

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

RUTH UMLOR,
PLAINTIFF,

V

DOCKET #07-0195

AMICARE HOME HEALTH SERVICES WEST/
TRINITY HEALTH MICHIGAN,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE MCAREE.

MICHAEL P. SZCZYTKO FOR PLAINTIFF,
MARTIN L. CRITCHELL FOR DEFENDANT.

OPINION

GLASER, CHAIRPERSON

Defendant appeals the decision of Magistrate Timothy M. McAree, mailed on August 1, 2007, granting plaintiff an open award on a finding of work-related right upper extremity condition. We affirm the magistrate's decision.

This case was initiated by plaintiff filing an Application for Mediation or Hearing on June 6, 2006, seeking reinstatement of her workers' compensation wage loss benefits. She alleged continuing disability as a result of a July 3, 1996 trip and fall at work, which resulted in reflex sympathetic dystrophy and chronic right lateral epicondylitis. The magistrate concluded that plaintiff continues to suffer from the upper extremity condition which causes a limitation in her wage earning capacity. On appeal defendant does not contest the finding of a work-related condition, or that such condition prevents plaintiff from returning to her highest paying work at Amicare. It does, however, take issue with the magistrate's legal analysis and application of Section 301(5) of the Act.

The magistrate set forth the testimony and evidence presented at trial in his opinion. We reprint relevant portions of that evidence for reference:

The plaintiff grew up working on the family farm. She graduated from West Catholic High School in 1973. Upon graduation she worked as a nurse

assistant at the Beacon Nursing Home in Marne, Michigan, until 1975, when she quit to attend Junior College full-time. She completed an Associate Degree in Nursing at Grand Rapids Junior College in 1977.

Her first job upon graduation was with Metropolitan Hospital, then known as Osteopathic Hospital. She was hired as a team leader and within a month became a charge nurse, earning about \$8.00 at the start. She described working in the recovery room and developing a program for teaching patients about what to expect before, during and after surgery. She continued in this position until 1980 when her first child was born. [Magistrate's opinion, p 3.]

* * *

She then resumed work for staff relief agencies until 1990 when she became a full-time employee of the Cascade Care Center, which was a residential facility. She worked there as a charge nurse until May of 1993 when she left due to differences of opinion relative to ethical priorities and obtained her employment with the defendant.

At Amicare she worked as a case coordinator. She would assess patient needs, she would do lab work, she would notify doctors about patient's needs. She would arrange for various types of therapy to cover patient's physical, emotional and social needs. These were homebound patients, although some lived in assisted care facilities.

She began in Grand Rapids and then transferred to Muskegon where she assumed more duties. She would drive at least 100 miles per day. She would have to assist the transfer of patients from bed to chair et cetera. She did wound care, dealt with contractions and did lab work, which she later explained meant drawing blood or taking specimens to the hospitals for evaluation. [Magistrate's opinion, p 4.]

* * *

She eventually returned to work with restrictions and continued working with restrictions from sometime in 1996 until 2003. She had restrictions as to the number of hours she could work per day, the number of days she could work per week. She would not work more than three consecutive days. She also had limitations in terms of the number of admissions, discharges or other duties that required paperwork because the extra writing would cause flare-ups. She would only assist patients who were able to ambulate.

In 2003 she had a flare-up and was off work. She said Dr. Fitzgerald changed her medications, which prevented her from being able to drive. She missed too many days and was terminated. However, her workers' compensation benefits continued, other than the time when they were terminated and then an agreement was reached to pay them voluntarily again until May of 2006.

She has had no work in nursing subsequent to 2003, but did telemarketing work from January 2005 until mid-December 2006. She did telemarketing in her own home. She had her own computer and the company she worked for provided a second phone line. She said she would work 40 minutes and then rest 20 minutes and would do 80-150 telephone calls per day. She would look up businesses and document phone numbers, addresses and key personnel.

At some point they had her doing a lot of cutting and pasting of Microsoft office documents, which caused a flare-up. In December 2006 she said the employer, All Facilities, Incorporated, advised her to discontinue work as they were attempting to negotiate an extension of a work contract for a client that was expiring at the end of December. She said she later learned that that contract had not been renewed.

She said she has looked for subsequent work, both in the medical field and outside of the medical field looking in the Grand Rapids Press and looking at on-line job search sites, such as Monster.com. She says she is not able to do the work she did at Amicare because she cannot do extensive documentation, she cannot do the visits, she cannot operate laptop computers and she could not handle heavy patients or those unable to ambulate. She could not do CPR if it was necessary. Her job with the defendant Amicare paid \$24.00 an hour, which was the most consistent and highest paying job she ever had. [Magistrate's opinion, pp 4-5.]

* * *

She did concede that from August of 2002 through June 2003, if the records show that she worked four days a week and earned \$689.35, she could not confirm the exact amount, but did not disagree. She indicated she was earning \$23.00 to \$24.00 per hour working eight hours a day and four days a week. [Magistrate's opinion, p 6.]

* * *

Her work for All Facilities, Inc. paid her \$9.00 an hour, times 40 hours per week, although there were some weeks she would be paid less than that if she was ill or if Comcast Broadband Internet was off-line. She never applied for unemployment benefits. [Magistrate's opinion, p 6.]

* * *

As far as looking for work, she says she has asked friends in and out of the medical field and talked to temporary agencies, looked up sites on the computer, but has been unable to find any work.

She says Dr. Fitzgerald had her on a ten-pound limitation and she demonstrates by putting her arm out 90 degrees showing that she was not to move her arm more than 90 degrees.

She then says that she did attempt to call Ms. Krista and left messages with her after she was laid off in December of 2006, but never got a response. She no longer has any of their equipment. She could not do the work for them now because she only has dial up service and would need Comcast high speed service. Also, there had been a second phone line provided to her but in January 2007 she checked that second line and found there was no dial tone.

She says she would not be able to do the work of a charge nurse because she would not be able to do the physical patient care specifically indicating she could not irrigate wounds depending upon the position of the wound on the body and whether the patient was able to ambulate.

On recross-examination, counsel asked if she was now changing her testimony, as she had earlier stated she made no contact with All Facilities since December 2006. She said after December 2006 she made a number of calls to Pittsburgh and left voice messages, but no one ever got back to her. When asked when was the last time she made this effort, she said the first week of January 2007. She said that all of this was complicated by the fact that there was no one left in the office at All Facilities after the contract had been lost.

Counsel showed her what was marked as Exhibit E, which was e-mail communication between plaintiff and JoAnn Krista on January 2, 2007. Plaintiff maintained that she never received the e-mail response from JoAnn Krista despite the fact that the response on Defendant's Exhibit E was two minutes after plaintiff sent her a letter to JoAnn Krista. The plaintiff's response was simply that when her Comcast Internet Service and phone was disconnected, she had assumed that the contract had not been renewed and there was no work available. [Magistrate's opinion, p 7.]

In addressing the question of whether plaintiff's subsequent employment had established a new wage earning capacity, the magistrate analyzed each of the employments separately. First, he analyzed the post injury employment with Amicare, applying the presumption set forth in 301(5)(d)(i). MCL 418.301(5)(d) states as follows:

(d) If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job through no fault of the employee, the employee shall receive compensation under this act pursuant to the following:

(i) If after exhaustion of employment benefit eligibility of an employee, a worker's compensation magistrate or hearing referee, as applicable, determines for any employee covered under this subdivision, that the employments since the time of injury have not established a new wage earning capacity, the employee shall receive compensation based upon his or her wage at the original date of injury. There is a presumption of wage earning capacity established for employments totaling 250 weeks or more.

(ii) The employee must still be disabled as determined pursuant to subsection (4). If the employee is still disabled, he or she shall be entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of termination of the employment of the employee, and the wages paid at the time of the injury.

(iii) If the employee becomes reemployed and the employee is still disabled, he or she shall then receive wage loss benefits as provided in subdivision (b).

There is no dispute that plaintiff's post injury employment with Amicare exceeded 250 weeks. The magistrate performed an extensive analysis to determine whether plaintiff had overcome the presumption of a new wage earning capacity in that employment. He concluded that she had, relying on a combination of Court of Appeals and Commission cases. The magistrate noted that plaintiff had restrictions as to the number of hours she could work per day, the number of days she could work per week and limitations in terms of the number of admissions, discharges or other duties that required paper work because the extra writing would cause flare-ups. He stated:

I find that plaintiff's ongoing physical restrictions, whether from true RSD or from some un-named, undefined condition, whether of physical or emotional origin, do present a significant obstacle to future employment as a nurse and this serves to rebut the presumption that the subsequent reasonable employment created a new wage earning capacity. I further find that defendant's termination and subsequent failure to make any attempt to contact plaintiff for future employment is strong evidence that the reasonable employment from 1996 to 2003 did not realistically represent marketable abilities in the real world.

Therefore, I find that plaintiff has successfully rebutted the presumption and that she did not establish a new wage earning capacity as a result of her more than 250 weeks of reasonable employment with defendant subsequent to her injury. [Magistrate's opinion, p 17.]

In addition to the above, we note that plaintiff was terminated for missing too many days. We find that there is competent, material and substantial evidence to support the magistrate's finding that plaintiff's accommodated work for Amicare did not establish a new wage earning capacity.

The magistrate then analyzed plaintiff's work as a telemarketer for All Facilities, Inc. This job he determined had lasted more than 100 weeks, but less than 250 weeks. Therefore, he applied a "preponderance of the evidence" standard rather than the presumption that the work had established a new wage earning capacity.

The issue raised by defendant and before us now is whether the previous weeks of reasonable employment at Amicare, combine with the weeks of reasonable employment at All Facilities, Inc., so that the presumption would apply to her work at All Facilities, Inc. also. This is a legal question, and we review it de novo. *Mudel v Great Atlantic & Pacific Tea Company*, 462 Mich 691 (2000); *Holden v Ford Motor Company*, 439 Mich 257 (1992).

Defendant argues that the last sentence of 301(5)(d)(i) requires a totaling of all employments to determine whether there have been 250 weeks, thus invoking the presumption. However, an equally reasonable interpretation is that each employment totaling 250 weeks or more carries its own presumption of wage earning capacity. We find this language to be ambiguous.

Ultimately, this case involves an issue of statutory construction. The cardinal rule of statutory construction is to discern and give effect to the intent of the Legislature. *Murphy v Michigan Bell Telephone Company*, 447 Mich 93 (1994).

Our primary obligation is to determine the intent of the Legislature and to effectuate it. *People v Burwick*, 450 Mich 281 (1995). If there is any doubt about the Legislative intent, a reasonable construction must be given, looking to the purpose subserved thereby. *People v McFarlin*, 389 Mich 557 (1973) [quoting *Webster v Rotary Electric Steel Company*, 321 Mich 526 (1948)]. Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible. *Stowers v Wolodzko*, 386 Mich 119 (1971); *Scott v Budd Company*, 380 Mich 29 (1968).

The purpose of the last sentence of 301(5)(d)(i) is to create a presumption that after being employed for 250 weeks, an injured worker should be able to continue working, regardless of his/her injury, and therefore, a reduction of benefits may be warranted. In a case such as this, either the second post-injury employment which did not total 250 weeks, but extended beyond 100 weeks, will be reviewed separate from the prior post-injury employment and will be held to a preponderance standard to establish that the second post-injury employment did not establish a new wage earning capacity, or the post-injury employments will be combined, and all subsequent employment beyond 250 weeks will be presumed to have established a new wage earning capacity. The question is, what did the Legislature mean by "...employments totalling 250 weeks or more." Did it mean that those employments, in which work was performed for a total of 250 weeks or more, were presumed to establish a new wage earning capacity? Or, did it mean that all employments combined (totaling) 250 weeks or more were presumed to establish a new wage earning capacity? We believe the former is a more reasonable construction, considering what the statute intended to accomplish.

It would certainly be reasonable to presume that an injured worker who has performed a job for almost five years, could continue to perform that job regardless of his/her injury. On the other hand, if after performing such a job for at least 244 weeks, an injured worker was then to obtain a new job which only lasted for six weeks, it would not be reasonable to presume that he/she could continue to perform that subsequent job regardless of his/her injury. Granted, a presumption applied to such circumstance, perhaps, could be easily overcome.

Section 301(5)(d)(ii) states:

(ii) The employee must still be disabled as determined pursuant to subsection (4). If the employee is still disabled, he or she shall be entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at

the time of termination of the employment of the employee, and the wages paid at the time of the injury.

This section would logically follow and be applied in the event it was determined that the work performed by the injured employee had established a wage earning capacity, whether performed for 100 weeks or performed for 250 weeks.¹

Our research finds no case precisely on point. However, the Court of Appeals in *Maier v General Telephone Company of Michigan*, 247 Mich App 655 (2001), and a subsequent unpublished decision, *Almedon v Herman Miller, Inc.*, [unpublished, May 29, 2003 (NO. 242828)], infer that the reasonable employment totaling 250 weeks would be one job.

Section 301(5)(d)(iii) states: “If the employee becomes reemployed and the employee is still disabled, he or she shall then receive wage loss benefits as provided in subdivision (b).” This subsection, of course follows 301(5)(d)(i), and relates to reemployment after loss of a job, through no fault of his/her own, which he/she has held for 100 weeks or more. This is the circumstance of our plaintiff herein. She worked at an employment totaling 250 weeks or more. The magistrate found she overcame the presumption of a new wage earning capacity in that job. She then received benefits pursuant to 301(5)(d)(i). When she became reemployed with All Facilities, Inc., plaintiff began a new cycle, and once again received benefits pursuant to 301(5)(d)(iii) and 301(5)(b). When plaintiff lost that employment through no fault of her own, after being employed for 100 weeks or more, the magistrate correctly determined, without applying a presumption, that the telemarketing job did not establish a new wage earning capacity.

The interpretation of the statute applied by the magistrate is certainly supported by the language of the statute. It is a reasonable and logical interpretation, which incorporates all sections and subsections to work in harmony. Defendant’s interpretation of the statute is also supported by the language of that statute, however, it does not harmonize well with the other subsections. Such an interpretation would render 301(5)(d)(iii) nugatory or meaningless, and merely surplusage. We do not interpret Legislative intent in that manner.

We affirm the magistrate in all respects.

Commissioner Przybylo concurs in result only.

Martha M. Glaser

Chairperson

¹ If the work was performed for less than 100 weeks, section 301(5)(e) would apply.

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

RUTH UMLOR,
PLAINTIFF,

V

DOCKET #07-0195

AMICARE HOME HEALTH SERVICES WEST/
TRINITY HEALTH MICHIGAN,
SELF INSURED,
DEFENDANT.

RIES, COMMISSIONER, CONCURRING IN RESULT

Once an employee is employed for 100 weeks or more in reasonable employment; MCL 418.301(5)(d) becomes applicable if the employee loses his or her job through no fault of their own. When that same employee demonstrates that “the employments since the time of the injury have not established a new wage earning capacity, the employee shall receive compensation based upon his or her wages at the time of injury.” MCL 418.301(5)(d)(i). The magistrate found this to be the case after she left her employment with defendant, Amicare Home Health Services, West, and there is competent, material and substantial evidence to support it. MCL 418.861a(3). This evidence is not merely that the work plaintiff performed for defendant “granted numerous accommodations”¹ but, rather, that plaintiff became unable to continue to perform the reasonable employment with defendant, at least in part because of increasing residuals of her work-related injury:

Applying Plaintiff Umlor’s facts to the applicable law, I find that she has proven that she did not acquire any new skills or qualifications from her reasonable employment from 1996 through 2003, other than gaining more experience in her nursing career and keeping her credentials up to date. I find that she did not experience any “economic rehabilitation” as a result of that reasonable employment.

I find that plaintiff’s ongoing physical restrictions, whether from true RSD or from some un-named, undefined condition, whether of physical or emotional origin, do present a significant obstacle to future employment as a nurse and this serves to rebut the presumption that the subsequent reasonable employment created a new wage earning capacity. I further find that defendant’s termination and subsequent failure to make any attempt to contact plaintiff for future employment is strong evidence that the reasonable employment from 1996 to 2003 did not realistically represent marketable abilities in the real world.

¹ Plaintiff’s brief, p 8.

Therefore, I find that plaintiff has successfully rebutted the presumption and that she did not establish a new wage earning capacity as a result of her more than 250 weeks of reasonable employment with defendant subsequent to her injury. [Magistrate's opinion, p 17, emphasis supplied.]

It is self-evident, I think, that work the employee can no longer perform cannot establish a wage earning capacity that continues after the work is no longer being performed. And, if it did not establish a wage earning capacity, it clearly did not establish a *new* wage earning capacity.

With this finding already made, and no evidence that plaintiff's condition improved, plaintiff returned to work at All Facilities. This work was also accommodative, but plaintiff performed it from January of 2005 through December of 2006. The magistrate held, and the parties do not disagree, that this work at All Facilities was performed for 100 weeks or more. The work at All Facilities required plaintiff to perform telemarketing work from her own home. The magistrate found that this work did "not represent an ability to earn wages in the real world." *Williams v Sparton Engineered Products*, 1999 ACO #669, p 15, lv den, 463 Mich 879 (2000). There is ample support in the record for this conclusion. Plaintiff was not able to locate any position after she left Amicare. She "applied and interviewed, but was never hired." [Trial transcript, p 38.] She was "looking for jobs, but [she] was unable to find any yet on [her] own and this is the job . . . the workman's comp agency then stated to me that they had found for me." [*Id.*, at 39.] She made calls, 80 or 150 or more a day. She documented the calls, first on paper and later on a computer. She was paid \$9.00 per hour and "it was normally forty hours a week but there were some weeks it was less." [*Id.*, at 86.] Once the contract ran out, she lost her position. The internet connection she had been given to perform the tasks she was retained to perform was taken away. She has looked for other work, but she has not been hired. [*Id.*, at 43.] She has "reviewed different job opportunities advertised in very different sources, but [she] did not feel [she] would be able to meet the requirements." [*Id.*, at 78-79.]²

Plaintiff's proofs thus took up the cudgel proffered by *Pulley v Detroit Engineering & Machine Company*, 378 Mich 418, 425-427 (1966), to demonstrate that her performance of the work with All Facilities did not demonstrate a wage earning capacity, much less a "*new* wage earning capacity" which is what the statute requires if defendant is to be granted the relief it seeks on appeal, that continued after All Facilities no longer engaged her services. That is, plaintiff demonstrated (and, significantly, the magistrate found) through her testimony that her physical condition, her ability to work, and the market for her labor³ as these factors existed after she left All Facilities did not establish wage earning capacity by the work she performed there. In addition, there are other reasons for this conclusion. First and foremost, it was not established that the work at All Facilities was employment or that All Facilities was the actual payer of the monies plaintiff received while performing the work, as opposed to merely being a conduit for the insurer who somehow was able to arrange for plaintiff's participation in the enterprise *without* engaging the services of a vocational

² Defendant does not contest the fact of plaintiff's disability under MCL 418.301(4) nor does it raise any issue of work avoidance. It also does not raise any issue reviewable under the standards required by MCL 418.301(5)(a).

³ And, as a result, I reject defendant's suggestion that "marketability" is not a factor to be considered. [Defendant's brief, p 11.]

rehabilitation counselor after other efforts to locate a job for plaintiff foundered on the shoals of the answer to the question of whether “she had ever had a workman’s comp case.” [Trial transcript, p 40.] All of this would tend to support plaintiff’s argument that the work was favored and created no wage earning capacity. [Plaintiff’s brief, p 10.] It also suggests an endeavor to make payments that, initially, arise from benevolent motives that evolve into “the purpose of ultimately escaping their compensation obligations.” *Markey v S. S. Peter & Paul’s Parish*, 281 Mich 292, 298 (1937). In *Smith v Pontiac Motor Car Co*, 277 Mich 652, 657-658 (1936), the Supreme Court wrote:

The earning capacity of the injured employee after such injury and upon an application to reduce or stop compensation is not to be measured by mere temporary or makeshift employment at high wages until after an order stopping compensation may be obtained, nor is it to be measured by what the employee actually earns in nondescript employment which is not steady, but it is to be measured by the injured employee’s capacity to earn wages in the same or another employment.

* * *

The factors to be considered by the Department of Labor and Industry upon this application were fixed, except there was open for the determination of the Department of Labor and Industry the question of what is the present earning capacity of the employee, that is, his earning capacity after his injury. This present earning capacity of the injured employee is not necessarily to be determined by what he may be paid by his employer during the time a petition to stop compensation is contemplated or pending, nor by what he may be paid for made work, or out of sympathy for his family, or as a reward for long and faithful service to his employer, or because of a temporary demand on the part of the employer for labor, or by pay for odd jobs which the injured employee may be able to pick up, but it is to be determined as a question of fact by the Department of Labor and Industry in the exercise of its sound judgment and discretion based upon all the facts in the case. This finding of fact upon the part of the Department of Labor and Industry is conclusive on all the parties in the absence of fraud.

The work plaintiff performed for All Facilities may be sharply contrasted with what the record in *Pulley* revealed. In *Pulley*, the employee was provided a job “to record . . . shipments by assembly plants on our records so that we would know whether we were up to schedule with our customers.” It was a “very necessary” function of the department. [*Pulley, supra* at 424.] It was found to be regular work and not made work but, even then, the employee was permitted to show a diminished wage earning capacity after leaving the work. [*Id.*, at 425-426.] This case is the converse. There is no showing that the tasks plaintiff performed with All Facilities represent a regularly recognized occupation and the circumstances under which she obtained, performed, and finally lost the position do not suggest a capacity to earn wages. Compare, also, Mr. Pulley’s “looking for anything, it didn’t matter what, just so I got a job”⁴ with plaintiff’s endeavors heavily circumscribed by the residuals of her medical impairment which the magistrate stated was “a

⁴ *Pulley, supra* at 428.

reasonable effort to find work without success [that] is generally credible and unrebutted.”⁵ The contrast in what work plaintiff and Mr. Pulley was able to seek provides a basis for why plaintiff prevailed, and Mr. Pulley did not.

Some form of an analysis of plaintiff’s disability is appropriate under MCL 418.301(5)(d)(i) to assess whether plaintiff has established “a new wage earning capacity” because MCL 418.301(4) equates disability with a limitation of wage earning capacity. The added feature of MCL 418.301(5)(d)(i) is that we are directed to add to the equation “the employments since the time of injury” whereas the definitions of disability under MCL 418.301(4) looks only to the work that the employee has performed through the date of injury.⁶ This is significant because “the employments since the date of injury” that are reasonable employment⁷ may include work that is defined in MCL 418.301(9)⁸ that is a more expansive field of employment than would be utilized under MCL 418.301(4).

The magistrate, as a result, made no error in serially augmenting his analysis of plaintiff’s wage earning capacity with the circumstances of the reasonable employment at Amicare and All Facilities. Indeed, he was required to do so. The difference between the lead opinion and this opinion, then, is slight in the context of this case. The lead opinion would conclude that the work that plaintiff performed for All Facilities, because that work was performed for less than 250 weeks, cannot be utilized in the assessment of whether plaintiff is required to rebut the presumption in MCL 418.301(5)(d)(i), last sentence, whereas I would conclude that plaintiff is so required, and did. Defendant’s argument is that the magistrate paid insufficient attention to the presumption, even after plaintiff introduced considerable proof rebutting it, because the presumption still remains and can provide evidence. *Ward v Consolidated Rail Corporation*, 472 Mich 77, 84 (2005); *Widmayer v Leonard*, 422 Mich 280, 289-290 (1985). This, however, merely leaves the issues to be one of fact, which the magistrate resolved with legally sufficient evidence under MCL 418.861a(3). Weighed against the evidence plaintiff presented, upon which the magistrate relied, “the inference *and not the presumption* that must be weighed against the rebutting evidence,”⁹ is too slender a reed upon which to overturn the magistrate’s result, or even to justify a remand.

⁵ Magistrate’s opinion, p 20. The magistrate also wrote that he was “not impress[ed]” by plaintiff’s search of it being “a particularly substantial and diligent, but none-the-less unsuccessful, search for any and all reasonable employment.” The parties do not source the basis in the record for this conclusion. Although an employee might utilize such an unsuccessful search for any and all reasonable employment as a device to prove a lessened (or eliminated) wage earning capacity, *Wilson v Walt Industries, Inc*, 2001 ACO #133, lv den, 465 Mich 935 (2001), there is no legal requirement that an employee search for reasonable employment.

⁶ That is, the law and the facts on the date of injury determine whether plaintiff is disabled. *Turrentine v General Motors Corporation*, 198 Mich App 572, 575-576; lv den, 443 Mich 889 (1993). Plaintiff was, of course, injured after the effective date of 1987 PA 28.

⁷ All of MCL 418.301(5) utilizes reasonable employment as a framework. To the extent that employment subsequent to the injury is not “reasonable employment,” MCL 418.301(5) does not apply.

⁸ MCL 418.301(9) specifically states that reasonable employment is work within the employee’s capacity to perform that “shall not be limited to jobs in work suitable to [the employee’s] qualifications and training.”

⁹ *Ward, supra* at 84, emphasis supplied.

While “there is a presumption of wage earning capacity established for employments totaling 250 weeks or more,” MCL 418.301(5)(d)(i) requires more to justify the result defendant seeks. MCL 418.301(5)(d)(i) requires a “*new* wage earning capacity” to be established to exclude MCL 418.301(5)(d)(i) and apply MCL 418.301(5)(d)(ii) such that defendant will receive, in effect, a credit for “the normal and customary wages paid to those persons performing the same or similar employment.” There is a difference, in my view, between a “wage earning capacity” and a “new wage earning capacity.” In MCL 418.301(5)(d)(i), the inquiry is whether “the employments since the time of injury” have augmented plaintiff’s wage earning capacity into something “new” that did not exist, at least for plaintiff, previously. In making this inquiry, the presumption of wage earning capacity in the last sentence of MCL 418.301(5)(d)(i) is helpful, but not dispositive, in the same fashion as is the presumption in MCL 418.301(3), where a presumption that one is in the course of employment aids the employee in meeting half of the requirement of MCL 418.301(1) that the injury, to be compensable under the Act, must be one “arising out of *and* in the course of employment.”¹⁰ In this case, “a presumption of wage earning capacity established for employments totaling 250 weeks or more” does not, in and of itself, establish a “*new* wage earning capacity.” However, the only facts that may be construed as representing a new wage earning capacity is “the employments since the time of the injury” since that is the only circumstance actually described in the first sentence of MCL 418.301(5)(d)(i). If the allegation is of a wage earning capacity lost as a result of the work-related injury, but now regained, such an allegation is one of recovery from disability, not a new wage earning capacity. If the allegation is of a “new wage earning capacity,” such is proven by “the realistic opportunity to gain and maintain employment *based on skills acquired or retained in post-injury reasonable employment.*” [*Sohn v U.S. Air, Inc*, 2004 ACO #63, p 18, lv den, 472 Mich 895 (2005), emphasis supplied.]

Having already considered the question of whether the work at Amicare after her work-related injury created a new wage earning capacity, it remained for the magistrate to consider whether the work at All Facilities, which itself consisted of 100 weeks or more of work although the evidentiary basis for this conclusion is not clear to me, created a new wage earning capacity if the work at Amicare did not. The magistrate held that it did not and defendant’s only objection is that the magistrate should also have considered the work at Amicare. It is evident, however, that he did and defendant points to no circumstance where he should consider it again.

There is no error in the magistrate’s opinion. The difference between the lead opinion and this opinion is slight, almost theoretical, in this case and will be significant only when the last employment is one that is less than 100 weeks in duration. At that time, if my formulation of MCL 418.301(5)(d) is correct, and a new wage earning capacity has been established by the employee’s performance of two or more dissimilar jobs totaling 100 weeks or more, we will then have to confront what “the normal and customary wages paid to those persons performing the same or similar employment” might be.

Granner S. Ries

Commissioner

¹⁰ MCL 418.301(1), emphasis supplied.

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

RUTH UMLOR,
PLAINTIFF,

V

DOCKET #07-0195

AMICARE HOME HEALTH SERVICES WEST/
TRINITY HEALTH MICHIGAN,
SELF INSURED,
DEFENDANT.

This cause came before the Appellate Commission on a claim for review filed by defendant from Magistrate Timothy M. McAree's order, mailed August 1, 2007, granting an open award of benefits. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be affirmed. Therefore,

IT IS ORDERED that the magistrate's order is affirmed.

Martha M. Glaser	Chairperson
Granner S. Ries	Commissioner
Gregory A. Przybylo	Commissioner