

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

BETTY JEANE NELSON,
PLAINTIFF,

V

DOCKET #07-0170

GENERAL MOTORS CORPORATION,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE BIRCH.

JAMES W. SMITH FOR PLAINTIFF,
BRUCE L. DALRYMPLE FOR DEFENDANT.

WILLIE N. COLEMAN,
PLAINTIFF,

V

DOCKET #07-0268

GENERAL MOTORS CORPORATION,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE BIRCH.

ROBERT J. MACDONALD FOR PLAINTIFF,
BRUCE L. DALRYMPLE FOR DEFENDANT.

OPINION

GASPAROVICH, CHAIRPERSON

In an order mailed June 23, 2008, the cases of *Nelson v General Motors Corporation*, Docket #07-0170 and *Coleman v General Motors Corporation*, Docket #07-0268, were consolidated and designated en banc. A recent change in the case law of this State has raised issues

of interpretation and analysis regarding out-of-state aggravation of cumulative trauma injuries in Michigan.

Nelson

In the case of *Nelson v General Motors Corporation*, plaintiff appeals and defendant cross-appeals the decision of Magistrate Kenneth A. Birch, mailed on June 27, 2007, granting plaintiff an award of medical only on a finding of work-related carpal tunnel syndrome. We remand for additional proceedings and analysis per *Stokes v Chrysler LLC*, 481 Mich 266 (2008).

This case was initiated by plaintiff filing an Application for Mediation or Hearing on May 23, 2004, alleging that she developed carpal tunnel syndrome as a result of repetitive work. That application was amended on July 29, 2004, to add a psychiatric claim based on harassment and stress at work. At trial a low back claim was added.

A trial was held on June 7, 2007. Plaintiff appeared personally and testified on her own behalf. There were no other lay witnesses. Plaintiff presented medical testimony by deposition of Thomas H. Beird, M.D. and Gavin I. Awerbuch, M.D. Defendant presented medical testimony by deposition of Nathan L. Gross. Following that trial the magistrate issued a decision finding that plaintiff's low back and psychiatric problems were not established to be work-related. However, he did find the carpal tunnel syndrome to be caused by plaintiff's work at defendant over several years.

Plaintiff filed a Claim for Review, arguing that the magistrate committed legal error in not awarding wage loss benefits after finding the carpal tunnel to be work related. Defendant filed a Cross-Claim for Review arguing that plaintiff was last subjected to conditions which caused her carpal tunnel syndrome while working in Kentucky, and as a result the magistrate did not have jurisdiction to find against this defendant.

Our function as an appellate body is to perform a qualitative and quantitative evaluation of the evidence to determine whether a magistrate's fact finding is supported by competent, material and substantial evidence on the whole record. We review questions of law de novo. *Mudel v Great Atlantic and Pacific Tea Company*, 462 Mich 691 (2000); *Holden v Ford Motor Company*, 439 Mich 257 (1992).

The magistrate set forth a summary of the evidence presented at trial. We reprint relevant portions of that summary here for reference:

Plaintiff was born on 10-19-44, and was 62 years old on the day of the hearing. She graduated from Flint Central High School and worked several years as a clerk at a market where she made no more than \$20 a week. Plaintiff has no other training or schooling. Plaintiff started working for General Motors on 7-8-72 at Fischer Body # 1. That plant closed in 1989, and Plaintiff went to Assembly General working as a utility absentee replacement worker. She worked all jobs standing in for any worker who was absent or had to leave early. Her jobs included using motors, hand tools, and power drills. One job she remembered required her to beat a part into the car with her hand.

In 1991, Plaintiff was laid off for 4 years, but was called back to Metal Fab as a press operator in 1994. One job included lifting greasy oil pans which made her hands swell up. She also worked with a long pole to separate parts and received a strained back. She lifted cast iron parts as big as small table from a tray into the press. Plaintiff testified that hanging fenders on a monorail at the rate of over a thousand a day and lifting sheets of galvanized steel hurt her back. At one time, Plaintiff pushed on a palm button all day and hurt her hand. In March of 1998, Plaintiff was working with lifting restrictions and a sit stand option. She testified that there was a chair on all jobs.

Plaintiff took a transfer to Bowling Green, Kentucky in March of 1998; she was given an incentive to transfer of \$6000. Her first job in Kentucky was to place rubber around car doors; she described that as easy. She was then changed to a job where she would put parts in motors. That job required standing all day and hurt her hands. She was given an office job filing papers, but, after a strike, the job was unavailable. Plaintiff went on sick leave in August of 1998 and retired with a total and permanent disability pension a year later, because of major depression. [Magistrate's opinion, pp 3-4.]

The magistrate concluded that while there is evidence on the record that plaintiff suffers from carpal tunnel syndrome, she has not preponderated in showing that she has lost wage earning capacity as a result of that syndrome. He accurately placed the burden on plaintiff to establish a compensable claim by a preponderance of the evidence for each element, citing *Aquilina v General Motors Corporation*, 403 Mich 206 (1978). There is really no dispute at this point that plaintiff suffers from carpal tunnel syndrome. The medical evidence is indisputable that she does. The magistrate relied on the medical testimony, as well as plaintiff's testimony and defendant's plant medical records to conclude that the carpal tunnel was contributed to by her employment with defendant.

A work-related injury or condition does not equate to a compensable disability. Plaintiff argues that because her highest wages were earned at defendant, the magistrate must find that she can perform all jobs at defendant, or else find that she is disabled. She further argues that she left the Flint plant because of her carpal tunnel and that, in and of itself, establishes a limitation in her wage earning capacity. Plaintiff argues that the magistrate misapplied *Sington v Chrysler Corporation*, 467 Mich 144 (2002).

We disagree. The magistrate does not combine the various jobs to determine whether plaintiff can perform each and every aspect of all of them; rather, he properly reviewed the evidence presented to determine whether each and every job which this plaintiff was qualified and trained to perform and which paid the maximum wages would be precluded by her restrictions. However, the trial and decision in this case took place before the Supreme Court's most recent pronouncement on disability.

The Court of Appeals, in response to a remand order from the Supreme Court, had issued a decision in *Stokes v DaimlerChrysler Corporation*, 272 Mich App 571 (2006), on October 26, 2006. That Court gave its interpretation of what is required to establish a claimant's "qualifications and

training.” It rejected any inference that “qualifications and training” included only jobs actually performed by the worker, prior to the injury. The Court had stated:

The language used in *Sington* takes a broad view of an injured employee's "qualifications and training," which is not limited to the jobs on the employee's resume, but, rather, includes any jobs the injured employee could actually perform upon hiring. The *Sington* opinion specifically directs the fact-finder to address "whether there is a limitation in wage earning capacity" rather than whether the injured employee "is merely limited in performing one (or more) particular jobs." *Id.* at 158. *Sington* referred to the Supreme Court's order in *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201; 536 NW2d 542 (1995). *Sington, supra* at 156-157, 161. Among other directions, the *Rea* order instructed the magistrate to develop the record and make findings regarding "[w]hether Rea is qualified and trained for any work other than what he did for Regency Olds and Rod's, and, if so, what." *Rea, supra* at 1201. This language shows that the magistrate's determination of the injured employee's qualifications and training should not be limited only to those jobs the employee had previously performed. [*Stokes v DaimlerChrysler Corporation*, 272 Mich App 571 (2006).]

The Court went on to distinguish between what “qualifications and training” might include and what evidence it believed a plaintiff was required to present, in order to establish a prima facie case:

On the other hand, to the extent the WCAC addressed the issue from the standpoint of the production of evidence, and held that as a practical matter, an employee's proofs will generally consist of the equivalent of the employee's resume-i.e., a listing and description of the jobs the employee held until the time of the injury, the pay for those jobs, and a description of the employee's training and education-and testimony that the employee cannot perform any of the jobs within his qualifications and training paying the maximum wage, the WCAC did not err. By producing such evidence, in addition to evidence of a work-related injury causing the disability, an employee makes a prima facie case of disability-a limitation in the employee's maximum wage earning capacity in all jobs suitable to the employee's qualifications and training. The WCAC did not err in concluding that such a showing is adequate to establish disability in the absence of evidence showing that there is in fact real work within the employee's training and experience, paying the maximum wage, that the employee is able to perform upon hiring. [*d.*]

An application for leave to appeal was filed with the Supreme Court, and after oral argument on the application itself, the Court issued a decision which has binding precedential effect on all cases. The Court did not address retroactivity, and therefore, we apply full retroactivity.

The Supreme Court held that in order to establish disability, plaintiff has a burden of completing a four-step process. Following the four-step process, defendant can then come forward with any additional evidence it wishes to produce regarding work suitable to plaintiff's qualifications and training. The four-step process consists of the following factors:

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. 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. . . .

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.

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. [*Stokes, supra* at 281-283.]

There is also a mechanism presented which allows the parties to 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.

This precise sequence is not rigid, but rather identifies the nature of the proofs that must precede the fact-finder's decision. [*Stokes, supra* at 283-284, footnote omitted.]

Considering the significant change that the Supreme Court's decision in *Stokes* has had on the procedural requirements of proof of disability, due process requires that this case be remanded for additional evidence on that issue.

On cross-appeal, defendant argues that because plaintiff was last subjected to the conditions which resulted in her carpal tunnel syndrome, while employed and living in Kentucky, the magistrate had no jurisdiction to find a personal injury, citing *Karaczewski v Farbman Stein & Company*, 478 Mich 28 (2007), and §§ 301(1) and 845. Those sections state, respectively:

Sec. 301. (1) An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an 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.

* * *

Sec. 845. The bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury and the contract of hire was made in this state. Such employee or his dependents shall be entitled to the compensation and other benefits provided by this act.

Prior to May of 2007, the facts of this case would not have raised an issue of jurisdiction. When plaintiff filed this application, the case law held that § 845 extended jurisdiction to out-of-state injuries where plaintiff was a resident of the state of Michigan or where plaintiff entered into a contract of hire in Michigan. *Boyd v W.G. Wade Shows*, 443 Mich 515 (1993). The Supreme Court overruled *Boyd*, holding that the clear meaning of § 845, limited jurisdiction for out-of-state injuries to those cases where plaintiff was a resident of Michigan on the date of injury and the contract of

hire was made in Michigan. Unless both criteria are met, the Board of Magistrates has no jurisdiction over an out-of-state injury. *Karaczewski, supra*.

Defendant asserts that § 301(1) requires that if the magistrate finds a date of injury, it must be while plaintiff was still employed in Kentucky. It goes on to argue that since this magistrate has no jurisdiction over Kentucky injuries, his finding of a personal injury must be reversed. We disagree. The Supreme Court in *Smith v Lawrence Baking Company*, 370 Mich 169 (1963), interpreted language, which is almost identical to that found in § 301(1), and held it must be read as follows:

The term “time of injury” or “date of injury” as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the [Michigan] employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.

The Court reasoned that the Act under consideration is a Michigan Act. It deals with Michigan workers and Michigan working conditions and Michigan problems. “Clearly, the legislature did not have in mind employers outside the State over whom it would have no jurisdiction.” [*Smith, supra*.]

We acknowledge our colleagues’ analysis and reliance on prior decisions of the Supreme Court. We respectfully disagree that our analysis here is inconsistent with that case law. The dissent, in footnote 2, discusses the holding in *Wagner v LaSalle Foundry Company*, 345 Mich 185 (1956). *Wagner* was specifically overruled in *Smith*. *Dressler v Grand Rapids Die Casting Corporation*, 402 Mich 243 (1978), did apply the successive injury rule, but did not involve employers outside of our Michigan borders.

Connaway v Welded Construction Company, 462 Mich 691 (2000) is also distinguishable from the cases before us, in that the Workers’ Compensation Appellate Commission had reversed the magistrate’s finding of continuing disability from the Michigan injury, holding that Ms. Connaway had recovered from her Michigan injury. The courts were interpreting their standard of review. The Supreme Court held that judicial review of the Commission was to determine whether there was “any” evidence to support the Commission’s reversal as opposed to “substantial” evidence. The Court found that there was medical testimony which could be interpreted as supporting the Commission’s finding that Ms. Connaway had recovered from her Michigan injury. The Court then looked to the Michigan-Massachusetts rule for subsequent injuries. This reliance on the Michigan-Massachusetts rule was not inconsistent with its prior holding in *Arnold v General Motors Corporation*, 456 Mich 682 (1998).

In *Arnold*, the Supreme Court reversed a Court of Appeals decision which held that a subsequent employer, SMART, was solely liable for payment of plaintiff’s workers’ compensation benefits, and the date of injury was with the subsequent employer, resulting in a lower weekly benefit due to a lower paying job. There had been no finding in *Arnold* that plaintiff had recovered from her back injury at General Motors. The Supreme Court, relying on the dissenting judge in the Court of Appeals decision stated:

Though the language of the statute is clear, we additionally note that this interpretation is consistent with the objective of the statute. Section 301 is intended to encourage disabled workers to seek employment within their limitations, which benefits everyone concerned, including the former employer. As the dissenting judge in the Court of Appeals noted, under the approach of the Court of Appeals, a claimant who returns to work at lower wages risks a drastic reduction in worker's compensation benefits if a subsequent injury occurs. [*Arnold, supra* at 691.]

Although the *Arnold* Court throughout its opinion refers to plaintiff being “disabled” from the initial injury, it must be understood that “disabled” was then defined as:

We hold that a disability is a personal injury or work-related disease that prevents an employee from performing any work, even a single job, within his qualifications and training under M.C.L. § 418.301(4); M.S.A. § 17.237(301)(4). [*Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997).]

In the instant cases both plaintiffs would have satisfied the definition of disability under *Haske* and *Arnold*. *Arnold* held that where a claimant remains disabled, the subsequent injuries rule does not apply. As in *Arnold*, the fact of an injury and disability (inability to perform at least one of the prior jobs), places an ongoing burden on the Michigan employer.

“Jurisdiction” may be defined as “the authority which the court has to hear and determine a case.” *Ward v Hunter Machinery Co*, 263 Mich 445, 449 (1933). However, an administrative agency is not a court. “It was created by statute, and to the statute it must look for its authority.” *Jones v St. Joseph Iron Works*, 212 Mich 174, 178 (1920). When there is no jurisdiction--and MCL 418.845 and *Karaczewski* plainly establish that there is no jurisdiction over injuries these employees may have sustained in another state--we must dismiss any claim for relief for such injury without further consideration of the merits. “When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void.” *Fox v Board of Regents of the University of Michigan*, 375 Mich 238, 242 (1965). But this necessarily leaves open for consideration any injury which did occur in Michigan--over which there clearly is jurisdiction¹--and relief can be granted under the Michigan Act if the requirements of the Michigan Act as to such injury are met. A comparable example is unemployment compensation. The workers' compensation administrative agency clearly has no jurisdiction over unemployment compensation benefits; we cannot grant or deny unemployment compensation benefits no matter how the facts are presented to us. Such a lack of jurisdiction over unemployment compensation benefits does not deprive us of jurisdiction to determine entitlement to Michigan workers' compensation benefits for that same employee, for a Michigan injury.

¹ *Schenkel v Tower Builders Company, Inc*, 380 Mich 492 (1968); *Wallace v Consolidated Freightways*, 199 Mich App 141; lv den, 444 Mich 891 (1993); *Alford v Pollution Control Industries of America*, 222 Mich App 693 (1997). This jurisdiction, once acquired, is not lost through the passage of time. *Catino v Morgan & Wright Co*, 272 Mich 154 (1935).

Once it is determined that there is no jurisdiction, there is no permission to proceed further. *Fox, supra* at 243. In *Lehman v Lehman*, 312 Mich 102 (1945), it was necessary for one of the parties to prove that they were a resident of the county in which the divorce action was commenced in order to confer jurisdiction upon the court. When, in *Lehman*, the residency was not established by the facts presented in the trial court, the Supreme Court held that “the trial court was without jurisdiction to grant the decree in question.” [*Id.* at 107.] Further, and in words appropriate for the cases here, the Court held that “it is unnecessary to discuss the testimony relative to the respective allegations.”

And so it must necessarily be here. In contrast to the admonition of the Court in *Lehman* that a discussion of the merits is unnecessary or, in other cases, the Court simply omitted any discussion of the merits, the dissenting opinion seeks to establish that there was an injury in another state, a matter over which this workers' compensation administrative agency has no jurisdiction. Once it is determined that the employee was a resident of another state at the point in time when it is alleged that there was an injury attributable to circumstances that occurred in another state, it is established by MCL 418.845 and *Karaczewski* that there is no jurisdiction over such controversies. And that is the end of the matter of what occurred in another state because, with no jurisdiction over such events, there is no occasion to address the merits of what happened in that other state just as, in *Lehman*,² there was no occasion to discuss the allegations that gave rise to the complaint and counter-complaint for divorce.

There is no jurisdiction by this Board of Magistrates to determine liability of the out-of-state employers. Therefore, a determination must be made as to whether the injuries in Michigan contributed to any disability of the plaintiff.

First, there is no evidence that plaintiff was subjected to the conditions that resulted in her carpal tunnel syndrome while employed in Kentucky. Second, only an injury which occurs outside of Michigan is covered by § 845. In the case of cumulative trauma as set forth in § 301(1), 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, would necessarily be the last day of work in such employment in Michigan.³ That is because a magistrate would not have jurisdiction to make a determination as to whether the employee was subjected to conditions that resulted in the disability or death in another state. He/she must make findings based only on the Michigan employment.

Coleman

In the case of *Coleman v General Motors Corporation*, plaintiff appeals the decision of Magistrate Kenneth A. Birch, mailed on October 18, 2007, denying plaintiff's claim for benefits on a finding that the Board of Magistrates did not have subject matter jurisdiction over plaintiff's disability. We remand to the magistrate for further findings.

² *Supra* at 107.

³ Unless the employee was a resident of Michigan at the time of injury, and the contract of hire was made in Michigan, and the cumulative trauma continued in employment outside of Michigan.

This case was initiated by plaintiff filing an Application for Mediation or Hearing on December 12, 2006 alleging that repetitive and forceful use of upper extremities has caused, aggravated and contributed to bilateral carpal tunnel syndrome. The alleged date of injury was October 18, 1995. Defendant denied liability under the Michigan Workers' Compensation Act, pursuant to MCL 418.845, as plaintiff was not a Michigan resident at the time he became disabled.

A trial in this matter was held on September 13, 2007. Plaintiff appeared personally and testified on his own behalf. He also presented medical testimony by deposition from Dr. Bronier L. Costas. Defendant presented medical testimony by deposition from Dr. Maynard Buszek. The magistrate issued his decision on October 18, 2007. Plaintiff filed a timely claim for review.

In his opinion, the magistrate set forth a summary of the plaintiff's testimony. We reprint portions of that summary here for reference:

Plaintiff graduated from high school in 1972 and went into the service for three years and then worked construction before beginning at General Motors in April of 1977. Plaintiff is married and has two children who are grown. He initially worked painting and installing molding on grills. He used his hand to cut off excess plastic from the molds. He transferred to Oldsmobile in Lansing where he worked six months running a welding machine. In 1982, he transferred to Truck and Bus in Flint and was assigned to adjusting transmissions. He also used a large power gun to fasten bolts to the engines. He eventually ended up welding frames.

For almost three years before 1995, he was making 40 welds per car and processing almost 60 cars a day. On 10-18-95, a doctor took him off of work because both hands were going numb, stinging, and had weakness. He had ganglion cyst surgery, and went back to the plant with restrictions. He went to a plant in Saginaw from 1995 until 1997 where he used his hands with vibrating tools and small parts assembly. He testified that his hands never got better. He filed for workers' compensation in 1996 for Carpal Tunnel Syndrome (CTS).

In December of 1997, he transferred to a General Motors plant in Georgia. In Georgia he was assigned to spot welding. He had to make 7 welds per vehicle at the rate of 60 vehicles per hour. During the one and a half years he worked that job, his carpal tunnel symptoms came back. The plant doctor, Dr. Singer referred him to a specialist, Dr. Costas, for treatment. Plaintiff had bilateral carpal tunnel surgery, went through rehabilitation and retired with a total and permanent disability pension, and received Social Security Disability in 2003.

Plaintiff testified that since 1995, his hand[s] never got better and the symptoms were about the same in Georgia a[s] they were in Michigan. He acknowledged a full move to Georgia; he bought a house, got a driver's license, registered to vote, and joined the UAW local at the plant. [Magistrate's opinion, pp 3-4.]

As noted in the magistrate's summary, plaintiff was a resident of Georgia when his upper extremity condition became totally disabling. He had worked in Georgia for defendant for over five

years, before going off work on a disability retirement. Defendant argued and the magistrate found that the work performed in Georgia aggravated plaintiff's condition, pursuant to MCL 418.301(1). However, the magistrate did not have jurisdiction to apply § 301(1) to determine whether plaintiff suffered an injury (aggravation) in Georgia, as that employment was not subject to this act. He only had jurisdiction to apply § 301(1), to determine what, if any, injury plaintiff sustained at the Michigan employer. *Smith, supra*.

Because the magistrate erroneously made findings of fact over which he had no subject matter jurisdiction, he declined to make specific findings relative to the alleged date of injury in Michigan. If, in fact, plaintiff's work here in Michigan contributed to his injury, it must be considered in determining whether he is entitled to benefits. We note that plaintiff did not allege a last date of employment, even here in Michigan. He did, however, allege an October 18, 1995 date of injury, and the magistrate must make a finding on that date, without considering any work performed in Georgia, specifically as it pertains to § 301(1).

We remand for findings of whether or not plaintiff has established a work-related injury in Michigan, and if so what if any benefits he is entitled to.

We retain jurisdiction. We direct the magistrate to issue a supplemental opinion on remand, and not a new order.

Commissioners Will and Ries concur.

Martha M. Gasparovich	Chairperson
Rodger G. Will	Commissioner
Granner S. Ries	Commissioner

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GRIT, COMMISSIONER, DISSENTING

We respectfully dissent from the lead opinion. The Michigan Supreme Court decision in *Connaway v Welded Construction Company*, 462 Mich 691 (2000) directly addresses the legal question in these two cases. We would reverse the finding of a March 15, 1998, date in *Nelson* and would affirm the magistrate's findings and legal conclusions in *Coleman*.

Overview

These consolidated cases not only involve the same legal question, they are strikingly similar in other ways. In both cases the claimants worked the bulk of their careers in Michigan for General Motors. Both left Michigan to accept out-of-state work. At the time of their last day of work for General Motors, both claimants were legal residents of other states, one in Kentucky and one in Georgia. As of their last day of work, both claimants were working in General Motors facilities in their new home states.

After both claimants left their out-of-state employment with General Motors, they returned to Michigan. Both took disability retirement pensions. They both filed workers' compensation cases in Michigan. Both claimants alleged their last day of work with General Motors in Michigan, but did not plead their actual last day of work for General Motors, which

for Ms. Nelson was in Kentucky and for Mr. Coleman was in Georgia. Both cases were heard before the same magistrate.

Both claimants allege cumulative trauma type injuries, which fall under MCL 418.301(1). Section 301(1) provides that in cumulative trauma cases, the injury date “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.” In both cases, the claimants had upper extremity conditions before they moved out of state.

In both cases, the claimants’ last day of work that contributed to their disabilities occurred outside of the state of Michigan. While it is not necessary to establish a distinct injury on the last day of work in a cumulative trauma case,¹ the facts in both of these cases establish the plaintiffs performed upper extremity work in their subsequent employments, worsening their conditions.

In both cases, the plaintiffs lost at trial. In Ms. Nelson’s case, the magistrate found her carpal tunnel syndrome was work-related, but denied wage loss benefits because the plaintiff failed to establish a link between her carpal tunnel syndrome and her wage loss. The reason the plaintiff left her job in Kentucky was related to non-occupational low back and psychiatric problems.² In Mr. Coleman’s case, the magistrate denied benefits because he did not have

¹ *Simpson v Borbolla Construction & Concrete Supply, Inc*, 480 Mich 964 (2007), *Simpson*, 2005 ACO #153, *Irvin v Columbus Destroyers*, 2008 ACO #13.

² The magistrate found as follows:

While working in Flint and in Bowling Green, Plaintiff was able to perform several light jobs as long as her restrictions for her back were honored. Dr. Awerbuch’s restrictions appear to apply to Plaintiff’s back; there were no specific CTS restriction[s] given. While Plaintiff continued to have problems with her hands in 1998, she has not established that a result of his [sic] CTS, she could not perform her jobs. Plaintiff left Flint to get a better job in Bowling Green, Kentucky. She was unable to continue there because after a strike there was not a job within her back restrictions and she became disabled because of major depression. I find that while Plaintiff did suffer from bilateral carpal tunnel syndrome related to her years of work at General Motors, the CTS did not limit her wage earning capacity in work suitable to her qualifications and training.

There is no evidence, medical or otherwise that Plaintiff’s depression was related significantly to her employment. Pursuant to the above decision, Plaintiff is denied wage loss benefits, but is entitled to ongoing medical benefits for carpal tunnel syndrome. [Magistrate’s opinion, p 7.]

Not only does the plaintiff not contest the wage loss finding, in her brief she agrees her wage loss is related to her psychiatric problems, not her carpal tunnel syndrome. In her brief she acknowledged:

Clearly, the Plaintiff’s wage loss in this case at the time of her leaving the Kentucky plant was a psychiatric condition. [Plaintiff’s brief, p 11.]

The majority remands for a disability analysis under *Stokes*. Whatever the magistrate’s disability finding on remand, the fact still remains the plaintiff failed to link her wage loss to her alleged work injury.

jurisdiction over the last day of work injury in Georgia. The magistrate specifically found the plaintiff was last subjected to the conditions that lead to his disability while he was working in Georgia. [Magistrate's opinion, p 7.] The lead opinion remands this case for consideration of a Michigan injury date, but does not include a *Stokes* remand.

Factual Summaries

Nelson

Ms. Nelson alleged bilateral carpal tunnel syndrome as the result of repetitive work activities. She worked for General Motors from 1972 until she took a non-occupational disability retirement in 1998. For all but approximately four months of her employment, Ms. Nelson worked for General Motors in Michigan. In March of 1998 she transferred to the Bowling Green, Kentucky plant.

The defendant argues the magistrate erred by assigning an injury date of March 15, 1998, the last day the plaintiff worked for General Motors in Michigan. The defendant argues the operative date is the last day of work in Kentucky, not the last day of work in Michigan. The actual last day of work was never pled.

The evidence establishes the work in Kentucky contributed to Ms. Nelson's carpal tunnel syndrome. The plaintiff acknowledged some of the work in Kentucky caused her hands to hurt. [Trial transcript, p 36.] Her treating neurologist, Dr. Awerbuch, recorded a history that while working with restrictions in Kentucky, her work involved repetitive hand activities that caused her increased symptoms. [Dr. Awerbuch's deposition, p 14.] Treating hand surgeon, Dr. Beird, related the plaintiff's carpal tunnel syndrome to 27 years of upper extremity overuse at work. [Dr. Beird's deposition, pp 18, 24-25, 29.]

The magistrate granted the carpal tunnel claim, but denied wage loss benefits because the plaintiff failed to establish her work-related condition limited her wage earning capacity. [Magistrate's opinion, p 7.] The magistrate used the last day of work in Michigan, March 15, 1998, as the applicable injury date. His analysis does not mention the potential problems created by the subsequent out of state employment. The plaintiff appealed and the defendant cross-appealed.

Coleman

Mr. Coleman worked for General Motors for approximately 22 years. All but the last year and half, he worked in Michigan. The magistrate found during his tenure in Michigan, Mr. Coleman developed work-related carpal tunnel syndrome. Mr. Coleman finished his employment with approximately one and one-half years at a General Motors plant in Georgia. While he was in Georgia his carpal tunnel syndrome worsened, causing him to go off work, undergo surgeries and eventually retire with a disability pension.

The medical testimony presented by the plaintiff, relied on by the magistrate, establishes the work in Georgia contributed to a worsening of Mr. Coleman's carpal tunnel syndrome. [Magistrate's opinion, pp 6-7, Dr. Costas' deposition, pp 15-17, 21.] The plaintiff's treating surgeon, Dr. Costas, testified the plaintiff complained of worsening carpal tunnel symptoms in May and June of 1999, when he was working in Georgia performing spot welding.

Q. When you saw him in 1999, the first time that you saw him in May, he said that his hands had become progressively worse where he started dropping things and started having more problems?

A. Yes, sir.

Q. And at that time he was doing welding, correct?

A. Correct.

Q. Later on you see him June 23rd of 1999 he indicates the symptoms are worsening?

A. Yes, sir.

Q. And you had a concern at that time about the spot welding job that he was doing?

A. Right. Correct.

Q. Certainly as he continues to work with his hands, his symptoms are going to worsen?

A. Correct.

Q. And could the underlying carpal tunnel syndrome worsen as well?

A. Yes, sir. [Dr. Costas' deposition, p 21.]

Dr. Costas felt the plaintiff's condition was "slowly ebbing" or getting worse. Because the plaintiff's condition was declining, Dr. Costas felt surgery was necessary. [*Id.*, pp 24-25.]

The magistrate denied the claim, finding the proper injury date was the actual last day of work, which occurred in Georgia, not in Michigan.

Carpal Tunnel Syndrome is an injury which occurs after long time repetitious use of the hands and wrists. It is clear Plaintiff's hands and wrist were bothering him while he worked in Michigan. As indicated above, Michigan worker's compensation law finds the date of injury as the last date that Plaintiff was subjected to the conditions which resulted in Plaintiff's disability. In this case that day was in 1999 while the Plaintiff was performing spot welding for Defendant in Georgia. Plaintiff's testimony is not consistent regarding the problems with his hands after he moved to Georgia. At one point, when asked

directly to compare his CTS in Michigan with the CTS in Georgia, he answered appropriately that there was no change. When testifying about his work as a spot welder, without coaxing, he volunteered that 7 welds a vehicle at a rate of 60 cars a day made his symptoms return. His own witness use the words progression and getting worse when describing Plaintiff's problems. Other than Dr. Costas's testimony, there is no other competent evidence that Plaintiff's pathology was not worse in 1999 than it was in 1997 when he last worked in Michigan. There is a statement in Dr. Dass's records which seems to suggest that if Plaintiff stayed on restriction and used his splints, he might not need surgery later on. It can be inferred from that statement that had Plaintiff not continued to work using his hands and wrists that his CTS might resolve without surgery. Finally, Plaintiff told Dr. Costas that his hands and wrist were getting worse since working in Georgia.

I find that Plaintiff's injury date when he was last subjected to the conditions which led to his disability was while he worked in Georgia for Defendant in 1999. [Magistrate's opinion, pp 6-7.]

The plaintiff appealed, arguing the magistrate's decision is contrary to *Connaway*. The defendant urges us to affirm the magistrate.

Analysis

There is no question if Ms. Nelson and Mr. Coleman had last worked for General Motors in Michigan, Michigan law would apply. The issue presented in these two cases is the legal effect of an out of state last day of work, when the last day of work is necessarily the injury date under § 301(1). We would find the correct injuries dates were the claimants' actual last days of work with General Motors, which occurred when both claimants were out of state residents and both worked outside of Michigan.

Section 301(1) reads as follows:

(1) An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employee's dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an 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.

The lead opinion wants us to read the limiting phrase from the first sentence, "by an employer who is subject to this act at the time of injury" into the third sentence of the section. There appears to be no relationship between the three sentences in § 301(1). Nevertheless, our colleagues' interpretation of the statute is arguably supported by the 1963 decision in *Smith v Lawrence Baking Company*, 370 Mich 169 (1963), interpreting similar language under a previous version of Chapter Four. The problem is that *Smith* is not the controlling law.

For decades, we have had Michigan Supreme Court law contrary to the *Smith*,³ holding. We start with Michigan Supreme Court's decision in *Dressler v Grand Rapids Die Casting Corporation*, 402 Mich 243 (1978). The *Dressler* Court affirmed a finding against the last employer for a back injury. In doing so, it quoted with favor from Professor Larson's description of the "Massachusetts-Michigan" rule regarding successive injuries.

The Massachusetts-Michigan rule in successive-injury cases is to place full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability.

If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. In this class would fall most of the cases discussed in the section on range of consequences in which a second injury occurred as the direct result of the first, as when claimant falls because of his crutches which his first injury requires him to use. This group also includes the kind of case in which a man has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of disability precipitated by some lift or exertion.

On the other hand, if the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed the major part to the final condition. This is

³ In a case even older than *Smith*, the Michigan Supreme Court held the Agency could not grant benefits against a Michigan employer, when the plaintiff lived and worked outside of Michigan on the last day of exposure. Interpreting a previous version of the statutory language, *Wagner v LaSalle Foundry Company*, 345 Mich 185 (1956), held a plaintiff who does not have a case against the "last" out of state employer still is not entitled to seek benefits from a previous Michigan employer.

It does not follow, however, that because of the fact that part 7, § 9, of the workmen's compensation act would not be binding upon the Ohio employer, that that necessarily would shift the responsibility for the injury from the Ohio employer to the defendant Michigan employer. To adopt such a theory would be to conclude that our legislature intended to make an award in all cases of this kind, and that where the jurisdiction of the commission prevented it from following plaintiff as he crossed our State line into Ohio that it must stop at the State line and determine what employer in Michigan was the last employer that should bear the total compensation that must be paid.

* * *

From an examination of the various sections of the act, as above referred to, this Court comes to the conclusion that the legislature intended that the commission would have jurisdiction and should exercise jurisdiction in a case of this nature under part 7, § 9, upon the last employer, provided, that such last employer was a Michigan employer; and where, as in this case, the last employer was an employer without the State of Michigan, said commission lacked jurisdiction to make an award. [*Id.*, pp 195-196, 197.]

consistent with the general principle of the compensability of the aggravation of a pre-existing condition. 3 Larson, Workmen's Compensation Law, s 95.12, pp. 508.130-508.133. [*Id.*, pp 253-254, emphasis added.]

The application of the successive injury rule to out-of-state injuries was addressed by the Michigan Supreme Court in *Connaway*. In *Connaway*, the plaintiff suffered an injury in Michigan when she fell and injured her knee. She underwent surgery and was returned to work without restrictions. She then worked in New York, performing the same type of work, when she suffered another knee injury. The WCAC found the plaintiff's New York injury was an "aggravation" of the earlier Michigan injury, not a "recurrence" of the Michigan injury. The WCAC determined the plaintiff would have to seek benefits in New York, rather than in Michigan.

The *Connaway* Court upheld the WCAC's findings as supported by the requisite evidence. The *Connaway* Court reiterated the successive injury rule and stated that if the New York injury aggravated the plaintiff's knee, "even slightly," that liability was with the last employer, the New York employer.

However, if the New York injury aggravated Connaway's original Michigan injury, independently contributing to her present disability, even slightly, then the successive injury rule would assign responsibility for Connaway's worker's compensation benefits to her New York employer. [*Id.*, p 721.]

The lead opinion questions whether the Workers' Compensation Agency has subject matter jurisdiction to determine all the questions posed by § 845. The statute, MCL 418.841(1), provides that:

1. Any dispute or controversy concerning compensation or other benefits shall be determined by the Agency, and
2. All questions arising under this act shall be determined by the Agency or a magistrate. MCL 418.841(1).

The Courts have long recognized the broad grant of jurisdiction given the Agency to decide disputes that arise under the Act. *Aetna Life Insurance Company v Roose*, 413 Mich 85 (1982); *Szydowski v General Motors Corporation*, 397 Mich 356 (1976). Application of § 845 necessarily requires a determination of whether the plaintiff is a resident of Michigan, if the contract of hire was made in Michigan **and** whether there was an out of state injury. Determining whether there was an out of state injury necessarily requires determining whether an injury occurred. The findings in *Connaway* highlight this point.

The lead opinion suggests we (magistrates and the WCAC) do not have jurisdiction to determine if an "injury" occurred to Ms. Nelson in Kentucky or to Mr. Coleman in Georgia. Clearly, the Michigan Supreme Court feels differently, since it affirmed the WCAC's fact finding in *Connaway*.

Both the magistrate and WCAC in *Connaway* performed the type of fact finding the lead opinion claims we do not have. The magistrate and WCAC both addressed the factual issue of whether the plaintiff’s New York knee injury was an “aggravation” of a previous injury. The Supreme Court affirmed the WCAC’s ultimate conclusions, because they were consistent with the WCAC’s standard of review **and** because they were consistent with the successive injury rule. [*Id.*, pp 723- 724.]

Conclusion

Under the *Connaway* case, some employees, such as Ms. Nelson and Mr. Coleman, who work the bulk of their careers in Michigan, will have to seek workers’ compensation benefits outside of Michigan. On the other hand, some employees will work the bulk of their careers outside of Michigan and then finish their employment in Michigan as Michigan residents. Those employees will be eligible, under § 301(1), to seek workers’ compensation benefits in Michigan, including benefits for cumulative trauma injuries.

Because Ms. Nelson and Mr. Coleman’s correct injury dates are their last day of work in Kentucky and Georgia, they do not have a remedy under § 301(1) in Michigan. Michigan does not have jurisdiction over the Kentucky and Georgia injuries. While not necessary to prove a cumulative trauma injury date under § 301(1), the medical evidence also establishes the out-of-state employment with General Motors “contribute[d] independently” to Ms. Nelson’s and Mr. Coleman’s carpal tunnel syndrome.

Commissioner Przybylo concurs.

Donna J. Grit

Commissioner

Gregory A. Przybylo

Commissioner

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

BETTY JEANE NELSON,
PLAINTIFF,

V

DOCKET #07-0170

GENERAL MOTORS CORPORATION,
SELF INSURED,
DEFENDANT.

WILLIE N. COLEMAN,
PLAINTIFF,

V

DOCKET #07-0268

GENERAL MOTORS CORPORATION,
SELF INSURED,
DEFENDANT.

These causes came before the Appellate Commission on, in *Nelson*, a claim for review filed by plaintiff and a cross-appeal filed by defendant from Magistrate Kenneth Birch's order, mailed June 27, 2007, granting plaintiff medical benefits only, and in *Coleman*, a claim for review filed by plaintiff from the decision of Magistrate Birch's order, mailed October 18, 2007, denying benefits. In an order mailed June 23, 2008, these cases were consolidated and designated en banc. The Commission has considered the record and counsel's briefs, and believes that the magistrate's orders should be remanded for further proceedings. Therefore,

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

Martha M. Gasparovich	Chairperson
Rodger G. Will	Commissioner
Granner S. Ries	Commissioner