STATE OF MICHIGAN

COURT OF APPEALS

RANDY J. BINKLEY, Plaintiff-Appellant,	UNPUBLISHED March 8, 2011
v	No. 295890 WCAC
ALSTOM POWER, INC., and AMERICAN ZURICH INSURANCE COMPANY, Defendants-Appellees.	LC No. 09-000080

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

In a 2-to-1 decision, the Worker's Compensation Appellate Commission ("WCAC") reversed a determination of the magistrate that plaintiff was entitled to an award of wage loss disability benefits. The majority concluded that plaintiff failed to establish a disability under *Stokes v Chrysler, LLC*, 481 Mich 266, 281-283; 750 NW2d 129 (2008),[1] for the reason that plaintiff failed to present any evidence to prove what jobs he is qualified and trained to perform that have the same salary range as his maximum wage earning capacity at the time of injury. All three members of the WCAC affirmed the magistrate's denial of an award of attorney fees to plaintiff under MCL 418.315(1). We granted plaintiff's application for leave to appeal and now affirm the decision of the WCAC.

I.

Following a tour of duty in the military in the late 1960s, plaintiff began his apprenticeship as a boilermaker. He earned his journeyman's card fifteen years later. On December 1, 2006, during blizzard conditions, plaintiff slipped and fell on a job site at the Consumers Power Pigeon River power plant and injured his lower back and right leg. Plaintiff

[1] To the extent that plaintiff asserts that *Stokes* was wrongly decided, we note that this Court is bound by our Supreme Court's decision until such time as the Court instructs otherwise by overruling or modifying the decision. *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009).

reports that, as a consequence of his injuries, he has experienced constant and worsening back and leg pain, which he described as "feel[ing] like somebody's sticking a knife in my lower right back; I got pain shooting down to my ankle. . . . It feels like somebody's stabbing me in the back. My right side." Plaintiff has not returned to work since the date of his injury.

Plaintiff commenced these proceedings to obtain worker's compensation benefits. He alleged in support of his benefits application that his December 2006 work injuries left him unable to perform any of the usual duties of boilermaker or a foreman on a job site, and that there was no light duty or sedentary work in the boilermaking trade. Following a two-day trial, the magistrate awarded wage loss benefits to plaintiff. The magistrate found that plaintiff demonstrated by a preponderance of the evidence that he sustained a work-related injury to his lower back and right leg. He also concluded that plaintiff had demonstrated that his December 1, 2006, injury was medically distinguishable from any prior back injury or condition, as required by *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220, 231-232; 666 NW2d 199 (2003).

Next, the magistrate found that plaintiff's work-related injury was disabling, as defined in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), and *Stokes*, 481 Mich 266. With regard to the second *Stokes* factor, whether plaintiff proved what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury, the magistrate opined:

> On appeal, the defendant will likely argue that plaintiff has failed to satisfy the second part of the *Stokes* test. Although a vocational expert is not required under *Stokes*, it would have been helpful in this case for an expert to testify that plaintiff's employment as a boilermaker represents his maximum wage earning capacity. This was not done. Plaintiff also conducted a very limited job search following his injury. He called the boilermakers' union on a few occasions, but realized that doing so was useless because he can no longer work as a boilermaker. Plaintiff has obtained skills throughout his life. He credibly testified that his service in the Army as a weapons expert, 40 years ago, does not realistically translate to transferable skills in the civilian world. However, the plaintiff has obtained skills while working as a boilermaker, including reading blueprints, welding, being a working foreman, general construction knowledge, and knowledge of tools. The question is whether, despite plaintiff's work injuries, he can obtain jobs which pay his maximum wage earning capacity. **Because the plaintiff did not obtain a vocational expert and conducted a very limited job search, plaintiff has made what should be an easy question to answer very difficult.**
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> Despite the lack of vocational testimony and plaintiff's limited job search, I find that the plaintiff established that his maximum wage earning capacity is working exclusively as a boilermaker. This finding is based on the unique circumstances of this case. Plaintiff has a ninth-grade education. He has performed one job, outside of the military, his entire adult life. He has worked as a boilermaker earning substantial wages. The job is union based and highly compensated. Based on the stipulation of the parties, plaintiff's annual income as

> a boilermaker is approximately $65,000.00. If fringes are included, his annual income as a boilermaker is approximately $106,000.00. Plaintiff and his medical experts credibly testified that he cannot work as a boilermaker. The plaintiff has developed skills while working as a boilermaker which may translate into other jobs the plaintiff has not sought. However, it defies common sense that the plaintiff could find a job earning the same wages he earned as a boilermaker given his set of skills and current physical condition. Based on the credible testimony of plaintiff's experts, the plaintiff has only been able to perform sedentary work since his injury. The plaintiff credibly testified he cannot sit or stand for long periods of time. He is also on heavy pain medication to cope with the symptoms related to his work injury. Therefore, it defies common sense that the plaintiff could find a sedentary job reading blueprints, welding or utilizing his knowledge of tools which would pay the wages he earned as a boilermaker, especially given the current state of the economy. Defendant may argue that this finding is based on speculation and conjecture. However, I believe that it is based on common sense. In *People vs. Simon*, 1989 [sic] Mich App 565 (1991), the Michigan Court of Appeals held that fact finders may and should use their own common sense and every day experience in evaluating evidence.
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> Common sense in this case suggests that the plaintiff's sole maximum wage earning capacity is working as a boilermaker. Therefore, he has satisfied the second element of the *Stokes* test by showing there are no reasonable employment options available for avoiding a decline in wages. [Boldface in original.]

Finally, the magistrate denied plaintiff's request for an award of attorney fees pursuant to MCL 418.315(1), which allows attorney fees to be awarded when a defendant has refused to pay medical expenses.

Defendants appealed that ruling and plaintiff cross-appealed. On December 14, 2009, all three members of the WCAC affirmed the magistrate's finding of injury and denial of plaintiff's request for an award of attorney fees. Two members of the WCAC issued a majority opinion, however, that reversed the magistrate's finding of disability. The majority opined that the magistrate's disability analysis was inconsistent with *Stokes* and that the magistrate's finding that plaintiff satisfied the second prong of the *Stokes* test was unsupported by the record. The majority elaborated:

> The plaintiff suggests his case is analogous to a case with an injury that prevents high paying professionals, such as lawyers and doctors, from returning to their normal work. The plaintiff argues that even though those professionals have a high skill set, it would be reasonable to conclude, without vocational testimony or job search efforts, that other jobs suitable to a doctor's or lawyer's skill set would likely pay less than maximum wages.
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> The plaintiff's analogy is faulty. For instance, a low back injury might prevent a surgeon from spending hours standing in an operating room leaning over a patient. But does it prevent him or her from editing or writing medical

textbooks, teaching medical students, teaching nursing students, researching, or working in a sales position for pharmaceutical or medical equipment companies?

Likewise, while we agree Mr. Binkley cannot return to the work he has performed in the past, we are not at all comfortable relying on "common sense" to tell us his particular skill set does not afford him an opportunity to earn maximum wages. Perhaps where the plaintiff lives in Florida is home to a trade school that needs someone to teach students to read blueprints. Perhaps Mr. Binkley's knowledge of tools would allow him to sell tools. Perhaps his long-term construction skills in building nuclear power plants and oil refineries are uniquely marketable as the world focuses on energy reduction. We are not saying any of those jobs exist, or what they would pay. To do so would be speculative. However, it was equally speculative for the magistrate to conclude those types of jobs do not exist, or if they do exist, that they would not pay maximum wages.

If Mr. Binkley had presented competent vocational testimony or conducted a good faith job search, his award of benefits would likely withstand scrutiny. Because he failed to provide either, we believe his proofs are insufficient. The magistrate's award of wage loss benefits is inconsistent with *Stokes* and is inconsistent with multiple cases from this Commission. *Daniels v Event Staffing, Inc*, 2009 ACO # 121; *Childs v Delphi Automotive Corporation*, 2009 ACO # 198 and *Angel v Al South, LLC*, 2009 ACO #184.

We certainly do not want to discourage magistrates from using common sense when appropriate. However, the disability analysis required in this case calls for more than can be gleaned from common sense or even a permissible inference. We believe what the magistrate did was akin to taking judicial notice of the fact the plaintiff was unemployable at his previous wages. That is not the type of fact that is subject to judicial notice.

We turn to the guidance offered by the rules of evidence on judicial notice. MRE 201 outlines the scope of judicial notice. The rule provides a judicially noticed fact must be one **not subject to reasonable dispute**, and that the fact is either generally known within the territorial jurisdiction of the court or capable or [sic: of] accurate and ready determination by sources whose accuracy are unquestioned.

Stokes offers us a complicated interpretation of the burden of proof required by a specific statutory provision in [the] Michigan Worker's Disability Compensation Act. We do not believe the complicated disability analysis required by *Stokes* falls within what most people would consider general knowledge or common sense. We do not believe whether Mr. Binkley is employable is an issue that is not subject to reasonable dispute. We do not believe Mr. Binkley's employability is a generally known fact. It is even less likely that Mr. Binkley's employability in Florida is generally known to a magistrate in Michigan.

> The plaintiff's proofs fall short of establishing disability. Common sense, inferences or judicial notice cannot be used to find the facts necessary to plug the holes in the plaintiff's case. Accordingly, we reverse the award of wage loss benefits. [Boldface in original.]

The dissenting commissioner noted that the magistrate's findings of fact were supported by competent, material and substantial evidence on the whole record where plaintiff testified that boilermakers are paid the highest wage of any of the skilled trades and where plaintiff presented documents from the unemployment agency indicating that he did not qualify for benefits because he was unable to perform suitable full-time work. The commissioner also noted that he was impressed with the "magistrate's common sense approach to this [the disability issue], where he discusses the role of common sense in the analysis process."

II.

A decision of the WCAC is subject to reversal if it is predicated on erroneously legal reasoning or the wrong legal framework. *Schmaltz v Troy Metal Concepts, Inc*, 469 Mich 467, 471; 673 NW2d 95 (2003); *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 561; 710 NW2d 59 (2005). This Court reviews the factual findings of the WCAC under the "any evidence" standard. *Ross*, 268 Mich App at 561. As long as there is any competent record evidence supporting the WCAC's factual findings, this Court must treat the factual findings as conclusive. *Schmaltz*, 469 Mich at 471. This Court continues to exercise de novo review of questions of law resolved in any final order of the WCAC. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 697 n 3; 614 NW2d 607 (2000).

III.

The WCAC majority correctly determined that plaintiff failed to carry his evidentiary burden under *Stokes*, 481 Mich 266, and, therefore, that he failed to establish a prima facie case of disability.

In *Stokes*, our Supreme Court delineated the proofs necessary to establish a prima facie case of disability under *Sington*, 467 Mich 144. A claimant may not establish a prima facie case of disability by merely demonstrating that "his work-related injury prevents him from performing a previous job." *Stokes*, 481 Mich at 281. Rather, the claimant must show a work-related injury and that the injury resulted in a reduction of the claimant's wage-earning capacity in work suitable to his qualifications and training. *Id*. To establish the requisite reduction in wage-earning capacity, the claimant must satisfy the following four steps. First, the claimant must fully disclose his qualifications and training. *Id*. at 281. Second, the claimant must establish "what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury." *Id*. at 282 "A claimant sustains his burden of proof by showing that there are no reasonable employment options available for avoiding a decline in wages." *Id*. Third, the claimant must prove 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." *Id*. at 283. Fourth, the claimant must show that he cannot obtain any of the jobs he is capable of performing. *Id*. at 283.

A claimant who successfully completes the above steps has established a prima facie case of disability. The burden of production then shifts to the employer to come forward with evidence to refute the claimant's showing. *Id*. at 283-284. "Finally, the claimant, on whom the burden of persuasion always rests, may then come forward with additional evidence to challenge the employer's evidence." *Id*. at 284.

Plaintiff challenges the majority's conclusion that he failed to satisfy step two of the *Stokes* test. To satisfy this second step, plaintiff was required to establish what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. 481 Mich at 282. Our Supreme Court offered the following guidance on how a claimant may satisfy this step of the analysis:

> The statute does not demand a transferable-skills analysis and we do not require one here, but the claimant must provide some reasonable means to assess employment opportunities to which his qualifications and training might translate. This examination is limited to jobs within the maximum salary range. There may be jobs at an appropriate wage that the claimant is qualified and trained to perform, even if he has never been employed at those particular jobs in the past. [*Sington*, 467 Mich at 160.] The claimant is not required to hire an expert or present a formal report. For example, the claimant's analysis may simply consist of a statement of his educational attainments, and skills acquired throughout his life, work experience, and training; the job listings for which the claimant could realistically apply given his qualifications and training; and the results of any efforts to secure employment. The claimant could also consult with a job-placement agency or career counselor to consider the full range of available employment options. Again, there are no absolute requirements, and a claimant may choose whatever method he sees fit to prove an entitlement to workers' compensation benefits. A claimant sustains his burden of proof by showing that there are no reasonable employment options available for avoiding a decline in wages. [*Stokes*, 481 Mich at 282.]

In the present case, plaintiff testified that he has a ninth grade education, that he served two years in the military and that, upon his discharge from the military, he became an apprentice boilermaker. After fifteen years, he earned his journeyman's card. He worked a short stint as a millwright after being injured while working as a boilermaker. Plaintiff further testified that his wages earned as a boilermaker were the highest wages paid in any of the skilled trades. As a boilermaker, plaintiff earned $28.24 per hour, unless he was working overtime, and then he was paid $42.36 an hour. He testified that he can no longer perform the job responsibilities of a boilermaker, or of such lesser paying trades as millwright or carpenter. The magistrate concluded that plaintiff had satisfied the second step because "it defies common sense that the plaintiff could find a job earning the same wages he earned as a boilermaker given his set of skills and current physical condition." Therefore, according to the magistrate, "[c]ommon sense in this case suggests that the plaintiff's sole maximum wage earning capacity is working as a boilermaker. Therefore, he has satisfied the second element of the *Stokes* test by showing there are no reasonable employment options available for avoiding a decline in wages."

The WCAC majority rejected the magistrate's analysis and cautioned that, under *Stokes*, a trier of fact may not rely on common sense to establish a fact not otherwise ascertainable by the record evidence. This conclusion of the majority reflects a proper application of *Stokes*.

Stokes clearly directed that a person seeking disability benefits "must provide some reasonable means to assess employment opportunities to which his qualifications and training might translate." *Stokes*, 481 Mich at 282. Although it seems likely that an individual, such as plaintiff, who has a ninth grade education and has worked close to 40 years as a boilermaker, will be unable to find another job that pays $28 an hour, the veracity and accuracy of such a proposition cannot be reasonably assessed without evidence in the record against which to test the proposition objectively. The examples offered in *Stokes* suggesting what manner of proofs might satisfy the second prong clearly reflect that our Supreme Court intended that a claimant present actual proofs on the question of employment opportunities available to earn the maximum wage. There is nothing in the language of *Stokes* that would suggest that indefinite notions of common sense are sufficient, alone, to satisfy the second step of the disability analysis.[2]

Under these circumstances, the WCAC majority correctly recognized that the magistrate erred in finding that plaintiff sustained his burden of proof with regard to the second step. Rather, plaintiff failed to sustain his burden of proof. The WCAC majority correctly reversed the finding of disability made by the magistrate.

IV.

Plaintiff challenges the decision of the WCAC to affirm the magistrate's denial of attorney fees. The dissenting commissioner opined that the magistrate appropriately exercised his discretion to deny the requested award of attorney fees under MCL 418.315(1), in part, for the reason that defendants had a colorable basis to dispute plaintiff's entitlement to medical benefits. The remaining commissioners agreed with the decision of the dissenting commissioner that the magistrate correctly denied an award of attorney fees. The reason offered by the WCAC falls within the range of reasonable and principled outcomes, and, therefore, the denial of attorney fees was valid. See *Harvlie v Jack Post Corp*, 280 Mich App 439, 446; 760 NW2d 277 (2008).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Patrick M. Murray

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[2] We are of the opinion that no one should leave "common sense" out of the equation, but, "common sense" must be supported by objective evidence contained in the lower court record. Without objective evidence, there exists no cornerstone to test the objectivity of the proposition.