RECENT CASES

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SUPREME COURT

Attorney Fees On Unpaid Medical Expenses

The Supreme Court has released its opinion in *Petersen v Magna Corp*, ____ Mich ____; ____ NW2d ____ (2009) (SC Docket Nos. 136542, 136543). The issue in the case is whether attorney fees can be assessed on employers and/or their carriers under MCL 418.315(1)'s last sentence, which reads: "The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee." A majority – four of the seven Justices – hold that only employers and insurance carriers (and not medical providers or medical creditors) can be assessed plaintiff's counsel's fees on unpaid medical expenses. It is a matter of the Magistrate's discretion as to whether or not to award such attorney fees.

There are five different opinions from the seven Justices in the case. Chief Justice Kelly authored the lead opinion with Justice Cavanagh concurring. Justice Hathaway authored the second opinion with Justice Weaver concurring. Both of these opinions reach the same result – the result described in the paragraph above – but for different reasons. Justice Markman dissented in a lengthy opinion. Justice Young dissented in a separate opinion. And, Justice Corrigan dissented joining Justice Markman's dissent and part of Justice Young's dissent.

With respect to the first opinion authored by Chief Justice Kelly (with Justice Cavanagh concurring), the Chief Justice finds that the statutory language at issue is ambiguous in the sense that it does not identify amongst whom the attorney fees are to be prorated, *e.g.*, the employee, the employer, the insurance carrier, or the medical provider or medical creditor. The

Chief Justice concludes that the sentence at issue only allows for proration between employers and their carriers. In response to one of the dissents, Chief Justice Kelly clarifies that nothing in her opinion is to be construed as *requiring* a Magistrate to prorate a fee against an employer or the employer's carrier; it is instead a matter of the Magistrate's discretion.

In the course of her opinion, the Chief Justice embarks on a discussion of how to determine when a statute is ambiguous. In so doing, the Chief Justice disapproves of more recent opinions from the Supreme Court that define ambiguity. The Chief Justice then discusses *stare decisis* and would change the rules as to when Supreme Court precedent can be overturned.

The second opinion authored by Justice Hathaway (with Justice Weaver concurring) agrees with the lead opinion but "only to the extent that it concludes that the term 'prorate' in MCL 418.315(1) applies exclusively to employers and their insurance carriers." What Justice Hathaway disagrees with in the lead opinion is the lead opinion's finding that the statute is ambiguous. Justice Hathaway finds it unambiguous. For that reason, Justice Hathaway undertakes no discussion of ambiguity and *stare decisis*.

The primary dissenting opinion is that of Justice Markman. Justice Markman says the proration sentence in § 315(1) contemplates a division of attorney fees among the different medical providers who reap the benefit of the unpaid medical award, as opposed to assessment of fees on employers or carriers. Justice Markman says the majority is adding an additional cost upon the workers' compensation process "by penalizing employers and forcing them to pay not only for their own attorneys, but also for their employees' attorneys." Justice Markman also criticizes the Chief Justice's definition of ambiguity, saying it creates "an extraordinarily low threshold for finding ambiguity" which permits a Justice to "utilize whatever factors are deemed appropriate [by that Justice] in reaching a result."

Justice Young joined in parts of Justice Markman's dissent, but he would hold that the term "prorate" applies only to a proration between the claimant and the employer – not to medical providers or medical creditors who are not parties to the case or represented by counsel. Justice Young says the majority's opinion will have a chilling effect on employers and carriers contesting medical expenses.

Finally, Justice Corrigan fully agreed with Justice Markman's opinion and a portion of Justice Young's criticism of the majority's holding.

Lofton Remanded Again

There was confusion relating to the Supreme Court's entry and release of its orders in *Lofton v AutoZone, Inc* (SC Docket No. 136029, rel'd July 15, 2009). Recall that *Lofton* is the case which had been remanded by the Court last year to the Board of Magistrates. That remand was:

> for reconsideration in light of *Stokes v Chrylser LLC*, 481 Mich 266 (2008). If it is found that plaintiff is disabled under MCL 418.301(4), but that the limitation of wage earning capacity is only partial, the magistrate shall compute wage loss benefits under MCL 418.361(1), based upon what the plaintiff remains capable of earning.

In remanding the case, the Court retained jurisdiction and set a time limit for the Magistrate's remand decision.

On remand, the Magistrate granted plaintiff weekly benefits at the maximum weekly rate of compensation. The case then returned to the Supreme Court. On June 17, 2009, the Workers' Compensation Appellate Commission received the following 4-3 order from the Court:

> By order of October 1, 2008, this Court vacated the decision of the Workers' Compensation Appellate Commission (WCAC) mailed April 4, 2007, and remanded this case to the Board of Magistrates for

> reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008), with instruction that the magistrate assigned to the fcase take additional proofs upon request of either party and issue a decision. This Court retained jurisdiction. On order of the Court, the assigned magistrate having subsequently presided over an evidentiary hearing and having submitted a new decision in accordance with this Court's instructions, we REMAND this case to the WCAC for review of any challenges the parties may have to the magistrate's decision pursuant to the standard of review established in MCL 418.861a. The motion for leave to file brief amicus curiae is GRANTED.
>
> We do not retain jurisdiction.

Chief Justice Kelly and Justices Cavanagh and Hathaway disagreed with the above ruling and would have granted leave to appeal.

For unexplained reasons, the above order was retracted by the Court. The following month, on July 15, 2009, the Court issued another order. The substance of the Court's July 15, 2009 order reads the same *verbatim* as the Court's June 17, 2009 order quoted above. The only difference is the votes of the Justices. Whereas in the June order, Chief Justice Kelly and Justices Cavanagh and Hathaway would grant leave to appeal, in the July order – Chief Justice Kelly and Justices Weaver and Hathaway would grant leave to appeal.

In any event, the case has now returned to the Appellate Commission without the Court retaining jurisdiction.

<u>Upcoming Arguments On Applications</u>

The Supreme Court has scheduled an oral argument on the application for leave to appeal in *Bezeau v Palace Sports & Entertainment, Inc* (SC Docket No. 137500, rel'd May 8, 2009). The Court said "the parties shall address whether the jurisdictional standard established at MCL 418.845, as interpreted by this Court in *Karaczewski v Farbman Stein Co*, 478 Mich 28 (2007), should be applied in this case." Section 845 and *Karaczewski* address when Michigan

can exercise jurisdiction over injuries occurring outside of the state. Section 845 was amended by the Legislature this year on January 13, 2009. It presently reads:

> "'The worker's compensation agency shall have jurisdiction over all controversies arising out of injuries suffered outside this state if the injured employee is employed by an employer subject to this act and if either the employee is a resident of this state at the time of injury or the contract of hire was made in this state. The employee or his or her dependents shall be entitled to the compensation and other benefits provided by this act.'"

The Court invited the Section to file an *amicus curiae* brief in *Bezeau.*

Another case scheduled for oral argument on the application for leave to appeal is *Loos v J.B. Installed Sales, Inc* (SC Docket No. 137987, rel'd May 1, 2009). The issue in *Loos* is whether the claimant is an employee or an independent contractor in light of income tax filings.

As of this writing, the dates for oral argument in *Bezeau* and *Loos* have not yet been set.

COURT OF APPEALS

Two *Stokes* Cases

The Court of Appeals has released two unpublished opinions in cases remanded to it by the Supreme Court for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). The Supreme Court, after release of *Stoke*s*,* had remanded most cases to the Board of Magistrates, but remanded these two cases to the Court of Appeals to hear as on leave granted. What the two cases have in common is that there had already been vocational testimony proffered by the parties, even though both cases had been tried before the Supreme Court's *Stokes* opinion. Both cases had resulted in open awards of weekly benefits.

In *Kenney v Alticor, Inc* (CA Docket No. 278090, rel'd June 18, 2009), defendant challenged whether plaintiff was disabled under *Sington* and *Stokes*. The Workers' Compensation Appellate Commission had "found that plaintiff's testimony that she would not have refused any job offered to her because she was desperate for a job and that she was unable to find an employer willing to hire her for any job was sufficient to establish that she was unable to perform all the jobs within her wage-earning capacity that pay any rate, let alone that pay at the maximum rate." The Court of Appeals disagreed with the Appellate Commission's view that plaintiff's proofs were adequate. The Court said "plaintiff's generalized and conclusory testimony regarding her inability to find an employer willing to hire her for any job simply lacks sufficient detail to allow a proper and thorough disability analysis under the stringent requirements detailed in *Stokes*." The Court explained:

> … Although the appellate courts of this state have observed that a claimant's testimony alone is sufficient to support a finding of disability, see, e.g., *Sanford v Ryerson & Haynes, Inc*, 396 Mich 630, 637; 242 NW2d 393 (1976); *Woods v Sears, Roebuck & Co*, 135 Mich App 500, 504; 353 NW2d 894 (1984); *Black v Gen Motors Corp*, 125 Mich App 469, 474; 336 NW2d 28 (1983), and although *Stokes* acknowledged that a claimant can establish what jobs, if any, the claimant is qualified and trained to perform within the same salary range as his or her maximum earning capacity without expert testimony and through the claimant's own testimony, *Stokes*, *supra* at 282, the claimant is still required to present an objective means to assess employment opportunities, such as job listings from a newspaper, a job-placement agency, or a career counselor. *Id.*

Rather than reverse the award, the Court remanded the case to the Board of Magistrates without retaining jurisdiction for a new evidentiary hearing and a new decision on disability.

In *Martin v Eaton Corp* (CA Docket No. 276134, rel'd July 21, 2009), the Court of Appeals responded similarly to the defendant's appeal. In this case, the Appellate Commission had also rejected defendant's argument that plaintiff did not sufficiently prove disability. The Appellate

Commission had found "that in light of the limited duties plaintiff performed as a janitor and the lack of recent training in the jobs he had performed in the distant past, the magistrate did not err in finding him disabled from working in the jobs paying the maximum wage and that it is unreasonable to expect him to look for work within those types of jobs." The Appellate Commission had also noted that plaintiff was "diligently seeking employment."

On review, the Court of Appeals disagreed. The Court reviewed *Stokes'* different steps and said that where – as in this case – the second *Stokes* step is not adequately addressed, it becomes virtually impossible to satisfy the steps which follow. The Court described that second step of the *Stokes* analysis as follows:

> The second step requires proof of what jobs plaintiff is *qualified and trained* to perform within the same salary range as his maximum earning capacity when he suffered his injury. Plaintiff's proofs on this step were deficient. Although plaintiff is not required to present a transferable-skills analysis, he "must provide some reasonable means to assess employment opportunities to which is qualifications and training might translate." *Id.* at 282. The focus is on jobs within plaintiff's maximum salary range. Plaintiff provided no solid evidence regarding jobs for which he is qualified and trained that fall within his maximum salary range. Delmar [plaintiff's vocational expert] found that plaintiff's work for defendant "was skilled and transferable," but he did not identify the specific nature of those jobs to which plaintiff's skills might translate. Delmar acknowledged and recognized plaintiff's additional employment training and history, but did not examine whether plaintiff's background would otherwise qualify him for jobs which he could obtain wages within his maximum earning capacity. Instead, Delmar found that plaintiff's retail experience "was too remote in time to be relevant to be included as a component of his present wage earning capacity," and he made the same conclusion with regard to plaintiff' work as a tax preparer. Delmar also dismissed plaintiff's work experience with Ralston in the food packaging industry as being too isolated to that industry. Step two must be approached and proven as outlined in *Stokes*.
>
> Step two of the *Sington*/*Stokes* test requires an articulation of the jobs for which plaintiff is qualified and trained and that fall within his maximum earning capacity. It requires a more particular statement

> of such jobs than that which the magistrate made. Had the parties and Delmar had the benefit of *Stokes*, it is likely that their treatment of this matter would have been more complete. (Bracketed words added).

The Court therefore vacated the Appellate Commission's determination and remanded the case without retaining jurisdiction to the Magistrate for reconsideration and, if requested, a new hearing to allow additional proofs.

<u>Seasonal Employee</u>

In an unpublished seasonal employee case, *Reece v Event Staffing* (CA Docket No. 284451, rel'd July 30 2009), the Court of Appeals addressed the question of year round liability for weekly benefits where a professional football player suffered a football injury. "[T]he magistrate found that plaintiff was entitled to wage-loss benefits during the off-season, even though plaintiff would not otherwise be earning wages playing professional football or engaged in other wage-earning employment. [And,] [t]he WCAC affirmed the magistrate's decision" in that regard.

The defendant argued to the Court of Appeals that, under the second sentence of MCL 418.301(4) and *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 8-9; 760 NW2d 586 (2008), plaintiff is not entitled to wage loss benefits during football's off season. The second sentence of the definition of disability in § 301(4), says: "The establishment of disability does not create a presumption of wage loss." *Romero* says this sentence means claimants must link the disability and wage loss to recover weekly benefits.

Applying § 301(4)' second sentence and *Romero*, the Court said that "in order to be entitled to wage-loss benefits, a claimant must demonstrate a clear connection between wage loss and work-related injury." The Court held this "requisite connection is not shown when plaintiff's lost wages are attributable to the end of the football season, rather than his shoulder injury." The Court therefore concluded that the Appellate Commission "erred as a matter when it awarded wage

loss benefits for time in the off-season when plaintiff would not otherwise be earning wages." The Court remanded the case to the Magistrate for determination of what portion of plaintiff's lost wages is because of the end of the football season rather than his disability.

The Court had reached the same conclusion in an earlier case: *Raybon v D.P. Fox Football Holdings LLC* (CA Docket No. 268634, rel'd July 17, 2007).

Out Of State Injury

In another unpublished opinion addressing a number of issues, the Court of Appeals primarily addressed the out of state injury provision described in MCL 418.845 (and at issue in the *Bezeau* Supreme Court case described earlier). The case is: *Schindler v Asplundh Tree Expert Co* (CA Docket No. 279295, rel'd June 9, 2009). This case had been remanded to the Court by the Supreme Court to consider "'whether the Michigan Bureau of Worker's Compensation has jurisdiction over the controversy arising out of plaintiff's injury'" and, assuming Michigan has jurisdiction, the Court was to proceed to address the remaining issues relating to the occurrence of the injury and disability.

The Court addressed the jurisdictional issue by applying § 845 (as it read prior to its amendment of January 13, 2009) and *Karaczewski* (described above in *Bezeau*). Recall that § 845 – prior to the way it currently reads – required that for injuries occurring outside of Michigan the employee must *both* be a resident of Michigan at the time of injury and be employed under a contract of hire made in Michigan.

In this case, the parties did not dispute that plaintiff was a Michigan resident when injured. The jurisdictional dispute centered solely on where the contract of hire was made. The employer contended that, while plaintiff was hired in 1993 via a contract of hire in Michigan, plaintiff was periodically laid off afterwards and signed a new contract of hire in 1997 in Wisconsin.

The Appellate Commission found as fact, however, that there was no evidence that a subsequent contract of hire was entered into in Wisconsin. The Court explained that plaintiff's "1993 contract and a union letter in 2004 reflecting that plaintiff was a member of the Michigan union" constituted sufficient factual evidence to affirm the finding that the "contract of hire arose in Michigan." After reviewing other issues, the Court affirmed the award on the basis that there was also record support for the Appellate Commission's other factual findings.

WORKERS' COMPENSATION APPELLATE COMMISSION

En Banc Opinion

In *Trammel v Consumers Energy Co*, 2009 ACO #126, the Appellate Commission unanimously held that, in determining specific losses under MCL 418.361(2) where there has been an implant in the body, the "usefulness" of the body member at issue is to be determined without considering the ameliorating effects of the implant.

The Appellate Commission *sua sponte* decided to *en banc* this case and the unanimously reached the result described above. In so doing, the Appellate Commission rejected the defendant's argument that two Court of Appeals' cases: *Tew v Hillsdale Tool & Manufacturing Co*, 142 Mich App 29; 369 NW2d 254 (1985) and *O'Connor v Binney Auto Parts*, 203 Mich App 522; 513 NW2d 818 (1994) control insofar as they say implants are to be considered in assessing "usefulness" for specific loss purposes. The Appellate Commission disagreed with defendant finding that *Cain v Waste Management, Inc*, 465 Mich 509; 638 NW2d 98 (2002) and *Cain v Waste Management, Inc (After Remand)*, 472 Mich 236; 697 NW2d 130 (2005) expressed disagreement with *Tew* and *O'Connor*.

Declining To Present Additional *Stokes* Proofs

In *Glave v City of Battle Creek School District*, 2009 ACO #41, the case had been tried before the Supreme Court's release of *Stokes* and resulted in an open award of benefits for a back injury. Defendant appealed, arguing the Magistrate's disability analysis did not satisfy the Supreme Court's *Stokes* criteria.

In a 2-1 opinion, the Appellate Commission agreed. The Appellate Commission first noted that the Magistrate had allowed the parties to supplement the record so as to address *Stokes* but plaintiff declined to present any additional proofs. As such, the Appellate Commission said: "The proofs simply cannot satisfy the *Stokes* standard. Plaintiff testified that he could not perform his previous jobs. *Stokes* requires much more. Plaintiff failed to show the jobs suitable to his qualifications and training under the *Stokes* standard. Without that proof, plaintiff cannot prevail."