

STATE OF MICHIGAN
COURT OF APPEALS

ALINA T. SULOWSKA,

Plaintiff-Appellee,

v

ALBERT TROSTEL & SONS COMPANY,
EAGLE OTTAWA ROCHESTER HILLS, LTD,
and SENTRY INSURANCE A MUTUAL
COMPANY OF AMERICA,

Defendants-Appellants.

UNPUBLISHED

July 26, 2012

No. 304195

Workers Comp Appellate
Commission

LC No. 07-000275

Before: STEPHENS, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

Defendants appeal the order of the Workers' Compensation Appellate Commission (WCAC) affirming the referee's conclusion that plaintiff was disabled under MCL 418.301(4). We affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff worked for defendant Albert Trostel & Sons Co. (Trostel), a leather processing company, for 16 years cutting, packing boxes, and inspecting leather. Plaintiff earned \$11.93 an hour. Plaintiff did not learn any special skills while working for defendants, and essentially had the skills to perform unskilled labor, such as packing and taping. Plaintiff also spoke very little English, and her conversations were limited to "a few words and gesturing."

Plaintiff injured her back in December, 2004. At the time of trial, plaintiff needed to take 3 to 4 naps a day because of the type of medication she was taking for her pain. She was unable to perform her job. She was unable to stand, walk, or hold anything in her hands. Plaintiff also could not fill out job applications in English.

James Fuller, a certified rehabilitation counselor, stated that plaintiff's restrictions excluded repetitive lifting, bending, pushing, or pulling with over ten pounds of force, and placed plaintiff in the sedentary physical job demand category. Fuller reported plaintiff's employment options were limited because she required light employment, did not have clerical or computer skills, and lacked English skills. Fuller further testified that because plaintiff had to lie down

during the day at times, this virtually eliminated all competitive employment outside of the home. Fuller did not contact employers or perform a labor market survey because “there was no point in it as [plaintiff] could not work in any capacity.”

Guy Hostetler, a certified vocational rehabilitation counselor and disability management specialist, submitted a report and testified for defendants. Hostetler did conduct a labor market survey and found one job that paid more than \$11.93 an hour and was classified as light duty work.¹ He acknowledged that it would be difficult for plaintiff to obtain employment because of her lack of English skills, but that it would not be impossible. The referee found that Hostetler admitted that no employer would hire someone who has to lie down during the working day.

The referee found that plaintiff had disclosed her qualifications and training, but his only finding regarding suitable work was his observation that plaintiff had not acquired transferrable skills. The referee entirely disregarded Hostetler’s testimony, because it did not find him to be a credible witness.

The WCAC reasoned that the referee had not utilized the *Stokes*² definition of suitable jobs and corrected the referee’s legal analysis, but assumed for the purposes of their analysis that plaintiff had established the first and second steps of *Stokes* because defendants did not challenge her prima facie case on those grounds. The WCAC concluded that plaintiff established the third step of *Stokes* because none of the jobs that plaintiff could perform were in the same salary range as her maximum earning capacity. Furthermore, her restrictions caused her to be disqualified from all work that paid wages equal to what she had earned at Trostel, and from all jobs that were suitable to her qualifications and training. The WCAC concluded that plaintiff had also established the fourth step of *Stokes* because she was not capable of performing any of the jobs identified as being within her qualification and skills.

The WCAC determined that the referee had erred when it did not consider Hostetler’s testimony under the fifth and seventh steps of the *Stokes* analysis. The WCAC then analyzed the job Hostetler presented, and determined that it did not fall within plaintiff’s maximum wage earning capacity and therefore had not rebutted plaintiff’s case under the second step of the *Stokes* analysis. Stating that it could stop there but wanted to provide a complete analysis, the WCAC further analyzed the job. It noted that defendants had not presented the details of the job in sufficient detail to allow plaintiff to discuss the job “relative to her meeting her burden of proof.” It determined that even if it considered the job as rebuttal evidence, plaintiff sustained her burden of proof under *Stokes* even though she did not investigate or actually apply for the

¹ Hostetler found a total of three jobs within plaintiff’s qualifications and training, but these jobs did not include descriptions of their physical requirements.

² In *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008) our Supreme Court discussed the standard for establishing disability under MCL 418.301. It outlined four different steps a claimant must show in order to establish a prima facie case of disability. It then listed three additional ways in which the burden of production shifts to the employer to come forward with evidence to refute the claimant’s showing. *Id.* at 281-284.

job, because she established through cross-examination that the job was not suitable to her qualifications and training. The WCAC refused to modify the referee's finding of disability.

II. STANDARD OF REVIEW

We give "considerable deference" to the WCAC's interpretation and application of the WDCA. *Cain v Waste Mgt, Inc*, 259 Mich App 350, 366; 674 NW2d 383 (2003). However, we review questions of law de novo and will reverse a decision of the WCAC "if it is based on erroneous legal reasoning or the wrong legal framework." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000); MCL 418.861a(14).

III. PLAINTIFF'S PRIMA FACIE CASE

Defendants argue in part that the WCAC's disability analysis reversed the burden of proof and required defendants to disprove that plaintiff was disabled, because plaintiff had not established a prima facie case for disability before the WCAC considered defendants' rebuttal evidence. We disagree.

As an initial matter, we note that defendants seriously confuse this appeal by attempting to inject an unpreserved argument; i.e., whether plaintiff presented a prima facie case under the second step of the *Stokes* analysis. However, defendants did not raise this issue before the WCAC. The WCAC is only required to review the specific findings of fact or conclusions of the law that the parties have requested that it review. MCL 418.861a(11). The WCAC exceeds its authority if it considers issues not raised by the parties. *Cane v Mich Beverage Co*, 240 Mich App 76, 80-81; 610 NW2d 269 (2000). In addition, this Court "lacks the power to address legal questions that have not been raised before or addressed by the WCAC." *Calovecchi v State of Michigan*, 461 Mich 616, 626; 611 NW2d 300 (2000); MCL 418.861a(14).

Defendants challenged whether plaintiff had established a prima facie case of disability under the fourth step of the *Stokes* analysis. The WCAC applied the proper legal analysis when it determined that plaintiff had established the third and fourth steps of *Stokes*. In order to establish the fourth step of *Stokes*, "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." *Stokes*, 481 Mich at 283. Here, the WCAC found that plaintiff's English speaking skills were very poor, she was only suitable for unskilled work, she was restricted to work on the sedentary physical demand category, and that any jobs within those restrictions would only pay \$7.40 to \$8.00 an hour. The referee found that there were no jobs available paying plaintiff's maximum wage earning capacity, considering her restrictions and the jobs within her qualifications and training. Accordingly, the WCAC concluded that, "[b]ecause [plaintiff] is precluded from performing all work properly part of the analysis under step 3, she has shown step 4 is not applicable because she is not capable of performing any of the jobs identified in step 2" (internal quotations omitted). The WCAC did not apply an incorrect legal analysis when it determined that plaintiff did not need to show that she had made a good faith attempt to procure employment, because plaintiff established that she was not capable of performing any jobs within her qualifications and training, paying her maximum wages.

Accordingly, defendants' argument that the WCAC shifted the burden of proof because plaintiff had not established a prima facie case must fail because the WCAC determined that plaintiff had met all of the steps to establish her prima facie case under the *Stokes* analysis.

IV. DEFENDANTS' REBUTTAL EVIDENCE

Defendants also argue that the WCAC shifted the burden of proof when it stated defendants had not provided enough specific details about the job presented by Hostetler as one which plaintiff could perform. We disagree. The WCAC did not err when it explained that defendants had the burden of production on Hostetler's rebuttal evidence. When the employer is attempting to refute the employee's showing of disability, "the burden of production shifts to the employer . . ." *Stokes*, 481 Mich at 283. The party with the burden of production is generally required to present the associated type of evidence. See *People v Perkins*, 473 Mich 626, 628; 703 NW2d 448 (2005). The WCAC concluded that "[d]efendants simply did not present enough detail about the job to enable, much less compel, the factfinder to conclude that the work is suitable to [plaintiff's] qualifications and training." It determined that *Stokes* did not require the plaintiff to investigate every possible job presented by a defendant in order to "fill[] in all the gaps in information provided by the employer." The WCAC did not misapply the burden of production when it required defendants to provide enough details about the job to enable the referee to determine whether it actually rebutted plaintiff's prima facie case, and to allow plaintiff to respond accordingly.

V. CONCLUSION

The WCAC utilized the correct burden of proof and the correct legal framework when it upheld the Magistrate's finding that plaintiff had established a disability. To the extent that defendants invite us to remand the case for a determination of whether plaintiff is partially disabled, we decline to do so. When appealing by leave, an appellant's arguments are normally limited to the issues that it raised in its application for leave to appeal. *Detroit Free Press, Inc v City of Southfield*, 269 Mich App 275, 290; 713 NW2d 28 (2005). Defendants did not raise this issue in their application for leave to appeal, and we will not consider it. Therefore, this issue lacks merit.

Affirmed. Plaintiff, being the prevailing party, may tax costs. MCR 7.219(A).

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Donald S. Owens