STATE OF MICHIGAN

COURT OF APPEALS

MARK S. MARTIN, Plaintiff-Appellee,	UNPUBLISHED July 21, 2009
v	No. 276134 WCAC
EATON CORPORATION, Defendant-Appellant.	LC No. 05-000230

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order of the Workers' Compensation Appellate Commission (WCAC) that affirmed the magistrate's open award of benefits to plaintiff. We vacate and remand for further proceedings.

This appeal is before this Court on remand from the Supreme Court for consideration as on leave granted. *Martin v Eaton Corp*, 482 Mich 1008; 761 NW2d 87 (2008). The Supreme Court directed us to consider the matter in light of *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). *Martin, supra.*

Plaintiff began working for defendant in March 1997 and continued doing so until defendant laid him off in July 2004. Plaintiff worked for several employers between his high school graduation in 1974 and his employment with defendant. Plaintiff worked for about two years as a store detective and soft lines department manager at a Meijer store. For one tax season in the late 1980s or early 1990s, plaintiff prepared tax returns for H&R Block customers. He also worked in the food packaging industry for Ralston.

As an employee of defendant, plaintiff machined and assembled parts. He also worked as a storeroom parts handler. All jobs involved physical labor. In January 2001, while working in the latter position, plaintiff experienced low back pain. His condition required surgery and recovery time. Defendant paid plaintiff workers' disability compensation benefits from February to December 2001. Plaintiff returned to work for defendant in December 2001 in a restricted data entry position until February 2002. In February 2002, a physician relaxed plaintiff's restrictions, and defendant assigned him to do janitorial work. Plaintiff worked in this capacity until defendant laid him off in February 2004. He returned to work as a janitor in March 2004. Defendant laid him off again in July 2004, and plaintiff has not returned to work since that time.

In 2001, after his back injury, plaintiff began taking classes at Kellogg Community College (KCC). In May 2004, he graduated with associates' degrees in business management and accounting. He has attempted unsuccessfully to find work in those fields.

Plaintiff received rehabilitation services. He took various classes to prepare for employment, seeking sedentary or light work. He has sought employment, but without success.

In October 2004, Paul W. Delmar, Ph.D., a vocational counselor, interviewed plaintiff. Delmar conducted a labor market survey based on information he obtained on his own. In doing so, he found plaintiff's retail experience at Meijer, which was about twenty-five years prior to the trial, too remote in time to be included as a component of plaintiff's current wage earning capacity. He made a similar conclusion with regard to plaintiff's tax preparation work with H&R Block. Delmar further determined that plaintiff's work with Ralston was not transferable because it was particular to the food packaging industry.

With regard to plaintiff's work for defendant, Delmar found that it was skilled and transferable, except for the fact that plaintiff was no longer physically capable of performing it. In Delmar's opinion, because of plaintiff's physical limitations, plaintiff could not expect to find a job within the Battle Creek-Kalamazoo area that paid more than $6 to $8 an hour. He explained that these hourly rates took into consideration plaintiff's KCC degrees in accounting and business management.

Karen Starr, a certified rehabilitation counselor, interviewed plaintiff in September 2001, and she prepared a rehabilitation report after the interview. At defendant's request, in August 2004 she prepared a new wage earning capacity analysis based on her initial vocational assessment. Starr explained that a wage earning capacity analysis is a report that considers an injured worker's physical restrictions, his work history, education, training and qualifications. This information is used to identify the worker's wage earning capacity in his or her geographic area.

Starr determined that plaintiff's maximum wage earning capacity at the time of the trial was $30.05 an hour ($1,202 a week). In coming to this conclusion, she performed a transferable skills analysis, searched America's Job Bank, contacted individual employers regarding actual job openings, considered whether the qualifications of open jobs fit within plaintiff's transferable skills, and considered the pay for the jobs. This analysis was performed in 2004, not in the year of plaintiff's injury (i.e., 2001).

The magistrate gave greater weight to Delmar's testimony than to Starr's. He found that plaintiff was disabled, concluding, "[T]he qualifications and training by means of which [plaintiff] derived his maximum wage earning capacity are those qualifications and training associated with the jobs he performed at [defendant]. Those jobs required the highest level of qualifications and training that he has ever attained." The magistrate concluded that plaintiff proved by a preponderance of the evidence that because of the injury he suffered at work, he can no longer earn his maximum wages in the work in which he is qualified and trained. Thus, the magistrate concluded, plaintiff proved he is disabled. The magistrate found that plaintiff's unemployment is directly attributable to his work-related injury and awarded him the maximum weekly benefit available.

Defendant appealed to the WCAC, arguing in part that plaintiff failed to establish that he was disabled. It argued that plaintiff was capable of performing work as a janitor, a tax preparer and in retail management, but he did not seek such employment and show that such jobs are unavailable to him. Defendant further asserted that plaintiff did not establish the pay for such positions and that his vocational expert failed to assess his ability to earn as related to those jobs. Thus, defendant argued that plaintiff failed to sustain his claim.

The WCAC rejected this argument, indicating 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 WCAC also noted that plaintiff had advanced his education and was diligently seeking employment. Thus, the WCAC affirmed the magistrate's decision.

This Court denied defendant's application for leave to appeal. *Martin v Eaton Corp*, unpublished order of the Court of Appeals, issued August 16, 2007 (Docket No. 276134). Defendant thereafter applied for leave to appeal in our Supreme Court, which, in lieu of granting leave, remanded the case to us for consideration as on leave granted in light of *Stokes*. *Martin, supra*, 482 Mich 1008.

Defendant argues that plaintiff did not establish a disability under *Stokes*. It asserts that even if plaintiff proved he is disabled, he did not prove that his disability is total as opposed to partial. We conclude that, in accordance with *Stokes*, this matter must be remanded to the magistrate for further consideration.

On review of a decision of the WCAC, if this Court finds any evidence to support the WCAC's factual findings and that the WCAC did not misapprehend its administrative appellate role in reviewing the magistrate's decision, we must treat the WCAC's factual findings as conclusive. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709-710; 614 NW2d 607 (2000).

This Court may review questions of law involved with any final order of the WCAC. MCL 418.861a(14). The WCAC's decision may be reversed if the WCAC operated within the wrong legal framework or based its decision on erroneous legal reasoning. *Id.*; *Benedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000).

The primary issue raised here is whether plaintiff established a disability in accordance with *Stokes v Chrysler, LLC*, 481 Mich 266; 750 NW2d 129 (2008). In *Stokes*, the Supreme Court set forth the test for proving a disability. It looked first to *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). In *Sington*, the Court explained that a person is disabled under MCL 418.301(4)[1] if he or she suffers a covered injury that causes "a reduction of that

[1] Pursuant to MCL 418.301(4), "disability" is defined as "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."

person's maximum reasonable wage earning ability in work suitable to that person's qualifications and training." *Sington, supra* at 155. "[A] condition that rendered an employee unable to perform a job paying the maximum salary, given the employee's qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training would not constitute a disability." *Id.* Section "301(4) requires a determination of overall, or in other words, maximum, wage earning capacity in all jobs suitable to an injured employee's qualifications and training." *Id*. at 159.

The *Stokes* Court set forth a seven-step method for applying *Sington*. The first four of those steps set forth the claimant's initial burden. They require the claimant to: (1) disclose his qualifications and training; (2) prove what jobs, if any, that "he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury;"[2] (3) "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;" and (4) show that he cannot obtain any of the remaining identified jobs that he is capable of performing. *Stokes*, *supra* at 281-283, 297-298. On this fourth step, the claimant must make a good-faith attempt to procure employment if there are jobs at the same or a higher salary that he is qualified and trained to perform and not precluded from performing because of the work-related injury. *Id.* at 283. On successful completion of these four steps, "the claimant establishes a prima facie case of disability," thereupon shifting the burden of production to the employer to refute the claimant's showing. *Id.*

The Supreme Court released its *Stokes* decision after the WCAC issued its opinion in this case; it is therefore expected that neither the magistrate nor the WCAC applied *Sington* in quite the same matter as set forth in *Stokes*. Plaintiff presented evidence of his work employment history, which included retail work and tax preparation work, as well as work within the food packaging industry. He also worked as a janitor for defendant after his injury. This evidence satisfied the first step in the *Stokes*/*Sington* analysis regarding disclosure of training and qualifications.

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 his 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 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

[2] The examination is limited to jobs that are within the maximum salary range. *Stokes, supra* at 282. "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.*

whether plaintiff's background would otherwise qualify him for jobs for 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's 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.

The third step requires plaintiff to show that his work-related injury prevents him from performing any or all of the jobs within his qualifications and training that pay the maximum wage. Plaintiff demonstrated that, due to his injury, he cannot perform the work that he did for defendant in the past. Without specifying the types of jobs to which the job skills he obtained while working for defendant might translate, Delmar testified that plaintiff's physical capabilities were no longer equal to those required for that type of work. Thus, plaintiff satisfied, at least to some extent, this particular element. Because further exploration relative to step two and the identification of jobs is needed, step three may require additional analysis depending on developments related to step two.

Step four requires plaintiff to show that he cannot obtain any jobs for which he is qualified, trained, and physically capable of performing. The WCAC found that with respect to plaintiff's experience in these areas:

> Due to plaintiff's limited duties performed as a janitor based on plaintiff's limitations caused by his injuries, the lack of recent training as a tax preparer and the limited amount he has done in this field in recent years and the time span since plaintiff has worked in retail management, it certainly is not speculation to find that he is disabled from work producing his highest earnings and that [sic] is not reasonable to make him look for such work even if arguably within his current qualifications and training.

Proper consideration of this element of the test is impossible in the absence of a complete and proper determination under step two, as then limited by any new findings under step three. The magistrate must reconsider this matter and, if requested, allow plaintiff to present proofs in an attempt to satisfy the *Sington*/*Stokes* test.

The *Stokes* Court found that because the *Sington* standard had been applied inconsistently, it would be equitable to provide the plaintiff in the *Stokes* case with the opportunity to present his proofs in light of the guidance provided by the Court in its decision. *Stokes, supra* at 299. Thus, it remanded the matter to the magistrate for a new hearing. *Id.* It is appropriate to follow that lead and remand this matter to give plaintiff an opportunity to prove his claim under the guidance of *Stokes*.

We vacate the WCAC's determination regarding whether plaintiff proved a disability and remand this matter to the magistrate for reconsideration and, if requested, a new hearing to allow additional proofs under the guidance of *Stokes*. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood