

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

JOEL C. CURTISS,
PLAINTIFF,

V

DOCKET #08-0067

CURTISS REPORTING AND
FARM BUREAU GENERAL INSURANCE COMPANY,
CURTISS REPORTING AND
AUTO-OWNERS INSURANCE COMPANY,
DEFENDANTS.

APPEAL FROM MAGISTRATE BARNES.

MICHEAL D. NELSON FOR PLAINTIFF,
JAMES J. HELMINSKI FOR DEFENDANT
FARM BUREAU GENERAL INSURANCE COMPANY,
MARK D. WILLIAMS FOR DEFENDANT
AUTO-OWNERS INSURANCE COMPANY.

OPINION

PRZYBYLO, COMMISSIONER

Defendant Farm Bureau General Insurance Company (Farm Bureau), appeals the decision of Magistrate Jennifer Barnes, mailed March 3, 2008, granting plaintiff benefits for his bilateral upper extremity injuries. Farm Bureau challenges the magistrate's injury and disability determinations. We remand for further proceedings.

FACTS

Plaintiff introduced evidence that showed limited work experience. Plaintiff stated that he held only two different jobs. First, in the late 1970's plaintiff researched property titles. He examined the title histories to produce abstract reports. Plaintiff did not clearly state whether he could perform the title research job or whether he could earn the most money performing the job. Following that job, plaintiff worked as a court reporter. He recorded legal proceedings and then transcribed the recordings. Plaintiff eventually just transcribed the recordings when personal problems prohibited him from recording the proceedings.

Plaintiff developed bilateral cubital tunnel syndrome. He recalled symptoms as early as the late 1990's. He worked without wage loss until 2003. In 2003, his symptoms progressed to the point that it prevented him from transcribing the same amount. Around that same time, plaintiff testified that the economic downturn reduced his ability to earn. Plaintiff continued working. His symptoms progressed. He recalled losing the ability to type with most fingers. Plaintiff then adjusted his typing, using the fingers that he could use. Eventually, plaintiff's surgeon, Mark Leslie, M.D., performed the first of two recommended surgeries. Dr. Leslie opined that plaintiff's work before 2003 caused nerve damage evidenced in EMG studies. In contrast, Farm Bureau hired an expert, Marvin Bleiberg, who opined that plaintiff's work after 2003 contributed to plaintiff's condition.

MAGISTRATE'S DECISION

The magistrate concluded that plaintiff proved a 2003 injury date and a resulting disability. The magistrate noted plaintiff's failure to prove whether the title research or the transcription work would pay the most. She decided that a 2004 injury date would punish plaintiff for attempting to return to work. She wrote the following:

Prior to working for Curtiss Reporting, he had done abstract title work for oil companies. Mr. Curtiss testified he would go to the courthouse, set up a microphone and camera, run the abstracts of titles, would have to pull the actual ledger off the shelf, place it on the copy machine and produce a copy, or sit at a microfiche film desk. Mr. Curtiss could return to this employment, however, he is not certain that it pays as much as he has earned at Curtiss Reporting.

Mr. Curtiss began to experience bilateral upper extremity complaints while working for Curtiss Reporting in the late 1990s. He continued to work despite his symptoms until September 2003. The work Mr. Curtiss performed for the title company had no physical demands.

* * *

INJURY:

The Plaintiff has the burden of proof to establish a compensable workers' compensation claim by a preponderance of the evidence for each element of the claim. *Aquilina vs. General Motors Corp*, 403 Mich 206 (1978). Those elements include proving an injury or disease arising out of and in the course of employment, and proving that the injury or disease has placed a limitation on the Plaintiff's wage earning capacity in work suitable to his or her qualifications and training. MCL 418.301(1) & (4).

There appears to be no dispute that Mr. Curtiss suffers from ulnar neuropathy or cubital tunnel syndrome in his bilateral upper extremities. There is no dispute that this is a cumulative trauma injury that occurs as a result of ongoing and repetitive insults to the ulnar nerve. Both physicians agree that the

work activities Mr. Curtiss performed as a court reporter and transcriptionist are the activities that caused the ulnar nerve insults. Both physicians testified that surgical intervention is the appropriate course of care and treatment for cubital tunnel syndrome.

The main concern is the date for which liability is to be imposed. Mr. Curtiss has alleged dates of injury to be January 27, 2003, September 5, 2003, June 2, 2004, and January 29, 2007. Testimony elicited from Mr. Curtiss, as well as exhibits presented, demonstrate that Mr. Curtiss' earnings began to drop following the surgical intervention of September 2003. Mr. Curtiss relates that he was unable to type as much transcription as he had previously due to complications with the left hand. He testified that just prior to surgery he began to have clumsiness in the left hand, primarily the little finger and ring finger. Unfortunately, following surgical intervention, that clumsiness has persisted despite strength being regained in that hand. Mr. Curtiss has also begun to suffer from atrophy of the right hand.

According to Section 301(1), "Time of injury or date of injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death." In Mr. Curtiss' case, that means September 5, 2003.

I find that Mr. Curtiss began receiving care and treatment for his bilateral upper extremity complaints during calendar year 2003. However, I find that he was able to tolerate his cubital tunnel syndrome until September 5, 2003, when he went off work for surgical intervention. I find that since his surgical intervention, restrictions have been imposed on him from his treating physician. I find that Mr. Curtiss has never returned to an asymptomatic level, despite surgical intervention. Mr. Curtiss has suffered a wage loss due to his disability since he went off work for surgery on September 5, 2003, with disability beginning September 9, 2003. He has attempted to return to his employment, but has been unable to perform his employment at the level of productivity that he was pre-injury, despite surgical intervention.

Due to the onset of work-related cubital tunnel syndrome, Mr. Curtiss has had a progression of his condition, despite following his work-related restrictions. This is consistent with the testimony of Dr. Leslie, who testified that even upon removal of Mr. Curtiss from the offending environment, his condition will continue to progress.

To find that Mr. Curtiss has any other date of injury would be to punish him for sustaining the original work-related condition of bilateral cubital tunnel syndrome. Mr. Curtiss logically argues that for each and every day that he attempts to continue to work, he would be required to file an additional Application for Mediation or Hearing because his condition continues to progress despite his restrictions and despite his bilateral surgical intervention. This would be an unrealistic burden on the plaintiff. Therefore, I find that Mr. Curtiss' work-

related date of injury is September 5, 2003, the time period at which he was no longer able to tolerate his injury, went off work for surgical intervention, and for which he began to suffer a wage loss due to his work-related disability.

DISABILITY:

I find Mr. Curtiss to be disabled as of September 5, 2003 and continuing. I find that he has been impaired and restricted since September 5, 2003 due to his work-related cubital tunnel syndrome. I find that Mr. Curtiss remains disabled until further Order of this Agency. [Magistrate's decision, pp 4, 10-12.]

LAW

The Worker's Disability Compensation Act requires the Appellate Commission to perform two essential functions when reviewing a magistrate's decision under two entirely different standards. First we examine the magistrate's fact findings under the substantial evidence standard. We must review the entire record. MCL 418.861a(4). The review must include both a qualitative and quantitative analysis of the evidence. MCL 418.861a(13). After our review of the record, we must determine whether a reasonable person would find the evidence adequate to support the magistrate's findings. MCL 418.861a(3). We expounded on these statutory mandates in *Isaac v Masco Corporation*, 2004 ACO #81, where we wrote the following:

The magistrate's credibility determination is entitled to deference because the hearing officer has the opportunity to view and judge witnesses. Moreover, the magistrate is not obligated to deal with the credibility issue like a light switch, turning it either on or off.

The magistrate's choice of which medical expert opinion or opinions to adopt is within his or her discretion and we defer to that choice, if it is reasonable. The magistrate need not adopt expert opinions in their entirety but may give differing weight to different portions of testimony. And, although a magistrate may give preference to a treating expert's opinion, she need not do so. [Footnotes omitted.]

In addition to our review of the magistrate's fact findings, we also examine the magistrate's statements and applications of the law. We do so under a de novo standard.

When assessing a magistrate's disability determination, we examine several recent changes in the law. Interpreting the definition of disability from MCL 418.301(4), the Michigan Supreme Court reversed prior decisions in *Sington v Chrysler Corporation*, 467 Mich 144 (2002). Responding to *Sington*, the Appellate Commission issued numerous decisions explaining its understanding of plaintiff's burden to prove disability and wage loss. However, in *Stokes v DaimlerChrysler Corporation*, 2006 ACO #24, the Appellate Commission issued an en banc decision reversing its position on plaintiff's burden of proof and altering its view of wage loss. The Michigan Supreme Court stayed Appellate Commission's opinion until the resolution of the appellate process. Then, the Court of Appeals issued its 2-1 decision in *Stokes*, 272 Mich

App 571 (2006). That decision again altered the parties' obligations and introduced the concept of plaintiff proving a prima facie case. Then, the Supreme Court reversed. *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

The multiple changes in legal standards concerning disability created an impossible situation for litigants. They could not make an informed decision about the evidence to introduce at the hearing. Under *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997), the decisions were simple. Plaintiff introduced proof that he could not perform any single job and proof that his injury caused his wage loss. Then, defendant introduced proofs that plaintiff could perform other jobs. *Sington* changed that, but did not create a clear mandate about what proofs would satisfy the new standard. Since *Sington*, the parties have been subject to a constantly changing mandate. In short, we keep moving the target. In some cases, the standard changed three times between plaintiff's filing and the actual hearing. In fact, the Supreme Court addressed the inconsistent application of the *Sington* standard in its *Stokes* decision. These constant changes prevent a fair process and require a remand in almost every case.

In *Stokes*, the Supreme Court then reversed the Court of Appeals and provided clear guidelines for future cases. In so doing, the decision specifically states that certain Appellate Commission decisions accurately reflect the *Sington* standard, but criticized the abandonment of the standard when analyzing cases. The Supreme Court *Stokes* decision also mandates discovery, including vocational rehabilitation expert interviews with plaintiff. Finally, the decision outlines plaintiff's obligations when proving disability. It states:

First, the injured claimant must disclose his qualifications and training. This includes education, skills, experience, and training, whether or not they are relevant to the job the claimant was performing at the time of the injury. It is the obligation of the finder of fact to ascertain whether such qualifications and training have been fully disclosed.

Second, the claimant must then prove what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. *Sington, supra* at 157, 648 N.W.2d 624. The statute does not demand a transferable-skills analysis and we do not require one here, but the claimant must provide some reasonable means to assess employment opportunities to which his qualifications and training might translate. This examination is limited to jobs within the maximum salary range. There may be jobs at an appropriate wage that the claimant is qualified and trained to perform, even if he has never been employed at those particular jobs in the past. *Id.* at 160, 648 N.W.2d 624. The claimant is not required to hire an expert or present a formal report. For example, the claimant's analysis may simply consist of a statement of his educational attainments, and skills acquired throughout his life, work experience, and training; the job listings for which the claimant could realistically apply given his qualifications and training; and the results of any efforts to secure employment. The claimant could also consult with a job-placement agency or career counselor to consider the full range of available employment options. Again, there are no absolute requirements, and a claimant

may choose whatever method he sees fit to prove an entitlement to workers' compensation benefits. A claimant sustains his burden of proof by showing that there are no reasonable employment options available for avoiding a decline in wages.

We are cognizant of the difficulty of placing on the claimant the burden of defining the universe of jobs for which he is qualified and trained, because the claimant has an obvious interest in defining that universe narrowly. Nonetheless, this is required by the statute. Moreover, because the employer always has the opportunity to rebut the claimant's proofs, the claimant would undertake significant risk by failing to reasonably consider the proper array of alternative available jobs because the burden of proving disability always remains with the claimant. The finder of fact, after hearing from both parties, must evaluate whether the claimant has sustained his burden.

Third, the claimant must show that his work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages. *Id.* at 158, 648 N.W.2d 624.

Fourth, if the claimant is capable of performing any of the jobs identified, the claimant must show that he cannot obtain any of these jobs. The claimant must make a good-faith attempt to procure post-injury employment if there are jobs at the same salary or higher that he is qualified and trained to perform and the claimant's work-related injury does not preclude performance.

Upon the completion of these four steps, the claimant establishes a prima facie case of disability. The following steps represent how each of the parties may then challenge the evidence presented by the other.

Fifth, once the claimant has made a prima facie case of disability, the burden of production shifts to the employer to come forward with evidence to refute the claimant's showing. At the outset, the employer obviously is in the best position to know what jobs are available within that company and has a financial incentive to rehabilitate and re-employ the claimant.

Sixth, in satisfying its burden of production, the employer has a right to discovery under the reasoning of *Boggetta* if discovery is necessary for the employer to sustain its burden and present a meaningful defense. Pursuant to MCL 418.851 and MCL 418.853, the magistrate has the authority to require discovery when necessary to make a proper determination of the case. The magistrate cannot ordinarily make a proper determination of a case without becoming fully informed of all the relevant facts. If discovery is necessary for the employer to sustain its burden of production and to present a meaningful defense, then the magistrate abuses his discretion in denying the employer's request for discovery. For example, the employer may choose to hire a vocational expert to challenge the claimant's proofs. That expert must be permitted to interview the claimant and present the employer's own analysis or assessment. The employer may be able to demonstrate that there are actual

jobs that fit within the claimant's qualifications, training, and physical restrictions for which the claimant did not apply or refused employment.

Finally, the claimant, on whom the burden of persuasion always rests, may then come forward with additional evidence to challenge the employer's evidence. [*Stokes, supra* at 281-284, footnote omitted.]

The Supreme Court also reiterated that plaintiff must prove wage loss. While the Worker's Disability Compensation Act clearly defines wage loss in MCL 418.371, the courts have interpreted wage loss differently. In *Haske, supra*, the Court required plaintiff to prove that he suffered an actual loss of wages after a work injury and that the work injury caused the subsequent wage loss. While the *Sington* Court overruled the *Haske* interpretation of disability, it upheld the need for plaintiff to prove wage loss. Further, the Court in *Sington* failed to offer any different interpretation of the wage loss requirement. In *Stokes* the Court of Appeals did not address wage loss other than expressly vacating the Appellate Commission majority view of wage loss. Finally, the Supreme Court *Stokes* decision mandates that plaintiff prove wage loss, but did not expound further. Thus, we must apply the two-part *Haske* requirement.

APPLICATION

We remand for additional proceedings. Plaintiff provided no proof to show the extent of his education or his training. In addition, the magistrate found that plaintiff failed to prove what he could earn researching property titles, a job plaintiff could perform according to the magistrate. Without that proof, the magistrate could not find disability. However, without the benefit of *Stokes*, the parties could not know their right to utilize discovery to satisfy the changing standards. Thus, we remand to allow the parties the opportunity to address *Stokes*.

We must also remand this matter to the magistrate to determine the appropriate injury date. The magistrate correctly determined that work caused plaintiff's cubital tunnel syndrome. The only issue required the magistrate to select the appropriate injury date. In selecting the 2003 injury date the magistrate inappropriately referenced the economic impact of selecting the 2004 injury date. The statute does not allow economic realities to dictate the injury date. Rather, the magistrate must determine whether work in 2004 affected the condition that produced plaintiff's disability.

CONCLUSION

Therefore, we remand for additional disability proceedings and remand for additional analysis of the injury. The magistrate must afford the opportunity to develop and introduce proofs that address the *Stokes* standard. After she allows the parties that opportunity, she must apply the *Stokes* standard. The magistrate must also select which date accurately reflects the language of MCL 418.301(1) without regard to the economic impact of her selection.

Commissioners Grit and Will concur.
Chairperson Gasparovich concurs in result.

Gregory A. Przybylo Commissioner

Donna J. Grit Commissioner

Rodger G. Will Commissioner

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RIES, COMMISSIONER, CONCURRING IN REMAND

On March 3, 2008 Magistrate Jennifer Barnes entered an award of benefits under the Worker's Disability Compensation Act in favor of plaintiff, Joel C. Curtiss. Defendants Curtiss Reporting and Farm Bureau General Insurance Company have filed a claim for review from this order. I agree that the matter must be remanded to address the issues raised by the two parties, but write separately because my reasons differ.

FACTS

Plaintiff was employed by Curtiss Reporting as a court reporter. He attended legal proceedings for the purposes of recording them and also reduced his records to transcript form. Plaintiff was diagnosed with bilateral cubital syndrome and after plaintiff found that he could not record the proceedings, he only transcribed proceedings.

Plaintiff remembered having the symptoms that were later diagnosed as cubital tunnel syndrome in the late 1990's. By 2003, his symptoms were such that he was limited in how much he could transcribe. Plaintiff however, continued working but his symptoms persisted and increased in intensity. He became unable to type with very many of his fingers. Plaintiff's treating surgeon, Mark Leslie, M.D., advised two surgeries, of which plaintiff has had one. Dr. Leslie concluded that plaintiff's work before 2003 caused nerve damage evidenced in EMG studies. Marvin Bleiberg, M.D., concluded that plaintiff's work after 2003 further aggravated plaintiff's condition.

The magistrate found that plaintiff sustained a compensable injury and assigned a date of injury of September 5, 2003:

The Plaintiff has the burden of proof to establish a compensable workers' compensation claim by a preponderance of the evidence for each element of the claim. *Aquilina vs. General Motors Corp*, 403 Mich 206 (1978). Those elements include proving an injury or disease arising out of and in the course of employment,

and proving that the injury or disease has placed a limitation on the Plaintiff's wage earning capacity in work suitable to his or her qualifications and training. MCL 418.301(1) & (4).

There appears to be no dispute that Mr. Curtiss suffers from ulnar neuropathy or cubital tunnel syndrome in his bilateral upper extremities. There is no dispute that this is a cumulative trauma injury that occurs as a result of ongoing and repetitive insults to the ulnar nerve. Both physicians agree that the work activities Mr. Curtiss performed as a court reporter and transcriptionist are the activities that caused the ulnar nerve insults. Both physicians testified that surgical intervention is the appropriate course of care and treatment for cubital tunnel syndrome.

The main concern is the date for which liability is to be imposed. Mr. Curtiss has alleged dates of injury to be January 27, 2003, September 5, 2003, June 2, 2004, and January 29, 2007. Testimony elicited from Mr. Curtiss, as well as exhibits presented, demonstrate that Mr. Curtiss' earnings began to drop following the surgical intervention of September 2003. Mr. Curtiss relates that he was unable to type as much transcription as he had previously due to complications with the left hand. He testified that just prior to surgery he began to have clumsiness in the left hand, primarily the little finger and ring finger. Unfortunately, following surgical intervention, that clumsiness has persisted despite strength being regained in that hand. Mr. Curtiss has also begun to suffer from atrophy of the right hand.

According to Section 301(1), "Time of injury or date of injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death." In Mr. Curtiss' case, that means September 5, 2003.

I find that Mr. Curtiss began receiving care and treatment for his bilateral upper extremity complaints during calendar year 2003. However, I find that he was able to tolerate his cubital tunnel syndrome until September 5, 2003, when he went off work for surgical intervention. I find that since his surgical intervention, restrictions have been imposed on him from his treating physician. I find that Mr. Curtiss has never returned to an asymptomatic level, despite surgical intervention. Mr. Curtiss has suffered a wage loss due to his disability since he went off work for surgery on September 5, 2003, with disability beginning September 9, 2003. He has attempted to return to his employment, but has been unable to perform his employment at the level of productivity that he was pre-injury, despite surgical intervention.

Due to the onset of work-related cubital tunnel syndrome, Mr. Curtiss has had a progression of his condition, despite following his work-related restrictions. This is consistent with the testimony of Dr. Leslie, who testified that even upon removal of Mr. Curtiss from the offending environment, his condition will continue to progress.

To find that Mr. Curtiss has any other date of injury would be to punish him for sustaining the original work-related condition of bilateral cubital tunnel syndrome.

Mr. Curtiss logically argues that for each and every day that he attempts to continue to work, he would be required to file an additional Application for Mediation or Hearing because his condition continues to progress despite his restrictions and despite his bilateral surgical intervention. This would be an unrealistic burden on the plaintiff. Therefore, I find that Mr. Curtiss' work-related date of injury is September 5, 2003, the time period at which he was no longer able to tolerate his injury, went off work for surgical intervention, and for which he began to suffer a wage loss due to his work-related disability. [Magistrate's opinion, pp 10-11.]

STANDARD OF REVIEW

The Commission's standard of review has been often described. Questions of law are reviewed de novo. *Calovecchi v State of Michigan*, 461 Mich 616 (2000); *Abbey v Campbell, Wyant & Cannon Foundry (On Remand)*, 194 Mich App 341 (1992). Findings of fact made by a magistrate are accepted as conclusive if those findings are supported by competent, material and substantial evidence on the whole record. MCL 418.861a(3); *Mudel v Great Atlantic and Pacific Tea Company*, 462 Mich 691 (2000). "Substantial" evidence is not just "any" evidence but, rather, such evidence that a reasonable person will accept as adequate to justify the conclusion. In MCL 418.861a(4), the "whole record" is defined as "the entire record of the hearing including all of the evidence in favor and all the evidence against a certain determination." Review includes "both a qualitative and quantitative analysis of that evidence and ensure a full, thorough, and fair review thereof." MCL 418.861a(13). The Commission "need not necessarily defer to all of the magistrate's findings of fact." [*Mudel, supra* at 703.] The Commission is permitted "in some circumstances to substitute its own findings of fact for those of the magistrate" when the record calls upon it to "accord[] different weight to the quality or quantity of evidence presented." [*Id.* at 700.]

ANALYSIS – DATE(S) OF INJURY

The magistrate determined that plaintiff's work for the employer ("Curtiss") caused his cubital tunnel syndrome. She did not, however, utilize the correct legal framework to determine the date of injury.

In *Elliott v Peterson American Corporation*, 2003 ACO #118, pp 4-11, Commissioner Leslie summarized the legal inquiry as to the date(s) of injury for which workers' compensation benefits must be paid into three categories:

The rules of causation under §301(1) prior to the enactment of §301(2) can be summarized as follows:

- 1) Where specific job duties cause or contribute to a medical condition, the employer who last employed the employee performing these duties bears the entire liability for the employee's disability without the necessity of proof that the specific period of employment made a discrete contribution to the medical condition.

2) Where no one specific set of job duties contributes to the medical condition, in order for liability to be found against any employer or carrier, proof of discrete contribution must be made.

3) Where specific job duties cause or contribute to a medical condition, and the last employer did not employ the employee in such conditions, there must be a finding of discrete contribution by the last period of employment in order for that employer to be liable for the payment of compensation. [*Id.*, pp 11-12.]

The rule in *Elliott* formed the basis for our more recent opinion in *Simpson v Borbolla Construction & Concrete Supply, Inc*, 2005 ACO #153, which was then affirmed by the Supreme Court when it “vacate[d] the opinion of the Court of Appeals . . . and affirm[ed] the result reached by the Court of Appeals for the reasons stated in the Workers' Compensation Appellate Commission opinion.” [480 Mich 964 (2007).] As for which category this case fits into, the testimony of plaintiff and the doctors describe specific job functions which are said to have contributed to his medical condition. A later date of injury does not necessarily relieve the insurer on the risk for a prior date of injury of all liability. *Arnold v General Motors Corporation*, 456 Mich 682; reh den, 457 Mich 1201 (1998).

The magistrate did not use this legal framework to make her findings. Instead, after finding a date of injury on September 5, 2003 she concluded that “find[ing] any other date of injury would be to punish (Curtiss) for sustaining the original work-related condition.” [Magistrate’s opinion, p 11.]

The legislative scheme is not concerned with punishment, nor with any other equitable concerns. The legal framework is provided by MCL 418.301(1) and *Elliott* and *Simpson*. On remand, she must use this framework to determine the date, or dates of injury.

ANALYSIS – DISABILITY

The magistrate’s entire analysis of plaintiff’s disability is as follows:

Mr. Curtiss has suffered a wage loss due to his disability since he went off work for surgery on September 5, 2003, with disability beginning September 9, 2003. He has attempted to return to his employment, but has been unable to perform his employment at the level of productivity that he was pre-injury, despite surgical intervention.¹

* * *

I find Mr. Curtiss to be disabled as of September 5, 2003 and continuing. I find that he has been impaired and restricted since September 5, 2003 due to his work-related cubital tunnel syndrome. I find that Mr. Curtiss remains disabled until further Order of this Agency. [Magistrate’s opinion, pp 11, 12.]

¹ This is actually part of the magistrate’s analysis of plaintiff’s injury.

This analysis is not sufficient. It is a finding, at most, that plaintiff has a medical impairment but it contains no mention of the economic consequences of the medical impairment. And, it relates only to “his employment,” not to work that is suitable to plaintiff’s qualifications and training. The magistrate’s findings, as a result, reflect a patently incorrect legal standard that fails to follow the criteria set forth by the Court in *Sington v Chrysler Corporation*, 467 Mich 144 (2002), and (in an opinion released after the magistrate entered her order) in *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

Most glaringly absent in the magistrate’s analysis is any definition of the work suitable to plaintiff’s qualifications and training. This is required by the provisions of MCL 418.301(4), which state as follows:

(4) As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.

Because the magistrate did not make the findings of fact that the Act requires be made, her order cannot be left undisturbed. This means that the Commission must either augment her opinion with our own findings, and then fashion an order that incorporates those findings, or the Commission must remand the matter for the magistrate to allow her to make the findings that the Act requires to be made in light of a proper standard of law. The latter course is preferable, because any finding of disability must integrate an assessment of the facts with an application of the legal standard and the parties are entitled, in the first place, to have the magistrate make this determination which can then, if requested, be reviewed in the ordinary course.

In virtually all circumstances in workers’ compensation jurisprudence in Michigan, when the Court has adjusted its view of the legal standard or indicated that the legal standard employed by the administrative agency is flawed, it has remanded the case to the fact-finder for further analysis. In *Zaremba v Chrysler Corporation*, 377 Mich 226, 231 (1966), the Court had occasion to address the compensability of heart conditions. Because the administrative agency’s decision “impart[ed] a consideration by the majority of a fallacious [legal] test,” the Court concluded it was necessary to remand the case:

How to disengage this erroneous concept from the board's fact-finding process, legislatively removed from judicial review, eludes us. We would perforce have to ascertain whether the majority in its reasoning to a factual conclusion posited *first* the ‘strenuous character’ concept test to the nonmedical fact background of the type of work being performed and *then* considered the opinion evidence of causality or lack thereof, in light of that first finding. This we cannot undertake. The reasoning process of the board is relayed to us by words. The words they used clearly, we think, impart a consideration by the majority board of a fallacious test. At what precise point this test was applied, we cannot determine.

For this reason we vacate the order of the board and remand the cause for reconsideration upon the record already made, to determine whether under the test we here established or affirmed, stripped of the strenuous character test, decedent's work, whatever its nature, was causally related to the fatality. [*Id.* at 231-232, the Court's emphasis.]

The utilization of an erroneous legal standard strips the factual findings made by the fact-finder of the insulation that MCL 418.861a(3) and *Mudel v Great Atlantic and Pacific Tea Company*, 462 Mich 691 (2000) would normally provide. The most prominent case to so conclude is easily *Williams v Lang (After Remand)*, 415 Mich 179 (1982), because the issue was squarely presented. In *Williams*, all members of the Court agreed that the administrative agency had applied the wrong standard of law. Justice Ryan acknowledged that it might be more convenient for the Court to go forward and make the findings, but held that the correct procedure is to remand with no exception for extra-statutory considerations:

The Michigan Constitution makes it clear that the Workers' Compensation Appeal Board is exclusively empowered to make factual determinations in workers' compensation cases and that this Court is absolutely without authority to do so. Const 1963, art 6, § 28. *Hlady v Wolverine Bolt Co*, 393 Mich 368, 224 NW2d 856 (1975). The constitution makes no exception for the age of the case or considerations of "judicial economy".

When this Court finds that the WCAB has applied an erroneous legal standard, the correct procedure is to reverse and remand to the WCAB. *Burke v Ontonagon County Road Comm*, 391 Mich 103, 214 NW2d 797 (1974); *DeGeer v DeGeer Farm Equipment Co*, 391 Mich 96, 214 NW2d 794 (1974); *Zaremba v Chrysler Corp*, 377 Mich 226, 139 NW2d 745 (1966).

While it may be efficient and convenient for the Court to do the WCAB's factfinding in this case, it is unconstitutional to do so. I would remand to the Workers' Compensation Appeal Board for resolution of the factual issues in light of the legal standard enunciated in parts I through V of Justice Williams' opinion. [*Id.* at 183.]

The analogy to *Williams* is not perfect, as the issue here does not rise to the level of having a constitutional dimension; nonetheless, the statute does contemplate that the fact-finder will be the magistrate and that the Commission will interfere with the magistrate's fact-finding function in extremely rare situations, where the magistrate's findings are not supported as legally required or where the magistrate has applied the wrong standard of law. The rule in *Zaremba* and *Williams* has been applied repeatedly by the appellate courts in circumstances where the Court has either recognized that the wrong standard has been used, as here, or where it was unable to ascertain whether the fact-finder understood the applicable law. *Woody v Cello-Foil Products (After Remand)*, 450 Mich 588, 596-597 (1996); *Rosinski v Speaker, Hines & Thomas*, 414 Mich 861 (1982); *Leskinen v Employment Security Commission*, 398 Mich 501, 509-510 (1978); *Burke v Ontonagon County Road Commission*, 391 Mich 103, 114 (1974); *Harrison v Tireman & Colfax Bump & Repair Shop*, 395 Mich 48, 50 (1975); *Mitchell v General Motors Corporation*,

89 Mich App 552, 555-556 (1979); *Arnold v General Motors Corporation*, 84 Mich App 713, 716-718 (1978); *Galac v Chrysler Corporation*, 63 Mich App 414, 419 (1975); *Lamb v John's Tavern*, 37 Mich App 678 (1972).

In *Cooper v Chrysler Corporation*, 125 Mich App 811, 819 (1983), the Court held that the administrative agency had “reached the correct result for the wrong reason.” However, “even though facts can be found to support the board's decision on this issue, a remand is necessary so that the WCAB can consider this issue while applying the proper legal standard.” *Williams* and *Cooper*, as a result, stand for the proposition that, even in circumstances where it would be convenient to turn a blind eye to the error made below, a remand is necessary so that the proper standard may be utilized by the fact-finder.

The rule in this state has been to allow the parties, on a remand, to present additional testimony in response to changes in the legal standard. In *DeGeer v DeGeer Farm Equipment Company*, 391 Mich 96, 101 (1974), the Court noted that it had (that same day) “thoroughly reviewed the scope of disability required to bring a claimant within the statutory phrase” encompassing permanent and total disability and had explained how in the other case (*Burke, supra*) the administrative agency had crafted a test that was “out of tune with the” standards it had previously set forth. [*Id.* at 113.] The Court held in *DeGeer* that the administrative disposition was so lacking in clarity that its findings could not be separated from the legal standard. The Court, accordingly, recapitulated the applicable standard and remanded the case for further proceedings, to include the taking of additional testimony, if requested by the parties or by the tribunal:

If appellant DeGeer, on remand, establishes that the use of his legs produces such disabling back pain that he is no longer able to use his legs to perform any reasonable employment, then he will clearly be eligible for permanent and total disability benefits under the above discussed section of the Workmen's Compensation Act.

Reversed and remanded to the Workmen's Compensation Appeal Board for further proceedings, *including the taking of additional testimony if requested, by the Appeal Board or any party*, to comply with this opinion. [*Id.* at 102, emphasis supplied.]

The opinion of the Court of Appeals in *Wright v Thumb Electric Cooperative*, 49 Mich App 714, 718 (1973), foreshadowed the result in *Burke* and *DeGeer*. The Court noted that it was “clear” that the fact-finder had not properly applied the standards that had been set forth by the appellate courts and, noting an opinion issued two years earlier, but after the case had been tried, remanded the case for reconsideration with the admonition that the fact-finder “may wish to take cognizance of Justice Adams' remarks [in *Miller v Sullivan Milk Products, Inc.*, 385 Mich 659 (1971)] and take further testimony in light of the proper legal standard.” [Emphasis supplied.]

In *Slebodnik v The Great Atlantic & Pacific Tea Company*, 86 Mich App 213 (1978), the Supreme Court had reworked the requirements to demonstrate fatal and permanent disability by

reason of incurable insanity, rejecting two of the elements that had been proffered by the Court in *Sprute v Herlihy Mid-Continent Company*, 32 Mich App 574, 579 (1971), and replacing it with a standard of social or cognitive dysfunction. *Redfern v Sparks-Withington Company*, 403 Mich 63, 85 (1978). The Court noted in *Slebodnik, supra* at 218, that “[t]his test was not applied by the appeal board” and remanded the case for further findings even while noting that “the appeal board’s opinion strongly suggests that the *Redfern* test had been satisfied.” The Court specifically remanded the case “for further findings and, if necessary, *for the admission of additional evidence*” and the Court “decline[d] at this time to review those factual findings previously made by the Appeal Board.” [*Id.* at 218, emphasis supplied.]

It should be obvious that neither the Supreme Court (*DeGeer*) nor the Court of Appeals (*Wright* and *Slebodnik*) is in a position to accept evidence into the record. The Commission, likewise, is not equipped to do so, as it entails ruling on the objections that may be made to the presentation of that evidence. *See e.g., Burch v Harrington House, Inc*, 2007 ACO #209.

On any remand occasioned by the failure of the magistrate to make all of the findings required by the Supreme Court in *Stokes v Chrysler LLC*, 481 Mich 266 (2008), the parties must be afforded the opportunity to present further proofs to address the obligations imposed by MCL 418.301(4) as interpreted by the Supreme Court in *Stokes*. Even if it now appears that the parties did not present the proofs necessary to permit the magistrate to fulfill the obligations imposed upon her by *Stokes*,² the parties must be afforded this opportunity. This is simply a recognition that “[t]he multiple changes in legal standards concerning disability created an impossible situation for litigants. They could not make an informed decision about the evidence to introduce at the hearing.” [*Reed v Glen Oaks Community College*, 2008 ACO #176, p 6.] A remand, with the opportunity to present additional proofs, is the only suitable remedy.

There will be those cases where it can be said that one or both of the parties should have been able to present the proofs that address the requirements of the Supreme Court in *Stokes*, even before the Supreme Court issued its opinion, and that no remand should be permitted, much less a remand that allows the party to offer additional proofs on such matters. Such a conclusion is inconsistent with the remedy chosen in *DeGeer* and *Wright*, where the appellate courts did not undertake as radical a restatement of the proofs necessary to satisfy the legal standard as occurred in *Stokes*. It also requires a survey of the proofs in an attempt to ascertain whether they meet a standard that no longer has any validity. In almost every case, however, the remand that is necessary arises because the magistrate was unable to predict the steps that the Supreme Court crafted in *Stokes* for, if the magistrate made no error, then no occasion for a remand arises. On

² “It is the obligation of the finder of fact to ascertain whether such qualifications and training have been fully disclosed.” [*Id.* at 282.] “[T]he magistrate must ensure that all steps are completed in some fashion or another, that all the facts necessary to the determination of the case are presented, that each side has been accorded an adequate opportunity to respond to the other’s proofs, and that the statutory burden of proof is respected. After that point, the magistrate can properly determine whether the claimant has satisfied his obligation under MCL 418.301(4).” [*Id.* at 284-285, emphasis supplied.] “A magistrate cannot make a proper determination without becoming fully informed of the facts regarding a claimant’s limitation in wage-earning capacity in work suitable to his qualifications and training. The disposition of a case on the basis of partial information might well under some circumstances constitute an abuse of discretion, ...” [*Id.* at 296.]

remand, if the parties are to be held to legal standard that the Supreme Court enacted, the parties must be given the opportunity to present proofs to address that standard. The Supreme Court in *Stokes* reiterated the requirement of MCL 418.301(4) that a work-related injury must be proven, but reworked virtually all of the remainder of the disability analysis. The parties must be afforded the opportunity to present proofs to address the standard the Supreme Court identified in *Stokes*.

The argument is made that plaintiff failed to prove the extent of his qualifications and training.” In actuality, plaintiff did present evidence as to this qualifications and training but plaintiff’s evidence did not make its way into any finding of fact made by the magistrate. It is this error that dictates a remand in all events, even without the appearance of the Supreme Court opinion in *Stokes*. The magistrate’s entire disability analysis is a momentary exposition of plaintiff’s medical impairment, with no reference to plaintiff’s qualification and training.

A rummage through the record may suggest that plaintiff did not disclose all of his qualifications and training and the wage earning capacity of such work. This conclusion is, only apparent if one scrutinizes the definition of work suitable to plaintiff’s qualifications and training set forth by the Supreme Court in *Stokes, supra* at 277, and then utilizes that definition in the search. The parties did not have this definition in hand when the proofs were previously put in and, in such circumstances, there is a heightened likelihood (particularly with the benefit of 20-20 hindsight that parses every word) that the parties will not have put in the proofs to address this standard. Allowing the parties to place additional proofs into the record to address the framework the Supreme Court enacted in *Stokes* only places the parties on equal footing. It does not provide them with another opportunity to address the definition of disability set forth in *Stokes, supra* at 481 Mich 266 *et seq*; a remand with the opportunity to present additional proofs provides them with the *first* opportunity to do so.

Ultimately, it is impossible to define the distinctions to be made between those proofs the parties will present to address the Supreme Court’s definition of disability in *Stokes* and those proofs the parties could have presented previously to address prior, now invalid definitions of disability. It is also pointless. It is simply not determinative of anything that a party met (or did not meet) an invalid standard. When, as here, the case must be remanded in any event, the valid standard (*Stokes, supra* at 481 Mich 266, *et seq*) must be applied on remand.

The one level of consistency that has transcended the opinions on disability is the necessity that a limitation of wage earning capacity must be a result of a “work-related injury.” Thus, the Supreme Court’s order was to reverse portions of the judgment of the Court of Appeals. *Stokes, supra* at 481 Mich 299.³ Beyond this, the Court in *Stokes, supra* at 281-284, set forth the obligations of the parties, and the magistrate, to enable a resolution of the issue of disability:

³ The Supreme Court’s judgment, issued June 12, 2008, was “that the judgment of the Court of Appeals is REVERSED IN PART and the cause is REMANDED to the Workers’ Compensation Board of Magistrates for further proceedings in conformity with the opinion.”

First, the injured claimant must disclose his qualifications and training. This includes education, skills, experience, and training, whether or not they are relevant to the job the claimant was performing at the time of the injury. It is the obligation of the finder of fact to ascertain whether such qualifications and training have been fully disclosed.

Second, the claimant must then prove what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. *Sington, supra* at 157, 648 N.W.2d 624. The statute does not demand a transferable-skills analysis and we do not require one here, but the claimant must provide some reasonable means to assess employment opportunities to which his qualifications and training might translate. This examination is limited to jobs within the maximum salary range. There may be jobs at an appropriate wage that the claimant is qualified and trained to perform, even if he has never been employed at those particular jobs in the past. *Id.* at 160, 648 N.W.2d 624. The claimant is not required to hire an expert or present a formal report. For example, the claimant's analysis may simply consist of a statement of his educational attainments, and skills acquired throughout his life, work experience, and training; the job listings for which the claimant could realistically apply given his qualifications and training; and the results of any efforts to secure employment. The claimant could also consult with a job-placement agency or career counselor to consider the full range of available employment options. Again, there are no absolute requirements, and a claimant may choose whatever method he sees fit to prove an entitlement to workers' compensation benefits. A claimant sustains his burden of proof by showing that there are no reasonable employment options available for avoiding a decline in wages.

We are cognizant of the difficulty of placing on the claimant the burden of defining the universe of jobs for which he is qualified and trained, because the claimant has an obvious interest in defining that universe narrowly. Nonetheless, this is required by the statute. Moreover, because the employer always has the opportunity to rebut the claimant's proofs, the claimant would undertake significant risk by failing to reasonably consider the proper array of alternative available jobs because the burden of proving disability always remains with the claimant. The finder of fact, after hearing from both parties, must evaluate whether the claimant has sustained his burden.

Third, the claimant must show that his work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages. *Id.* at 158, 648 N.W.2d 624.

Fourth, if the claimant is capable of performing any of the jobs identified, the claimant must show that he cannot obtain any of these jobs. The claimant must make a good-faith attempt to procure post-injury employment if there are jobs at the same salary or higher that he is qualified and trained to perform and the claimant's work-related injury does not preclude performance.

Upon the completion of these four steps, the claimant establishes a prima facie case of disability. The following steps represent how each of the parties may then challenge the evidence presented by the other.

Fifth, once the claimant has made a prima facie case of disability, the burden of production shifts to the employer to come forward with evidence to refute the claimant's showing. At the outset, the employer obviously is in the best position to know what jobs are available within that company and has a financial incentive to rehabilitate and re-employ the claimant.

Sixth, in satisfying its burden of production, the employer has a right to discovery under the reasoning of *Boggetta* if discovery is necessary for the employer to sustain its burden and present a meaningful defense. Pursuant to MCL 418.851 and MCL 418.853, the magistrate has the authority to require discovery when necessary to make a proper determination of the case. The magistrate cannot ordinarily make a proper determination of a case without becoming fully informed of all the relevant facts. If discovery is necessary for the employer to sustain its burden of production and to present a meaningful defense, then the magistrate abuses his discretion in denying the employer's request for discovery. For example, the employer may choose to hire a vocational expert to challenge the claimant's proofs. That expert must be permitted to interview the claimant and present the employer's own analysis or assessment. The employer may be able to demonstrate that there are actual jobs that fit within the claimant's qualifications, training, and physical restrictions for which the claimant did not apply or refused employment.

Finally, the claimant, on whom the burden of persuasion always rests, may then come forward with additional evidence to challenge the employer's evidence.

Plaintiff must also demonstrate wage loss in a manner the Act demands. *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 4 (2008).

Although the fact of injury attributable to the work plaintiff performed is no longer in dispute, the magistrate must assess the date, or dates, of injury utilizing the standards set forth in MCL 418.301(1) and utilize the date of injury to assess liability against the proper carrier.

Additionally, the Supreme Court's opinion in *Stokes* must be applied to all cases⁴ with orders that were not final on June 12, 2008, the day the Supreme Court's opinion was released in *Stokes*. To accomplish this, the parties must be allowed the present additional evidence, and the magistrate will be required to make additional findings, as required by the steps outlined in *Stokes*.

Granner S. Ries

Commissioner

⁴ Of course, the issue of disability must be preserved for review. MCL 418.861a(11).

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

JOEL C. CURTISS,
PLAINTIFF,

V

DOCKET #08-0067

CURTISS REPORTING AND
FARM BUREAU GENERAL INSURANCE COMPANY,
CURTISS REPORTING AND
AUTO-OWNERS INSURANCE COMPANY,
DEFENDANTS.

This cause came before the Appellate Commission on a claim for review filed by defendant, Farm Bureau General Insurance Company from Magistrate Jennifer L. Barnes' order, mailed March 3, 2008, 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 remanded for additional analysis of the injury and disability. Therefore,

IT IS ORDERED that the magistrate's order is remanded for further proceedings according to the attached opinion. We retain jurisdiction. Because we retain jurisdiction, the magistrate should issue a supplemental opinion only, and not a green sheet order. Transcript and/or brief filing requirements shall be issued to counsel as soon as the magistrate's supplemental opinion is filed with the Commission.

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| Gregory A. Przybylo | Commissioner |
| Donna J. Grit | Commissioner |
| Rodger G. Will | Commissioner |
| Martha M. Gasparovich | Chairperson |