General ex rel Insurance Commissioner v Michigan Property & Casualty Guaranty Association*

80 Mich App 653 (1978). In the above case, MPCGA tried to duck its obligation to pay the claims of insolvent insurance companies, by making the same argument the SIF makes in Mr. Carter's case. In *Attorney General*, MPCGA argued that because the insurance companies were no longer authorized to conduct business in Michigan when the receivership was appointed, the insurance companies were neither "member insurers" or "insolvent insurers," and therefore MPCGA was not obligated to pay the claims.

While there have been some minor changes in the statutory language since *Attorney General* was issued, we find the case on point. The Court of Appeals found whether or not the insolvent insurance company had since lost the State's permission to conduct business was irrelevant. The Court stated:

...(T)he significant temporal reference, for purposes of the present issue, is the effective date of the act. In other words, if, after the act's inception, an insurer had ever been authorized to transact insurance business in Michigan and subsequently had a receiver appointed for it, the Association's duty to pay covered claims...is thus invoked. **Hence, that such an insurer may have been stripped of its authority to transact business prior to the receiver's appointment is of no moment.** [pp 659-660, emphasis provided, footnote omitted.]

We believe, as did the magistrate, that the *Sharpe* case, heavily relied on by the SIF, is not on point. In *Sharpe*, the Court of Appeals held the SIF was not obligated to reimburse a claimant directly, because the claimant was not an insurer or self insurer. The decision in *Sharpe* noted the statute made the SIF "separately but dependently liable" to an insurer or self-insurer, but that the SIF was not obligated to make payments to a claimant directly. The *Sharpe* case does not provide us with the narrow definition of an "insurer" or "insolvent insurer" that the SIF urges us to adopt in this case. As the magistrate pointed out, the uninsured employer in *Sharpe* was not in compliance with the Act at the time of the injury. The plaintiff in *Sharpe* was not able to circumvent the employers' uninsured status by collecting directly from the SIF. In contrast, Smitty's and CRE were in compliance with the Act when Mr. Carter suffered his injury. It was not until sometime later that CRE became insolvent and lost its right to conduct business in Michigan.

Finally, we dismiss the SIF's argument that public policy considerations compel a finding against the MPCGA. We direct the parties again to the magistrate's excellent discussion on the public policy issues. The SIF should not enjoy a windfall because MPCGA's member insurer, CRE, lost its right to conduct business in Michigan. The SIF urges us to find it has less liability (zero) than it would have if CRE were still solvent or still authorized to conduct business in Michigan. We believe SIF's public policy arguments lack common sense and have no merit.

Conclusion

We modify the order to reflect an IRS filing status of single with no dependents. We remand for introduction of the plaintiff's 2001 through 2004 tax returns. On remand the magistrate is to determine if the calculation on the average weekly wage is correct based on the income tax returns. In addition, the magistrate should determine whether the tax records change his findings on disability.

We affirm the magistrate's finding that the Second SIF must reimburse MPCGA 64.4% of the weekly indemnity rate.

Commissioner Will and Chairperson Glaser concur.

Donna J. Grit Commissioner

Rodger G. Will Commissioner

Martha M. Glaser Chairperson

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

DAVID J. CARTER,
PLAINTIFF,

V

DOCKET #06-0034

SOUTHWEST STANDARD SERVICE, A/K/A/
SMITTY'S SOUTHWEST AMOCO,
CASUALTY RECIPROCAL EXCHANGE (INSOLVENT)/
MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION;
COTTAGE INN PIZZA OF GRAND BLANC,
MSX INTERNATIONAL, INCORPORATED AND
FEDERAL INSURANCE COMPANY;
SECOND INJURY FUND (DUAL EMPLOYMENT PROVISION),
DEFENDANTS.

This cause came before the Appellate Commission on a claim for review filed by defendants Smitty's Southwest Amoco and Casualty Reciprocal Exchange/Michigan Property & Casualty Guaranty Association and Second Injury Fund (Dual Employment Provision) from Magistrate Michael T. Harris' order, mailed January 30, 2006, granting plaintiff benefits for a left upper extremity injury. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be remanded in part and affirmed in part and modified in part. Therefore,

IT IS ORDERED that the magistrate's order is remanded in part and affirmed in part. We remand for introduction of the plaintiff's 2001 through 2004 tax returns. On remand the magistrate is to determine if the calculation of the average weekly wage is correct based on the income tax returns. In addition, the magistrate should determine whether the tax records change his findings on disability and whether the plaintiff had earnings from the University of Michigan. We affirm the magistrate's finding that the SIF must reimburse MPCGA 64.4% of the weekly indemnity rate. We modify the order to reflect an IRS filing status of single with no dependants. The rate shall be adjusted to reflect the modification.

Donna J. Grit	Commissioner
Rodger G. Will	Commissioner
Martha M. Glaser	Chairperson