STATE OF MICHIGAN

COURT OF APPEALS

THOMAS M. KOHLOFF, Plaintiff-Appellee,	UNPUBLISHED October 16, 2012
v	No. 300801 Workers Compensation Appellate Commission
CHRYSLER GROUP LLC, f/k/a DAIMLERCHRYSLER CORPORATION, Defendant-Appellant.	LC No. 08-000185

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Defendant, Chrysler Group LLC, appeals as on leave granted[1] the decision of the Worker's Compensation Appellate Commission (WCAC) that affirmed the magistrate's open award of wage loss benefits to plaintiff, Thomas M. Kohloff. For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

The WCAC's findings of fact are conclusive if supported by any competent evidence. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000); MCL 418.861a. This Court's standard of review is "extremely deferential." *Id*. "As long as there exists in the record any evidence supporting the WCAC's decision, and as long as the WCAC did not misapprehend its administrative appellate role . . . then the judiciary must treat the WCAC's factual decisions as conclusive." *Id*. This Court does not review the magistrate's findings of fact, but restricts its limited review to the WCAC's findings. *Mudel*, 462 Mich at 701. This Court reviews de novo questions of law in final orders of the WCAC. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000). This Court may reverse a WCAC decision if the WCAC operated within the wrong legal framework, if its decision was

[1] This Court originally denied leave to appeal in this case. *Kohloff v Chrysler Group LLC*, unpublished order of the Court of Appeals, entered July 19, 2011 (Docket No. 300801). The Supreme Court, in lieu of granting leave to appeal, remanded to this Court for consideration as on leave granted. *Kohloff v Chrysler Group, LLC*, 490 Mich 1003; 807 NW2d 710 (2012).

based on erroneous legal reasoning, if it based a finding of fact on a misconception of law, or if it failed to correctly apply the law. *Id.*

Defendant first argues the WCAC erred in granting plaintiff worker's compensation benefits because plaintiff's injury did not cause his wage loss. First, defendant argues the evidence showed defendant terminated plaintiff because plaintiff's work was inadequate. Additionally, defendant argues the economy, and lack of other available jobs, caused plaintiff's wage loss.

To recover workers compensation benefits, a claimant must prove entitlement under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, by a preponderance of the evidence. *Stokes v Chrysler LLC*, 481 Mich 266, 274; 750 NW2d 129 (2008). A claimant must first prove he suffered a "disability." *Id.* MCL 418.301(4) states:

> "[D]isability" means 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. The establishment of disability does not create a presumption of wage loss.

A claimant must prove he suffered an injury covered by the WDCA and the injury resulted in a reduction of the claimant's maximum wage earning ability in work suitable to the claimant's qualifications and training. *Stokes*, 481 Mich at 275, citing *Sington v Chrysler Corp*, 467 Mich 144, 155-159; 648 NW2d 624 (2002). In establishing a disability, it is not sufficient for the claimant to show an inability to return to the same or similar work as he performed in the past. *Id.* "If the claimant's physical limitation does not affect the ability to earn wages in work in which the claimant is qualified and trained, the claimant is not disabled." *Id.*

The *Stokes* Court enumerated four requirements the claimant must prove to sustain a prima facie showing of disability. *Stokes*, 481 Mich at 282. "First, the injured claimant must disclose his qualifications and training." *Id.* The claimant must disclose all education, skills, experience, and training, regardless of whether they were relevant to the job claimant was performing when injured. *Id.* at 281-282.

"Second, the claimant must then prove what jobs, if any, he is qualified to perform within the same salary range as his maximum earning capacity at the time of the injury." *Stokes*, 481 Mich at 281, citing *Sington*, 467 Mich at 157. The claimant must provide a reasonable means to assess what employment opportunities his qualifications and training might translate. *Id.* However, this inquiry is limited to jobs within the claimant's maximum salary range. *Id.* The claimant must consider jobs he is qualified and trained to perform, even if he has never previously performed those jobs. *Id.* A claimant meets his burden of proof on this requirement by showing "there are no reasonable employment options available for avoiding a decline in wages." *Id.*

"Third, the claimant must 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." *Stokes*, 481 Mich at 283. "Fourth, 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." *Id*.

After making a prima facie showing of disability, the claimant must also establish the disability caused him to suffer a wage loss. *Sington*, 467 Mich at 160 n 11; *Romero v Moeke Hardwoods, Inc*, 280 Mich App 1, 8; 760 NW2d 586 (2008). In addition, "[t]he establishment of a disability does not create a presumption of wage loss." *Romero*, 280 Mich App at 8, quoting MCL 418.301(4). For example, if an employee is injured on her last day before retirement, and she does not intend to work after retirement, she suffers no wage loss. *Sington*, 467 Mich at 160-161. Even if the injury reduced the employee's capacity to earn wages, she would not have earned future wages regardless of the injury. *Id*.

Plaintiff established a prima facie showing of disability under *Stokes*. First, the WCAC specifically found that plaintiff adequately disclosed his qualifications and training. Defendant does not contest this point.

The WCAC also found plaintiff proved there are no jobs in the area in which plaintiff "is qualified to perform within the same salary range as his maximum earning capacity at the time of the injury." *Stokes*, 481 Mich at 282. Plaintiff provided a reasonable means to assess what employment opportunities his qualifications and training might translate into by meeting with defendant's occupational therapist, Kimberly Thompson, and answering her questions. Thompson testified that plaintiff cooperated fully and seemed eager to find another job. Despite her efforts, Thompson could not find any jobs plaintiff could perform within his limitations at his maximum salary range. Plaintiff specifically testified he not only considered those jobs he performed in the past, but expanded his search to include all jobs he is qualified and trained to perform. *Id*. Robert Ancell, a vocational rehabilitation counselor, testified that, after conducting a skills assessment analysis, he could not find any jobs plaintiff could perform within his limitations which would allow plaintiff to earn his maximum wage earning capacity. Ancell's testimony, which the WCAC found credible, satisfied plaintiff's burden to prove "there are no reasonable employment options available for avoiding a decline in wages." *Id*. Plaintiff, therefore, met his burden to establish the second requirement in *Stokes*, 481 Mich at 283.

Defendant argues the market, rather than plaintiff's injury, caused his inability to find a job earning his maximum wage capacity, negating this requirement. The *Stokes* requirements, however, focus on the availability of employment opportunities to avoid a decline in wages. *Stokes*, 481 Mich at 283. Additionally, plaintiff showed that he could have continued working with defendant had his injury not occurred. Defendant's argument also overlooks the fact that plaintiff restricted his search due to his limitations. Therefore, it is not true that there were no available jobs. Rather, there were no available jobs within plaintiff's limitations. We hold that, under these circumstances, the *Stokes* framework allows an award of worker's compensation benefits. See *Lawrence v Toys R Us*, 453 Mich 112, 124; 551 NW2d 155 (1996) ("Potential ability to work, if uncoupled with an actual opportunity to exploit that potential, leaves the employee unable to earn wages."); *Leizerman v First Flight Freight Serv*, 424 Mich 463, 473; 381 NW2d 386 (1985) (the statutory scheme is designed to avoid "penalizing the worker for his ability to do a job which is not available.")

Plaintiff satisfied the third *Stokes* requirement by showing "his work-related injury prevents him from performing . . . all of the jobs identified as within his qualifications and training that pay his maximum wages." *Stokes*, 481 Mich at 283. As Ancell explained, the only job available to plaintiff paying his maximum wages was with defendant. Plaintiff established he could no longer perform this job by testifying he could no longer lift boxes as defendant required. Because plaintiff established he could not perform the only available job paying his maximum wages, plaintiff established the third requirement.

Defendant argues plaintiff merely showed he could not perform his previous job with defendant, and showing an inability to perform the job at which the injury occurred is insufficient to establish disability, as established in *Stokes*, 481 Mich at 275. However, defendant's argument overlooks the WCAC's factual finding that plaintiff's job with defendant represented plaintiff's maximum wage earning capacity and there are no other jobs available to plaintiff that offer his maximum wage. Plaintiff did not merely show an inability to work in his previous job, he showed an inability to perform that job coupled with a complete lack of other opportunities to earn his maximum wage within his limitations. In other words, plaintiff proved his physical limitations caused him to restrict his job search, and his search within those restrictions did not reveal any jobs where plaintiff could earn his maximum wages. Defendant, in addition, failed to rebut this evidence by pointing to any available job which plaintiff could perform within his limitations that would provide him with his maximum wage earnings. By proving a lack of other opportunities to earn his maximum wage earning capacity within his limitations, coupled with his inability to perform his job with defendant, plaintiff met his evidentiary burden under *Stokes*.

Defendant also claims plaintiff did not meet the third *Stokes* requirement because plaintiff performed alternative jobs with defendant and another company, and both of those jobs paid his maximum wages. However, the WCAC is "free to accept or reject evidence of actual wages earned, avoided, or refused, or other factors affecting [a claimant's] actual as opposed to theoretical, employability." *McKissack v Comprehensive Health Servs of Detroit*, 447 Mich 57, 71; 523 NW2d 444 (1994). This rule prevents employers from avoiding disability claims by retaining an employee at his prior salary in an alternative position for the purpose of establishing the employee retains the ability to earn his maximum wages despite his limitation. See *Pulley v Detroit Engineering & Machine Co*, 378 Mich 418; 145 NW2d 40 (1966). It also encourages a legitimately disabled claimant to seek out and obtain other jobs by ensuring the claimant will retain the ability to obtain worker's compensation benefits despite his subsequent success in finding a job if his disability later causes him to suffer wage loss. *Leizerman*, 424 Mich at 473.

Ancell's testimony also supported the WCAC's finding that plaintiff's subsequent work with Magna Steyr did not establish plaintiff remained able to earn his maximum wages despite his limitations. Ancell testified Magna hired plaintiff under extraordinary circumstances, and that Magna was willing to pay a "premium" because it desired experience in plaintiff's field. In Ancell's opinion, this situation remains exceedingly rare, and plaintiff could not hope to find another job under similar circumstances. Plaintiff's heightened earning potential in this job, therefore, was caused by Magna's willingness to pay more for work within plaintiff's limitations, rather than plaintiff's ability to earn his maximum wages despite his limitations. Thus, the WCAC properly rejected defendant's argument that plaintiff was not disabled because plaintiff

worked in other jobs paying maximum wages following his termination, and plaintiff established the third *Stokes* requirement.

Finally, plaintiff established the fourth *Stokes* requirement by proving "he cannot obtain any of the[] jobs" meeting the previous requirements. *Stokes*, 481 Mich at 283. As discussed above, plaintiff showed, and the WCAC found, plaintiff's job with defendant was the only available job where plaintiff could earn his maximum wages. As found by the WCAC, plaintiff made a good-faith attempt to procure post-injury employment within his limitations by undertaking an exhaustive search for jobs throughout the state of Michigan. Plaintiff, therefore, made a prima facie showing of disability under *Stokes*. *Id*.

Plaintiff has also established his disability caused him to suffer a wage loss. *Sington*, 467 Mich at 160 n 11; *Romero*, 280 Mich App at 8, quoting MCL 418.301(4). Plaintiff presented evidence he worked for defendant, earning his maximum wages, until he was injured. Defendant terminated plaintiff's employment after accommodating him by placing him in a non-physical job in the "follow-up" area of defendant's plant for a short period of time. Contrary to defendant's argument, it is not "undisputed" that defendant terminated plaintiff due to his poor performance or a slowdown in production at plaintiff's plant. Plaintiff testified, before his injury, he never received any negative feedback regarding his work. Although defendant shut down its plant for a short period of time, Leto told plaintiff he would be called back to work in two to three weeks. Around this time, plaintiff informed Leto he could not adequately perform his position in follow-up due to his injury. Leto told plaintiff that if he could not perform, Leto would replace him with someone who could. Plaintiff also testified Leto became very angry when plaintiff informed Leto he intended to seek worker's compensation benefits. Defendant then terminated plaintiff when he continued to pursue his worker's compensation claim. This evidence supports the WCAC's rejection of defendant's contention that it would have terminated plaintiff regardless of his injury. Plaintiff thus established his work-related injury caused his inability to perform his job for defendant, and that defendant terminated him for this reason. Plaintiff, therefore, established his disability caused him to suffer wage loss.

Defendant alternatively argues the WCAC erred in finding plaintiff totally disabled. Defendant states, because plaintiff returned to work with defendant and performed other jobs within his qualifications, training, and limitations after his termination, plaintiff is, at most, partially disabled. We find defendant's argument on this issue persuasive.

The WCAC erred in failing to make a factual finding regarding the extent of plaintiff's disability. Because plaintiff remains able to work and earn wages, the WCAC erred in failing to specifically determine to what extent plaintiff's disability limits his wage earning capacity. See *Cain v Waste Mgmt, Inc*, 465 Mich 509, 512; 638 NW2d 98 (2002) ("Total and permanent disability benefits are intended for those who sustain the more catastrophic loss of more than one member.") In *Cain*, the Court stated:

> MCL 418.301(1) provides that an employee, who receives a personal injury arising out of and in the course of employment for an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. If such a showing is made, one must then determine if the disability is total or partial. Payment formulas are set by statute. [*Cain*, 465 Mich at 511.]

The record reveals that plaintiff remained able to perform jobs within his qualifications, training, and limitations, as evidenced by his subsequent employment with Swift Transportation. MCL 418.371(1), states, in relevant part, that "[t]he weekly loss in wages referred to in this act shall consist of the percentage of the average weekly earnings of the injured employee computed according to this section as fairly represents the proportionate extent of the impairment of the employee's earning capacity . . . ." The WCAC failed to apply the correct legal framework under MCL 418.371, specifically, to determine the "proportionate extent of the impairment of the employee's earning capacity" caused by the work-related injury. We therefore reverse the WCAC's award of total disability and remand to the WCAC for a factual finding regarding the extent of plaintiff's disability and its proportionate affect on plaintiff's wage earning capacity.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello
/s/ Michael J. Riordan