

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SANDRA STIVEN,

Plaintiff-Appellee,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

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UNPUBLISHED

December 16, 2010

No. 294579

WCAC

LC No. 09-000006

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant General Motors Corporation (GM) appeals by leave granted an order of the Workers' Compensation Appellate Commission (WCAC), affirming the magistrate's open award of wage loss benefits to plaintiff. We reverse and remand for further proceedings.

In July 2006, plaintiff executed an irrevocable special attrition plan (SAP) relative to her employment with GM. Under the terms of the SAP, plaintiff had to retire from GM no later than January 1, 2007, and she would receive a lump sum payment of \$35,000, along with a regular pension. On November 29, 2006, plaintiff sustained an injury to her right hand and wrist when her wrist became caught in a piece of machinery while plaintiff was performing maintenance work during the course of her employment with GM. Although she applied for sick leave, plaintiff continued to show up for work through December 22, 2006. However, because she was only able to use one hand due to the injury, she did not perform her normal duties as an electrician. She spent some time ordering, sorting, and stocking parts, and plaintiff also sold raffle tickets while on the job. Plaintiff testified that, by December 22, 2006, GM had run out of work for her to perform that could be done with only one hand. From December 23, 2006, through the end of the year, regular plant operations were shut down for the holidays. Plaintiff received a down-time paycheck for the last week in December 2006; it was not a sick leave check. Plaintiff testified that she had been working 12-hour days, six days a week. And she

would have worked “overtime” during the holiday week had she not been injured, assuming overtime work had been available and offered.<sup>1</sup> Plaintiff retired on January 1, 2007.

Plaintiff subsequently filed a petition for workers’ compensation benefits. The magistrate granted plaintiff an open award of wage loss benefits at the rate of \$706 per week from December 23, 2006, until ordered otherwise. The WCAC affirmed the magistrate’s ruling. This Court then granted GM’s application for leave to appeal.

On appeal, GM argues that plaintiff is not entitled to wage loss benefits because any wage loss that plaintiff incurred was attributable to her decision to retire, not to her disability.

The WCAC’s factual findings are deemed conclusive in the absence of fraud. *Stokes v Chrysler LLC*, 481 Mich 266, 274; 750 NW2d 129 (2008). “We review de novo questions of law in final orders of the WCAC.” *Id.* “[A] decision of the WCAC is subject to reversal 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 418.301(4) provides:

As used in this chapter, “disability” 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.

With respect to this provision, our Supreme Court in *Stokes* made the following observations:

The claimant bears the burden of proving a disability by a preponderance of the evidence under MCL 418.301(4), and the burden of persuasion never shifts to the employer. The claimant must show more than a mere inability to perform a previous job. Rather, to establish a disability, the claimant must prove a work-related injury *and* that such injury caused a reduction of his maximum wage-earning capacity in work suitable to the claimant’s qualifications and training. [*Stokes*, 481 Mich at 297.]

Accordingly, there must exist a causal connection or linkage between the injury and the wage loss. See also *Sweatt v Dep’t of Corrections*, 468 Mich 172, 186; 661 NW2d 201 (2003). This necessary causal connection was the subject of a hypothetical in *Sington v Chrysler Corp*, 467 Mich 144, 160-161; 648 NW2d 624 (2002), wherein the Court stated:

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<sup>1</sup> The record does not reveal whether overtime work would have actually been available to plaintiff during the holiday week.

[T]he second sentence [of § 301(4)] reflects an understanding that there may be circumstances in which an employee, despite suffering a work-related injury that reduces wage earning capacity, does not suffer wage loss. For example, an employee might suffer a serious work-related injury on the last day before the employee was scheduled to retire *with a firm intention to never work again*. In such a circumstance, the employee would have suffered a disability, i.e., a reduction in wage earning capacity, but no wage loss because, even if the injury had not occurred, the employee would not have earned any further wages. [Emphasis added.]

This language does not mandate a denial of benefits simply because an injured employee plans or is required to retire and then retires. Rather, the pertinent question appears to be whether there was any intention to ever work again in general after the employee retired from the particular job that gave rise to the work-related injury. We find further support for this proposition in *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1; 760 NW2d 586 (2008).

In *Romero*, this Court stated that even if an employee showed a disability, the employee must further prove wage loss. *Id.* at 8. “Additionally, the employee’s unemployment or reduced wages must be causally linked to the work-related disability.” *Id.* at 8-9 (citations omitted). The panel in *Romero*, consistent with *Sington* and *Stokes*, indicated that there must be a linkage or causal connection between the injury or disability and the wage loss in order to establish a loss that secures a right to benefits. *Romero*, 280 Mich App at 9. In *Romero*, the plaintiff left his employment with the defendant Hardwoods when his visa expired and after a forklift had crushed his leg during the course of the plaintiff’s term of employment with Hardwoods. *Id.* at 3. This Court held:

In this case, plaintiff was 21 years old when he was injured and was training for a future job as a millwright. Hardwoods was training plaintiff with the intent to employ him as a millwright in Mexico. But, because of his injury, plaintiff is now unable to work as a millwright in the United States or Mexico. While defendants are correct that plaintiff cannot legally work in the United States without a valid visa, plaintiff could have earned wages as a millwright in Mexico had the injury not occurred. Therefore, contrary to defendants’ assertion, there is a causal connection between plaintiff’s work-related injury and wage loss. [*Id.* at 9-10.]

*Romero* therefore indicates that wage-loss benefits can potentially be recovered relative to an inability to engage in future work with a new employer as caused by a work-related injury occurring during employment with a past employer despite the fact that the previous employment was terminated for a reason other than the injury.

Taking into consideration *Stokes*, *Sington*, and *Romero*, we think that the properly framed issues here are whether plaintiff, while intending and being required to *retire from GM* on

January 1, 2007, firmly intended to retire from any and all active employment thereafter, and, if she indeed intended to seek post-GM employment, whether her work-related injury prevented her from obtaining such employment, thereby causing wage loss.<sup>2</sup>

A review of the record from the hearing before the magistrate suggests that plaintiff did not intend to retire in general. Plaintiff recognized that she could not work for GM after January 1, 2007, and she testified that she did not have plans to go back. Plaintiff testified that after her retirement from GM, she began looking for employment by checking the help-wanted ads in the local newspaper. She testified that, so far, she had probably checked the paper for jobs on about 40 to 50 occasions. Although she found some advertised positions for which she had the relevant background and experience, she never pursued those listings because she realized that her injuries would prevent her from performing the tasks associated with those jobs.

GM's counsel, on cross-examination of plaintiff, attempted to elicit testimony from plaintiff that she was only looking into other avenues of employment merely to support her claim for worker's compensation benefits, not because she truly desired new employment. Plaintiff rebuffed these efforts, testifying that she sought employment because she wanted to remain active, because she liked being around people and wanted to continue interacting with others, and because she wanted to function in a way that benefited and contributed to society. Plaintiff was doing volunteer work as a member on the board of directors for Good Will.

Neither the magistrate, nor the WCAC, directly answered the question whether plaintiff had intended to retire from any and all active employment after retirement from GM. Stated otherwise, there was no ruling that addressed the issue of whether plaintiff retired from GM "with a firm intention to never work again." *Sington*, 467 Mich at 160. Further, while plaintiff's testimony suggested that she intended to work again after retiring from GM, the testimony, as well as the questions posed by counsel, did not directly confront the issue. Given the lack of a ruling on the issue, especially considering that credibility determinations are best left for the magistrate, and given the undeveloped testimony on the issue, we reverse the award of benefits and remand the case to the magistrate for further hearing. The magistrate can consider additional

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<sup>2</sup> This Court's decision in *Rangel v Ralston Purina Co*, 248 Mich App 128; 638 NW2d 187 (2001), does not dictate a different analysis here. In *Rangel*, plaintiff Greenman suffered an injury but never quit working before terminating her employment pursuant to a severance agreement, and this Court found that the wage loss was attributable to the severance agreement and not the injury. Initially, we note that here plaintiff testified that there was no one-handed work left for her to perform, and it was just happenstance that the GM plant shut down at that point for the holidays, with the retirement date falling at the end of the holiday week. Regardless, in *Rangel*, there was no indication that Greenman intended to work elsewhere after ending her job with the defendant pursuant to the severance agreement. And this Court certainly did not explore that issue if it was raised. Moreover, our Supreme Court's opinions in *Stokes* and *Sington*, which greatly sharpened and clarified the analysis applicable to workers' compensation cases, had not yet been issued when *Rangel* was decided.

testimony and specifically address the issue whether plaintiff retired from GM with a firm intention to never work again for a different employer or whether her intent was to the contrary.<sup>3</sup>

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. We decline to award taxable costs under MCR 7.219, where, under our ruling, neither party actually prevailed in full.

/s/ William B. Murphy  
/s/ Patrick M. Meter  
/s/ Elizabeth L. Gleicher

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<sup>3</sup> With respect to GM's argument regarding the presumption under MCL 418.373(1), we find that the presumption does not apply because plaintiff was not "actively on the job and performing the customary work of [her] job" when she retired. *Frasier v Model Coverall Service, Inc*, 182 Mich App 741, 744; 453 NW2d 301 (1990). The *Frasier* panel stated that "the question is not whether an employee files his workers' compensation claim before or after he retires, but whether the employee was actively employed when he left." *Id.* at 746. Given that plaintiff, an electrician, was doing such work as selling raffle tickets after the injury, and considering that GM had run out of one-handed work for her to perform, we cannot conclude that plaintiff was actively employed when she left GM.