STATE OF MICHIGAN

COURT OF APPEALS

FREDIE STOKES, Plaintiff-Appellee, v DAIMLERCHRYSLER CORPORATION, Defendant-Appellant.	FOR PUBLICATION October 26, 2006 9:05 a.m. No. 268544 WCAC LC No. 02-000388 Official Reported Version

Before: Saad, P.J., and Jansen and White, JJ.

SAAD, P.J. *(dissenting).*

I respectfully dissent because of the numerous legal errors in the WCAC's en banc opinion. Though I agree with the majority's conclusion that the WCAC's majority opinion contains several misstatements of law, I disagree with the majority's ruling that the result reached here should nevertheless be affirmed. Because the commission's and the magistrate's actions in this case repudiated our Supreme Court's holding in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), and effectively prevented defendant from preparing and presenting a defense under *Sington,* I would reverse the WCAC decision and remand this matter to the magistrate.

Definition of Disability

The WCAC clearly erred in its ruling that "work suitable to that person's qualifications and training" under MCL 418.301(4) and *Sington* is limited to the jobs the claimant performed, without reference to whether the claimant possessed any other "transferable" skills by which he could earn wages. Contrary to *Sington,* both the WCAC and the magistrate improperly limited this pivotal inquiry to plaintiff's employment history with defendant rather than the plaintiff's qualification and training to perform any other work. I disagree with the majority's "harmless error" conclusion that "[i]n the instant case . . . the employee's qualifications and training were straightforward and limited," see *ante* at ___, because the WCAC used the wrong legal definition of disability and defendant was denied a meaningful opportunity to discover evidence and present proofs regarding plaintiff's actual qualifications and training.

Discovery

Also, the WCAC erred by ruling that the magistrate had no authority to order plaintiff to provide discovery to defendant. Clearly, the WCAC erred as a matter of law by upholding the

magistrate's refusal to order discovery because, under *Boggetta v Burroughs Corp*, 368 Mich 600; 118 NW2d 980 (1962), the magistrate had authority to order discovery to allow a party to prepare and present its case. This issue was neither fully argued nor fully developed, because the magistrate and the WCAC erred as a matter of law regarding defendant's right to discovery. Accordingly, it is appropriate and necessary to reverse and remand this matter to the magistrate, with directions to order discovery reasonably necessary to allow defendant to prepare its defense under *Sington*.

Causal Connection

Further, the WCAC's statements regarding whether plaintiff needed to show loss of wages were also incorrect, unnecessary, and confusing, and constitute legal error. Even if plaintiff proves both a work-related injury and the loss of wage-earning capacity, he must also show that his work-related injury *caused* his current loss of wage-earning capacity pursuant to MCL 418.301(4). *Sweatt v Dep't of Corrections*, 468 Mich 172, 186; 661 NW2d 201 (2003) ("there must be a linkage between the disabling work-related injury and the reduction in pay"). This is a fundamental part of plaintiff 's proofs under the Act.

Burden of Proof

Finally, I disagree with the majority's analysis regarding defendant's argument that the WCAC erroneously concluded that defendant-employer bore the burden of disproving disability under *Sington* by affirmatively proving the existence of jobs within the injured employee's qualifications and training. It is well established that the plaintiff in a workers' compensation matter must establish his work-related disability and entitlement to benefits by a preponderance of the evidence. MCL 418.851; *Aquilina v Gen Motors Corp*, 403 Mich 206, 211; 267 NW2d 923 (1978). This broad burden of proof includes the burden of showing disability under *Sington* and the Supreme Court's order in *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201; 536 NW2d 542 (1995). The *Rea* order specifically states that "the 1987 definition of disability in the Worker's Disability Compensation Act [the present version of § 301(4)] *requires a claimant* to demonstrate how a physical limitation affects wage-earning capacity in work suitable to the claimant's qualifications and training."[1] *Id.* (emphasis added). Because the WCAC committed a clear error of law by concluding otherwise, we should reverse.

/s/ Henry William Saad

[1] Though the defendant-employer may have the obligation to provide or pay for vocational rehabilitation services under MCL 418.319, nothing in § 319 or any other provision in the act suggests that the burden of proving the existence of work within the claimant's qualifications, training, and current physical abilities somehow shifts to the defendant.