STATE OF MICHIGAN

COURT OF APPEALS

LARRY J. OLSEN and MARY E. OLSEN, Plaintiffs-Appellees/Cross Appellants,	UNPUBLISHED December 27, 2002
v	No. 229543 Wayne Circuit Court
TOYOTA TECHNICAL CENTER, USA, INC., Defendant-Appellant/Cross Appellee.	LC No. 96-645266-NO

Before: Whitbeck, C.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

The jury found in favor of plaintiff Larry J. Olsen[1] in this case concerning Toyota's responsibility to accommodate his back injury pursuant to the Persons With Disabilities Civil Rights Act (PWDCRA).[2] The jury awarded Olsen $360,600 for lost wages, $5,000,000 for emotional distress, and $800,000 lost future wages. The jury also found in favor of Mary E. Olsen with respect to her claim for loss of consortium, awarding her $1,000,000. The trial court reduced the Olsens' total award to $6,388,087.87, plus attorney fees, interest, and costs. Defendant Toyota Technical Center, USA, Inc., now appeals by right the trial court's order denying its motions for new trial, remittitur, or judgment notwithstanding the verdict (JNOV). The Olsens cross-appeal by right the trial court's decision to set off Olsen's award by the worker's compensation and social security benefits he received and will receive in the future. We affirm.

[1] Unless otherwise noted, "Olsen" refers to Larry Olsen.

[2] MCL 37.1101 *et seq*. Formerly known as the Handicappers' Civil Rights Act (HCRA), the Legislature changed the name of the act in 1998 to the Persons With Disabilities Civil Rights Act, while this case was pending in the trial court. See 1998 PA 20. To be consistent with the way the parties refer to the legislation that serves as the basis for this lawsuit, we refer to the PWDCRA instead of the HCRA.

I. Basic Facts And Procedural History

In 1971, Olsen began working for Braun Engineering as a maintenance technician. In 1983, while lifting a motor at Braun, Olsen sustained a serious back injury for which he received worker's compensation. Over the next several years, Olsen had intermittent medical leaves of absence from work because of his back injury, including surgery in 1985. For the first several years after the injury, when he was able to work, Olsen had restrictions on the work he could perform, including the weight of objects he could lift. The chief, lingering symptoms of this injury were lower back pain and pain radiating into his legs. Olsen used prescription pain relievers, muscle relaxers, and a back brace to control his pain and discomfort, and his condition improved sufficiently for him to return to work full-time at Braun in the late 1980s.

In 1990, Braun suspended Olsen for a few days because he was involved in a fight on the job with a coworker. The coworker was reportedly drunk at the time and his assault on Olsen rendered Olsen unconscious and caused him to sustain a concussion. Afraid to return to work at Braun because of this coworker, Olsen began searching for a new job. Olsen saw a job posting in a local newspaper in which the Toyota Technical Center was advertising its need to hire a senior maintenance technician. The job description did not indicate that the work required heavy lifting, or repetitive bending or pushing. Believing that he could perform this work even with his back condition, Olsen applied for work at the Toyota Technical Center as a senior maintenance technician in September 1990.

Jerry Frazier, who worked in Toyota's personnel department, and Robert Riemer, who was a facilities manager in charge of the maintenance technicians, interviewed Olsen. According to Olsen, the men described the senior technician's work responsibilities as general maintenance, which included "boilers, everything from the lights, light switches, ceiling tile – anything that – and everything. That included even off the wall things," like acting as a messenger. In the interview, Olsen was "open" with Frazier and Riemer about the circumstances surrounding the assault at Braun. He did not tell them about his back injury because he knew he had to pass a preemployment physical, during which he could not hide the four- or five-inch scar on his back from his surgery. Nothing said in this interview, or his subsequent interview, made Olsen question whether he could perform the job.

Toyota, evidently impressed with Olsen's lengthy experience in the field, especially his knowledge of heating and cooling systems, offered him the job. The letter extending the employment offer asked Olsen to obtain a preemployment physical, just as he had anticipated. Choosing from a list of approved medical facilities, Olsen went to see a physician, who asked him about the scar on his back. Olsen informed the doctor that he had been treated for low back pain, was currently taking medication, and had been hospitalized in 1985 for back surgery, all of which the doctor recorded in the report. A section of the report entitled "physical" lists numerous body parts and provides two boxes for the physician to check: "unremarkable" or "problem." The doctor checked all the boxes as "unremarkable," except that he checked "problem" next to the words "mental" and "other," along side which he wrote "spine." In the space next to these boxes, the doctor wrote several notes, "History of laminectomy [sic] – (Back operation) has good range of motion. Has had problems with nerves for which takes [unreadable] Valium. – Risk for heavy lifting repetitive bending [?] or pushing. –" Under this section, the doctor had a choice to circle one of two statements: Olsen was "physically qualified" or had "restrictions." The doctor circled "restrictions," but did not separately indicate

what those restrictions were. The doctor who performed the examination also checked the line that said, "The applicant may perform the essential functions of the job but will require periodic follow up for: ____ [.]"

Following this examination, John Baylis, a member of Toyota's personnel division, asked Olsen to obtain a vocationally handicapped worker's certificate through a program administered by the Michigan Department of Education. This certificate program was designed to improve a worker's prospects for finding employment after sustaining an injury by limiting the subsequent employer's worker's compensation liability and coordinating potential future benefits with the second-injury fund. Olsen, who had never heard of this program, obtained this certification, which was valid for two years.

Olsen started work at Toyota on October 23, 1990, as a senior maintenance technician. Initially, he worked in a building in Ann Arbor Township that tested emissions doing what he considered "light" work, such as changing lights, taking boiler and chiller readings, setting up a computer program for maintenance, and identifying the tools necessary to do the job. However, Toyota was also constructing a new facility near Plymouth. Olsen and other maintenance technicians spent several months working with the general contractors learning the systems in place at the new facility. During this initial period, Olsen received high marks on his performance evaluation from Riemer. Attached to his first evaluation, dated January 14, 1991, was a six-page list of tasks associated with his position, none of which, Olsen believed, required heavy lifting, or repetitive bending or pushing. Riemer, who evaluated Olsen, wrote that Olsen worked cooperatively with his peers, was timely, followed-up on projects, took initiative, and was willing to "take on varied assignments. In addition, he ha[d] done work of others in snow removal and helped with some janitorial tasks when [a] regular janitor was in the hospital." Olsen's overall score on this evaluation was a "3" out of a possible "4," which Riemer acknowledged was "excellent."

Olsen received consistently high marks on subsequent reviews, actually improving his overall score by attaining "4s" in some categories. Nine months into his job, Olsen was still doing light work, taking readings, repairing small pumps, working with the general contractors building Toyota facilities, dealing with water leaks and similar problems; this did not require heavy lifting, or repetitive bending or pushing. At the beginning of his second year on the job, Olsen assumed additional responsibilities while Riemer was temporarily away from work.

In October 1992, Toyota reminded Olsen to renew his vocationally handicapped worker's certificate for another term. When he attempted to do so, the program employees told him it was unnecessary for him to renew the certificate in order to retain his certification.

Olsen took on increasing responsibilities through 1993. For instance, Olsen was assigned to take care of an office building and two corporate houses Toyota owned for visiting executives. He was often on-call twenty-four hours a day, responding to emergencies at all times of the day and night. With respect to the corporate houses, Olsen secured contracts for landscaping and snow plowing. During these twenty-seven months working for Toyota, no one asked Olsen to work beyond his restrictions, and, he believed, his restrictions did not affect his ability to perform the essential functions of his jobs.

According to Olsen, on June 17, 1993, he was at a Toyota office building dealing with a decorative fountain in the lobby atrium that was leaking. On Riemer's command, and over Olsen's protest that they needed additional help, Olsen and coworker Chris Olmstead attempted to move a metal sump pump cover weighing more than three hundred pounds, which was located in a closet. In doing so, Olsen reinjured his back. In serious pain, Olsen went to a medical clinic where he received anti-inflammatory medication before being sent home. Olsen returned to work in about a week, which was too soon in his estimation. Back on the job, Olsen observed that Riemer's attitude

> was not good. His attitude was, it was different. His attitude had changed and after that time I got heavier work put on me when I, you know. I'd had the problem, they knew I had had prior surgeries, Mr. Riemer knew that and then having this other incident and then to go back and have him, you know, put more on me, heavier [work].

On July 1, 1993, two weeks after the injury from the sump pump cover, Olsen received another evaluation. This evaluation was still good overall, but Olsen received lower scores in some of the individual categories; for the first time in more than two years working for Toyota, Olsen received a "2." Riemer criticized Olsen's problem analysis and communication skills, indicating that Olsen needed to improve his cooperation and be more flexible.

On July 17, 1993, Olsen went to a clinic for additional treatment. The physician restricted his lifting to five pounds or less, not below knee height, above shoulder height, or more than twelve inches from torso. Additionally, Olsen was not to twist his torso or maintain a position like sitting, standing, or kneeling for more than twenty minutes, he was to avoid awkward positions involving sustained bending, extending his arms, and working at frantic paces, among other things. The clinic doctor indicated that Olsen could not return to work. When Olsen gave the note with these restrictions to Riemer, Riemer was "[v]ery unhappy" and "badger[ed]" Olsen about why he could not work. When Olsen replied that he had hurt his back, Riemer said, "I don't care. You've got to, got to get the work done here." Olsen was in pain and, though he feared losing his job, he did not return to work at that time.

Olsen returned to the clinic on July 23, 1993, where he received permission to return to work, with restrictions, such as a fifteen-pound limit on the amount of weight he could lift. The remainder of the restrictions concerning positions and types of work Olsen had to abstain from performing were essentially the same. In Olsen's view, these restrictions did not prevent him from doing the work his job required. Still, when he gave this new set of restrictions to Riemer, Riemer was again upset, emphasizing that the work had to be done. "He would just say he'd like, you know, if you want to keep working here you better get this job done." When he visited the doctor four days later, on July 27, 1993, Olsen's condition had not improved. Yet, he asked his doctor to issue a full release to work without restrictions because, he said, "I was being hassled by my Supervisor. I needed to, I needed to get the restrictions off because I knew that, I was fearing that I was going to get fired from my job and I needed that job." Though the doctor did not agree with Olsen's decision, the doctor nevertheless complied with the request. Riemer was reportedly happy that Olsen had returned to work without restrictions.

Olsen's performance reviews continued to decline slowly. By May or June of 1994, Olsen still had significant pain, but he "felt" that he "had to keep going," even though he was

given increasingly heavy work to perform, like moving furniture, with less help from others. Olsen saw Dr. Moore, the physician treating him for the back injury he sustained while working at Braun, to obtain a prescription for Darvocet, a pain medication. Olsen had been taking Darvocet for many years because of his first back injury. Braun's worker's compensation insurer paid for this medication. In seeking treatment from Dr. Moore in 1994, Olsen did not disclose that he had sustained an additional back injury at Toyota. He feared that, if he returned to Toyota's clinic, the information would get back to Riemer, who would then have a reason to fire him.

On June 13, 1994, Olsen was working at one of Toyota's buildings with a new lawn sprinkler system. Olsen had tried to alert other Toyota employees, presumably supervisors, that the contractors had not done a good job. However, he was "just told to get them sprinklers going." While digging in the clay soil, Olsen injured his back again. Olsen, who could not finish the job, reported the incident to Dan Cable, the Toyota employee in charge of worker safety. Though fearful that Riemer would find out about his injury and fire him if he went to Toyota's clinic, Olsen sought treatment at the clinic either that day or the next morning. He received treatment that included hot packs, ultrasound, and manipulation. Dr. Steve Harwood, who evidently worked at the clinic, ordered Olsen not to return to work for three or four weeks. Olsen also sought treatment at two pain management clinics, where he received steroid injections in an attempt to alleviate his constant pain.

Olsen returned to work under Dr. Harwood's orders not to dig, bend, lift, push, twist, or engage in similarly strenuous activities. Riemer's conduct toward Olsen allegedly worsened at this time. According to Olsen, "Riemer was terrible to get along with. He was just, he didn't care. It was very, very traumatic trying to work under the restrictions and have Mr. Riemer making remarks." On October 25, 1994, Olsen wrote a letter to a Toyota Vice President, Mr. Shiria, in which Olsen expressed that he was "tired of Bob Riemer's suggestion to me that if I don't do as he wants, that he will get me fired," and detailed the threats to which he had been subjected. One of his complaints was that Riemer would become mad when Olsen would have to seek treatment or obtain medication during working hours. In the letter, Olsen also told Shiria that he was afraid that his performance evaluations would decline, but he could no longer tolerate the situation with Riemer. Shiria reportedly told Olsen that he would take care of the problem.

Nevertheless, on his performance evaluation of November 4, 1994, less than two weeks after he wrote the letter to Shiria, Olsen received the lowest score he had ever received on a Toyota evaluation; he received "2s" in five out of six categories. The sixth category, "Quantity of Work," did not have a score with it, but the notation for that category stated, "Larry incurred a back [injury] in [sic] June 16 and has been placed on severe medical work restrictions through October 20." Other comments on the performance evaluation also mentioned his injury. For example, under "Communication and Approachability," it said, "Larry was in some discomfort due to the accident, became noncommunicative on occasion." Additionally, "other technicians were assigned to . . . work with Larry during this period to help do tasks that Larry was restricted from doing." Under "Overall Performance," the evaluation noted that Olsen's "medical restrictions have influenced this evaluation. Now that Larry is no longer under restrictions I [Riemer] would expect his next performance review to improve." Olsen disagreed with these assessments of his performance and initially declined to sign the evaluation, eventually signing the document but filing the equivalent of a protest.

Olsen continued working under restrictions for the next several months. However, Riemer was "very belligerent," giving him "job assignments that were too heavy." He could not complete these jobs or get any help. "People would say they were . . . going to come [to help Olsen, but they] didn't show up." Olsen tried to have Olmstead help him, but Riemer "would actually say [that Olsen was] on another job."

In spring 1995, Olsen was dissatisfied with what he saw as Riemer's "convenient memory and inconsistent treatment." Riemer reportedly would tell Olsen to do one thing, and then later claim never to have directed him to take on that first task, or Riemer would exclude Olsen from critical meetings, but then tell others that Olsen was responsible for carrying out what had been discussed at the meeting. There was no documentation for Riemer's directions, because Riemer allegedly "wanted no paper trial [sic: trail]. He wouldn't put anything in writing." Consequently, Olsen made a telephone call to Baylis in the personnel department. Baylis was not there, so Olsen left a message for Baylis on his voicemail indicating that if Baylis could not take care of the problem, then he, Olsen, would take care of the problem. Olsen meant that he would talk to Toyota's President, Mr. Nakagawa, whom Olsen knew because Olsen had worked for him at one of the Toyota houses. When Baylis heard the message while he was out of the state, he was concerned that Olsen might pose a threat to Riemer or others, so he told Olsen to stay home until he could return to Michigan and they could discuss the situation. Soon thereafter, Olsen reported to a Toyota facility to deliver company mail that he was in the process of shuttling between buildings, only to find out that his security passes and keys no longer worked. A security officer escorted him to a meeting with Baylis and Cable, who told him to undergo a psychological evaluation. Dr. Elissa Benedek, M.D., a psychiatrist, evaluated Olsen and referred him for psychological testing. Her evaluation found that Olsen was not a threat. Olsen, however, did not return to work.

In April 1995, Olsen went to see Dr. Mark Falahee. Dr. Falahee recommended that Olsen undergo spinal fusion to alleviate some of his lower back pain. Olsen had the surgery in August 1995, but it was not successful. Even after the surgery, Olsen's pain was so severe – despite medication – that he could not sleep at night, much less in a bed with his wife, whose slightest movement caused him even more pain. The medication that Olsen had to take caused him to develop problems with his memory and ability to carry on a conversation. His lifestyle was no longer as active as it once had been. He and his wife no longer were able to go out to movies or dinner as frequently as they had in the past because sitting for long times was a problem. They were unable to have intimate relations. The family could not take vacations to amusement parks because Olsen could not go on the rides. An avid sportsman, Olsen could no longer hunt as he used to. He received permission from state regulators to use a modified crossbow instead of a regular bow, and was only able to go hunting because a friend had a small structure in the woods that allowed him to rest frequently; mainly, he would just sit in the structure and enjoy observing nature. He could no longer fish and play baseball with his son. His typical day consisted of efforts to find some comfort, usually sitting in a special reclining chair designed for people with back injuries or lying in bed, because the pain never abated. Olsen received worker's compensation benefits first from Toyota, and then the second injury fund. Additionally, he applied for and received social security disability benefits after an administrative law examiner determined that he was permanently disabled. During this time, Olsen remained on the Toyota payroll, as he did for more than a year after he left the voicemail message for Baylis. Toyota removed Olsen from the payroll in August 1996.

At the end of October 1996, Olsen filed a two-count complaint and jury demand. In Count I, Olsen alleged that Toyota had failed to accommodate his disability in that Riemer had failed to allow him to work within his restrictions, leading to his two on-the-job injuries, and had harassed him. Olsen did not claim that his discharge was discriminatory. In Count II, Mary Olsen alleged that Toyota's actions had denied her the "society, companionship, social pleasure and support" from her husband.

The parties spent the next several years engaged in procedural wrangling, most of which is not relevant to this appeal. Toyota moved for summary disposition, which the trial court denied. After obtaining leave to appeal from this Court, Toyota challenged the trial court's decision to deny the motion for summary disposition. This Court, in *Olsen v Toyota Technical Center, USA, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 25, 1999 (Docket No. 205031), affirmed the trial court's decision denying summary disposition. In particular, this Court rejected Toyota's argument that Olsen's suit was nothing more than a personal injury action in tort, which the worker's compensation act's exclusive remedy provision would bar, rather than the distinct cause of action for a civil rights violation. *Id*. at 2.

At trial, Olsen gave detailed descriptions of the two injuries he sustained at Toyota, as well as the harassment he claimed Riemer directed at him. With respect to the sump pump cover incident, Olsen said that he asked for more help lifting the extremely heavy cover, but Riemer, who sounded "belligerent," yelled at him and Olmstead to hurry because he wanted the "cover right now." The situation was somewhat chaotic and, Olsen recalled, as soon as he slid the cover he immediately felt "excruciating" pain and

> [i]t was, sweat was rolling off me and I, it was terrible, and I thought oh, my God, not again, not another back operation and I thought, why did I let him keep badgering me and why did I keep pulling on this stupid plate. And but I had had, I had had some small threats from Mr. Riemer about my job prior to that and that's why I went ahead and was trying to get that plate up.

For example, Olsen said, that Riemer would make "make reference that if you'd like to keep eating I suggest you do this," which would come up in passing if Olsen indicated that he did not want to do something because he feared hurting himself. Olsen, who enjoyed his work, did not want to lose his job because he was supporting his wife and son. As for the June 1994 sprinkler incident, Olsen described it in simple terms:

> And [I] was out there with the shovel and the summer, would have been June. It was the clay. The whole area was hard clay and it was just like concrete and so I was trying to dig up this sprinkler to see what was the matter with it so I could get it going. And I dug it up or I started to dig it up, and God, I had back, real bad back pains again. You know, and I was just devastated because I had been receiving so many threats and stuff, I was just petrified I was going to lose the job.

As additional support for his contention that Riemer had harassed him, Olsen presented evidence that Toyota had disciplined Riemer for the way he had treated him (Olsen) and Olmstead. As proof that his injuries at Toyota caused his damages instead of his first injury at Braun, Olsen presented Dr. Falahee's deposition testimony to the jury. Though Olsen had

developed a degenerative disc condition because of the injury at Braun, Dr. Falahee believed that the physical labor Olsen performed at Toyota worsened the injury.

Toyota adopted a multi-pronged approach to refuting Olsen's claims. First, Toyota attempted to define the essential functions of the job of senior maintenance technician as including heavy and repetitive physical labor, which Olsen could not perform. To do this, Toyota called several Toyota employees who worked as maintenance technicians to describe their daily work and experiences in the field in general and indicate that the workers could request help over the radio. Riemer added that he never would have hired Olsen had he known about his back injury because he needed people who could do the difficult physical work the job required. From Riemer's perspective, that Olsen might have had light work when he started at Toyota was not representative of the essential functions of the job, but was a result of the fact that Toyota was still setting up a new facility. When all the systems in place at the facility were functioning, as occurred later in Olsen's employment, Olson's job certainly would have required harder labor. Toyota also drew the jury's attention to the fact that Braun had suspended Olsen for fighting and, allegedly, Olsen engaged in playful roughness, such as wrestling, with Olmstead.

Second, Toyota, using similar evidence to illustrate both points, attempted to discredit Olsen and claim that it lacked sufficient notice to accommodate him. In particular, Toyota emphasized that, when meeting with physicians to be evaluated for his continuing need for medication for the injury he sustained at Braun, Olsen failed to report any of the injuries at Toyota and distinguished between what he considered to be pain attributable to his separate injuries at Braun and Toyota. Toyota also challenged Olsen's credibility by presenting evidence that Olsen had never specifically complained to Baylis, Cable, Shiria, Nakagawa, or anyone else at Toyota that he was being forced to work beyond his restrictions. Toyota claimed, immediately following his injuries, that no one at Toyota knew what, if any, restrictions Olsen had to follow at work – even though posters urged workers to inform Toyota about their needs for accommodation – because Olsen made sure that his restrictions had been lifted. Further, according to Baylis and others, when Olsen did complain about Riemer, his complaints addressed Riemer's management style and related personality issues, not whether Riemer was forcing him to work unsafely by exceeding his restrictions, whatever they were.

Third, Toyota challenged Olsen's claim that his back injury substantially impaired any of his major life activities, noting that he continued to hunt, drive, and go out with his wife, although less frequently. With respect to Mary Olsen's related claim, Toyota contended that her trial testimony indicated that her life had changed very little since her husband's most recent injuries. She did not work outside the home before Olsen sustained his latest injuries and, therefore, did not have to give up working. While the couple was no longer able to have intimate relations, they still had what she described as a strong relationship.

Olsen attempted to counter most of these contentions. For instance, he relied on the written opinion of one of Toyota's doctors at the preemployment physical examination to demonstrate that he could perform the essential functions of the job even while at risk of more back injuries. His good performance reviews supported this initial medical evaluation. He noted that most heavy work could be made easier with coworker cooperation or supporting technology, e.g., using a dolly to transport furniture, or a crane to lift a heavy item. He testified that this sort of cooperation and technical assistance had prevented his similar job at Braun from being overly

strenuous. Further, there was a marked increase in the kind and amount of heavy work he was assigned to do at Toyota after he injured his back in June 1993, and Riemer's own performance evaluation chastised him for giving Olsen too many menial tasks.

As for the question of Olsen's restrictions, the preemployment physical examination indicated that, from the very beginning of his employment with Toyota, he required restrictions related to lifting, bending, and pushing. While the report prepared following that examination did not specify exactly the necessary restrictions, Olmstead corroborated Olsen's testimony that he had reminded Riemer of his need to not stress his back a number of times even before the sump pump cover incident. In particular, Olmstead recalled Olsen showing Riemer his vocationally handicapped worker's certificate to verify his need for these accommodations. With regard to notice to Toyota of the need for accommodation, Olsen elicited testimony from Baylis to the effect that though Toyota had printed posters informing workers that they needed to submit a written request for accommodations, it was not at all clear when Toyota first displayed the poster, whether its text had changed over time, or whether it was displayed continuously.

In submitting the case to the jury after the trial court denied Toyota's motion for a directed verdict, the trial court used a special verdict form. On this form, the jury found that Olsen's back condition substantially limited one or more of his major life activities; this disability was unrelated to his ability to perform the essential functions of his job; Toyota had notified its employees that it required a written request for an accommodation within 182 days after the employee knew he needed the accommodation; Olsen made a timely request for an accommodation in writing; Toyota did not provide a reasonable accommodation for Olsen's back condition; and Toyota's failure to accommodate Olsen's condition proximately caused his permanent and total disability. The jury, which also found in favor of Mary Olsen, then awarded damages in several separate categories.

Following this verdict, Toyota moved for JNOV, a new trial, and remittitur. The trial court denied the motion. The trial court, however, reduced the award for lost wages to $220,814.87 to account for $139,785.13 Olsen received as worker's compensation, and the award for lost future wages to $412,022.00, a setoff of $387,978.00 so that the award would match what the trial court considered the accurate measure of its present value. The trial court also offset $159,843.00 Olsen received as social security disability benefits.

II. Directed Verdict

A. Standard Of Review

Toyota's first issue challenges the evidence in support of Olsen's prima facie case. Toyota argues that the trial court erred in denying its motion for a directed verdict because there was insufficient evidence to submit to the jury concerning whether Olsen fit the statutory definition of a person with a disability. This Court reviews de novo a trial court's decision to deny a motion for directed verdict. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

B. Prima Facie Case

The PWDCRA guarantees individuals the "opportunity to obtain employment, housing, and other real estate and full and equal utilization of public accommodations, public services, and educational facilities without discrimination because of a disability . . . ." MCL 37.1102(1). In order to give life to this guarantee, MCL 37.1102(2) of the PWDCRA requires employers to "accommodate a person with a disability," subject to the limitations within MCL 37.1201 *et seq*.[3] A critical threshold issue in any claim alleging that a defendant's failure or refusal to accommodate the plaintiff violated the PWDCRA is whether the plaintiff is a "person with a disability" within the meaning of the PWDCRA. See *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

The Legislature defined the phrase "person with a disability." According to MCL 37.1103(h), "'[p]erson with a disability' or 'person with disabilities' means an individual who has 1 or more disabilities." In turn, MCL 37.1103(d) defines a "disability" in the employment-related provisions of the PWDCRA in relevant part as:

> (i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
>
> (A) For purposes of article 2,[4] substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.

Moreover, case law explains that a disability within the meaning of the PWDCRA cannot be related to a plaintiff's ability to perform the specified duties of a job. See *Hatfield v St. Mary's Medical Center*, 211 Mich App 321, 326; 535 NW2d 272 (1995).

At the close of proofs at trial, Toyota moved for a directed verdict of no cause of action. While challenging all the elements of Olsen's prima facie case,[5] Toyota contended that Olsen had failed to demonstrate that his back injury substantially impaired one or more of his major life activities.

---

[3] For example, MCL 37.1202 defines practices in which an employer may not engage and MCL 37.1210 sets forth the framework for proving that a defendant unlawfully failed or refused to accommodate the plaintiff's disability.

[4] MCL 37.1201 *et seq*., which is the PWDCRA article concerning disability discrimination in employment.

[5] See *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999) ("To establish a prima facie case of discrimination under the statute, a plaintiff must show that (1) he is 'disabled' as defined by the statute, (2) the disability is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute.").

Toyota also asserted that Olsen's vocationally handicapped worker's certificate was not relevant to proving that he fit within the definition of a person with a disability. Toyota contended that the ample evidence of Olsen's total and permanent disability at the time of trial was relevant only to the measure of his damages. Further:

> To limit the major life activity of working our Court of Appeals, the U.S. Supreme Court interpreting the ADA, say that you really have to be precluded from doing a whole range of jobs, Your Honor, not just one maintenance job at Toyota. Mr. Olsen testified himself that he had worked at Braun Engineering for 19 years, bearing [sic: barely] skipped a beat before he came to Toyota – one or two days, doing the same type of work. He held various heating and cooling licenses. He believe[d] he could draw on his experience and work with contractors – do all kinds of various things that would not involved [sic] physical activity. That was also disqualifies him from being a handicapper under the Civil Rights Act . . . .

Olsen's counsel responded that Olsen's restrictions constituted impairment of a major life activity, arguing:

> We have an individual whose spine – according to four physicians, was gradually collapsing to the point where he was not to lift heavy objects, he was not to do repetitive beneding [sic], he was not to do repetitive pushing and he was at risk. That is a substantial limitation of a major life activity and the Court has found that now; that there are issues of fact. It's not for the Court to decide yes or no, it's for the Court to decide whether there's evidence and the Court has already done that on several occasions.

Having heard extensive argument from both sides concerning the motion for directed verdict, the trial court denied the motion without explanation.

C. Major Life Activity

On appeal, the parties present the same arguments concerning whether Olsen provided sufficient evidence that his back injury substantially limited one or more of his major life activities to submit the question to the jury.

A back injury may be a disability. This Court has adopted the three-part federal test for determining whether a physical impairment constitutes a disability within the meaning of the PWDCRA:

> "First, we consider whether respondent's [complaint] was a physical impairment. Second, we identify the life activity upon which respondent relies . . . and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity." [*Chiles v Machine Shop, Inc*, 238 Mich App 462, 474; 606 NW2d 398 (1999), quoting *Bragdon v Abbott*, 524 US 624, 631; 118 S Ct 2196; 141 L Ed 2d 540 (1998).]

Turning to the first step in the analysis, the record leaves no doubt that Olsen's back injury constituted a "determinable physical . . . characteristic," which resulted from his "injur[ies]." MCL 37.1103(d)(i). There was consensus among the medical professionals that Olsen's back injury was real and debilitating, that his pain was serious, and that his attempts at rehabilitation had failed, leaving him with few – if any – options for meaningful relief and no likelihood that he would return to his job at Toyota. None of the witnesses suggested, implicitly or explicitly, that Olsen was a malingerer. Consequently, his back condition fits the first part of the statutory definition of a disability under the PWDCRA.

The second step of this analysis pertains to what major life activity his back injury affected during his employment with Toyota. According to his appellate brief, Olsen "was substantially limited in his ability to lift and move about, not only in the course of his employment but throughout his life activities, at the time Defendant hired him as a senior maintenance technician." Olsen's attorney also clarified that Olsen's back injury had substantially impaired his major life activities of repetitive bending, lifting, and pushing.

In support of his argument that he fit the definition of a person with a disability, Olsen notes that he received a vocationally handicapped worker's certificate. Under MCL 418.901(a) the state provides this sort of certificate to individuals with a specified impairment that "is a substantial obstacle to employment, considering such factors as the person's age, education, training, experience, and employment rejection." This certification is relevant support for Olsen's obligation to prove that he has had a physical impairment notwithstanding the fact that this provision in the worker's disability compensation act does not attempt to define a disability in the context of any sort of workplace discrimination.

MCL 418.901(a) assumes that the individual who obtains the certification is able to work, but would not be hired because of the financial risk of future expenses that would arise in the event that the individual sustained an additional injury. "Work" is a major life activity. *Lown v JJ Eaton Place*, 235 Mich App 721, 735-736; 598 NW2d 633 (1999). Although, Olsen never claimed that his back injury prevented him from holding any sort of job during the period Toyota employed him, his back injury clearly impaired his ability to lift, bend, push, and move generally. That Olsen suffered because of his back during his employment with Toyota is beyond debate. Moreover, the fact that he stoically continued to work despite the pain and physical limitations does not and should not preclude him from being a person with a disability pursuant to statute. In our view, this record certainly allowed for the court's and the jury's conclusion that plaintiff's back injury substantially impaired a major life activity during his employment with Toyota.

Olsen also argues that his back injury essentially impaired all other aspects of his life. The record provides a wealth of information about the substantial limitations Olsen faced on a daily basis at the time of trial, ranging from an inability to sleep at night to a dependence on medication that impaired his memory and ability to carry on conversations. Moreover, the evidence established that before the spinal fusion surgery in August 1995, Olsen led an active life, able to hunt, fish, attend amusement parks, and provide the companionship and support to his wife to which he was accustomed.

From a practical standpoint, the jury could easily and properly infer that it was increasingly difficult for Olsen to perform the tasks assigned to him at Toyota and that lifting and

moving might be major life activities. Consequently, the trial court did not err in denying the motion for directed verdict.

III. Toyota's Other Issues

The previous discussion analyzes and disposes of most of the claims Toyota raised on appeal. Most of the issues Toyota raises inherently relate to each other; thus, they have been addressed in our analysis of the central issue of whether Olsen met his burden of proof with respect to the elements required under the PWDCRA. We also find it important that the parties in this case submitted the case to the jury and required it to complete a detailed questionnaire. Consequently, we know precisely how the jury decided the specific elements of this case.

One of the issues Toyota raises on appeal that falls somewhat outside the above analysis is whether Olsen's own testimony demonstrates that he could not perform the essential functions of his maintenance position, i.e., lifting, bending, turning, stooping, and digging. From our review, we conclude that the testimony was such that Olsen testified that he *could* and did perform his job with the accommodations specified. Moreover, the jury agreed, answering "no" to question number two of the special verdict form: "Was plaintiff Larry J. Olsen's back condition related to his ability to perform the essential functions of his job when he worked at Toyota Technical Center?

Similarly, Toyota disputes that Olsen, indeed, asked for any accommodations as required by statute, and whether any restrictions were imposed after the injuries in question. Again, the jury responded "yes" to the special verdict question, number four: "Did plaintiff Larry J. Olsen request accommodation in writing from Toyota within 182 days of when he knew or reasonably should have known that he needed an accommodation?" We will not second guess a jury in its weighing of the evidence, particularly when the case was thoroughly tried and where the jury completed a special verdict form wherein it was specifically required to and answered these precise questions.

Toyota also urges us to find that the trial court committed error requiring reversal when it denied Toyota's motion for new trial. Toyota argues that the overwhelming weight of the evidence favored Toyota given that Olsen's testimony was entitled to no weight because of his numerous inconsistencies. This argument fails to recognize that much of Olsen's testimony was not in dispute. Toyota fully apprised the jury of all of plaintiff's inconsistent statements, and Olsen provided explanations for some of the inconsistencies. It was the jury's function to weigh the evidence. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

Next, Toyota claims that the trial court erroneously admitted irrelevant evidence of Olsen's supervisor's conduct toward a coworker and irrelevant evidence of the supervisor's performance evaluations. Toyota claims that the admission of this evidence unfairly prejudiced the jury against the supervisor, and by association, Toyota.

These alleged evidentiary errors, which relate to the trial court's decision to admit evidence of the negative evaluations of Riemer and the fact that he had used derogatory language toward Olmstead about his weight, did not overshadow the trial to the extent that their admission would require reversal if actually erroneous. *Krohn v Sedgwick James of Michigan Inc*, 244

Mich App 289, 295; 624 NW2d 212 (2001) ("[o]ur courts are reluctant to overturn a jury's verdict, particularly if there is ample evidence to justify the jury's decision, and we will not do so on the basis of an erroneous evidentiary ruling unless refusal to take this action would be inconsistent with substantial justice"). Nor is it plainly apparent that Olsen's counsel was guilty of any misconduct during closing arguments such that reversal would be required given that the trial court instructed the jury that the attorneys' arguments did not constitute evidence. *People v Ullah*, 216 Mich App 669, 683; 550 NW2d 568 (1996).

Finally, Toyota claimed that the trial court improperly denied its motion for a new trial even though the jury's five million dollar award for pain and suffering damages and its one million dollar award for loss of consortium (1) were the highest such awards ever affirmed in a published opinion from the courts of the largest states in the country, (2) were not supported by any rationale, logic, or evidence, and, (3) demonstrated a passion or prejudice that affected the liability verdict as well.

In essence, Toyota seeks remittitur. The test for remittitur requires a court to examine whether the evidence submitted will support the jury award. *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995). Although some opinions make fleeting reference to comparable jury awards, the core analysis must focus on the evidence in the case at bar. *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 131-132; 492 NW2d 761 (1992). Thus, we conclude that the trial court did not abuse its discretion in refusing to grant remittitur. *Phillips, supra.*

In summary, after reviewing all of Toyota's arguments, we conclude that that trial court committed no error in denying the motions for directed verdict, summary disposition, new trial, JNOV, and remittitur. We affirm the jury's verdict.

IV. Olsen's Cross-Appeal

We turn next to Olsen's cross-appeal. In his cross-appeal, Olsen alleges that the trial court erroneously ordered a setoff from the judgment in Olsen's favor, the amount of social security disability [SSD] benefits he received. In support of his argument, Olsen claims that the specific language itself of the PWDCRA precludes the setoff and that any such setoff is preempted by federal law. Because these facts are not in dispute, and we are left with only a question of statutory construction, this Court's review is de novo. *Perez v Keeler Brass Co*, 461 Mich 602, 608; 608 NW2d 45 (2000).

In deciding this issue, the trial court concluded that there existed no conflict between the collateral source rule set forth in MCL 600.6303 and the PWDCRA. The trial court further found that this issue was not preempted by federal law; consequently, the court ordered the setoff of all the SSD benefits Olsen had received and would receive in the future. From our review of the statutes and case law in this area, we conclude that the trial court properly set off these benefits.

Olsen filed suit under the PWDCRA, which provides in pertinent part as follows:

> The amount of compensation awarded for lost wages under this act for an injury under article 2 shall be reduced by the amount of compensation received for lost

> wages under the worker's disability compensation act . . . , for that injury and by the present value of the future compensation for lost wages to be received under the workers' disability compensation act . . ., for that injury. [MCL 37.1606(4).]

In addition to the setoff set forth above under the PWDCRA, MCL 600.6303 also provides for certain setoffs:

> (1) In a personal injury action in which the plaintiff seeks to recover for the expense of . . . loss of earnings, loss of earning capacity, or other economic loss, evidence to establish that the expense or loss was paid or is payable, in whole or in part, by a collateral source shall be admissible to the court in which the action was brought after a verdict for the plaintiff and before a judgment is entered on the verdict. Subject to subsection (5), if the court determines that all or part of the plaintiff's expense or loss has been paid or is payable by a collateral source, the court shall reduce that portion of the judgment which represents damages paid or payable by a collateral source by an amount equal to the sum determined pursuant to subsection (2). . . .
>
> * * *
>
> (4) As used in this section, "collateral source" means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or medicare benefits. . . [.] [MCL 600.6303(1), (4); emphasis added].

Olsen vigorously argues that because MCL 600.6303 predates by several years the setoff provision contained within the PWDCRA, the "more specific" provision of the PWDCRA should be that which is followed. It is more specific than the "personal injury" collateral source enactment as the former applies solely to disability discrimination cases, while the latter applies to all tort and personal injury cases. "When two legislative enactments seemingly conflict, the specific provision prevails over the more general provision." *Frame v Nehls*, 452 Mich 171, 176, n 3; 550 NW2d 739 (1996). But, as Olsen also notes, two statutes potentially apply. Thus, as Toyota points out, we must see if these statutes can be read so as to create no conflict. It is, of course, a well-settled principle of statutory construction that when this Court construes two statutes that arguably relate to the same subject – here, collateral source setoffs - or share a common purpose, then the statutes are in pari materia and should be read together as one law. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). Even if the two statutes contain no reference to each other and were enacted on different dates, we must strive to construe them in a manner that avoids conflict. *Id.*; *Jackson Community College v Michigan Dep't of Treasury*, 241 Mich App 673, 685; 621 NW2d 707 (2000). We agree with Toyota that even without the mandate of MCL 600.6303, the PWDCRA itself does not exclude discretionary setoffs for other collateral sources simply by virtue of the fact that it mandates a setoff for WDCA benefits. In respect to the specific facts of this case, we also note that to follow Olsen's theory would allow the "double recovery" that MCL 600.6303 seeks to avoid. Again, as Toyota points out, Michigan courts can look to federal cases interpreting the Americans With Disabilities Act (ADA), 42 USC 12101 *et seq*. when applying the PWDCRA. See *Chmielewski v Xermac, Inc,*

457 Mich 593, 602; 580 NW2d 817 (1998). In *Swanks v Washington Metro Area Trans Auth*, 325 US App DC 238, 243; 116 F3d 582, 587 (1997), the Court held:

> Although the issue of remedy is not now before us, we think [SSD] set-offs may provide a way to prevent windfall recoveries while guaranteeing disabled persons the full protection of both Acts [Social Security Act and ADA].

We agree with Toyota that this language supports the trial court's decision to apply both the setoff provisions set forth in the PWDCRA and MCL 600.6303. Moreover, there seems to be little doubt that Olsen's injuries constituted "personal" injuries, i.e., his current and totally disabling back condition was a personal injury albeit caused by Toyota's failure to accommodate his preexisting back condition. We therefore conclude that the verdict in this case was for "bodily harm" and "emotional harm resulting from bodily harm," a "personal injury" within the meaning of MCL 600.6301(b). We agree with the trial court that a review of both statutes establishes that there is no conflict between MCL 600.6303 and MCL 37.1606(4): the former provides mandatory reductions applicable to all personal injury claims while the latter simply mandates the reduction of PWDCRA verdicts (whether based in personal injury or not) by the amount of benefits Olsen received under the WDCA. Nothing in either statute explicitly or implicitly bars the application of the other; consequently, they can be read in pari material, and no conflict ensues.

Olsen also asserts that there should be no setoff for the SSD benefits because the application of MCL 600.6303 is preempted by federal law. We do not agree. Certainly, no federal law is involved in this matter. Federal law will preempt state law only under certain circumstances. Olsen has not advised this Court on appeal which of those circumstances he believes apply. Briefly, the circumstances wherein federal law will preempt state law are:

> [l] [W]hen Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, . . . [2] when there is outright or actual conflict between federal and state law, . . . [3] where compliance with both federal and state law is in effect physically impossible, . . . [4] where there is implicit in federal law a barrier to state regulation, . . . [5] where Congress has legislated comprehensively, thus occupying an entire field of regulation . . ., or [6] where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. [See Louisiana Public Service Commission v Federal Commuinications Commission, 476 US 355, 368-369; 106 S Ct 1890; 90 L Ed 2d 369 (1986) (citations omitted).]

Our review of this matter and the trial court's opinion leaves us with a firm belief that none of these bases exist in the present case; therefore, there is no valid preemption argument available to Olsen.

In conclusion, we affirm the jury's special verdict in this matter and the trial court's final order providing for the setoff of Olsen's social security disability benefits.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey