

STATE OF MICHIGAN
COURT OF APPEALS

JOE HOLMES,

Plaintiff-Appellant,

v

ET4, INC. and PARK AVENUE PROPERTY &
CASUALTY INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED

August 2, 2012

No. 303954

WCAC

LC No. 10-000017

Before: STEPHENS, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order of the Workers' Compensation Appellate Commission (WCAC) that modifies a magistrate's decision to eliminate an award of wage-loss benefits to plaintiff. We vacate in part the portion of the WCAC's decision that eliminates the award of wage-loss benefits to plaintiff and remand for reconsideration of that issue.

Plaintiff contends that the WCAC made a legal error when it overturned the determination of disability made by two magistrates on the ground that plaintiff had not satisfied the second step of establishing a prima facie case of disability pursuant to *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). Questions of law involved with any final order of the WCAC are reviewed de novo. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 697 n 3; 614 NW2d 607 (2000); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401; 605 NW2d 300 (2000). The issue "whether the claimant sustained his burden of proving that his work-related injury effected a reduction of his maximum wage-earning capacity in work suitable to his qualifications and training" is a question of law, which we review de novo. *Stokes*, 481 Mich at 285.

A claimant must prove disability and entitlement to benefits by a preponderance of the evidence. MCL 418.851. Disability is defined in MCL 418.301(4)(a), in relevant part, as "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." In *Haske v Transp Leasing, Inc*, 455 Mich 628, 634; 566 NW2d 896 (1997), overruled in part in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), the Supreme Court held that a personal injury or work-related disease that prevented an employee "from performing any work, even a single job, within his qualifications and training," constituted a disability. In *Sington*, the Court rejected

that approach as being inconsistent with the statutory definition of disability. The Court explained that where a condition “rendered an employee unable to perform a job paying the maximum salary, given the employee’s qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training,” the employee does not suffer a reduction of that person’s maximum reasonable wage earning ability in work suitable to that person’s qualification and training, which is required to satisfy the definition of “disability.” *Sington*, 467 Mich at 155. Thus, disability was not shown by a mere limitation in performance of one or more particular jobs. *Id.* at 158.

In *Stokes*, 481 Mich at 289, the Court “reiterated” its holding in *Sington*, but noted that the WCAC had struggled in consistently applying the standard that *Sington* had established. *Stokes*, 481 Mich at 276, 289. After discussing prior WCAC decisions, the *Stokes* Court set forth “a practical application of the *Sington* standard” that did not impose any “new requirements,” but attempted “to afford guidance in the application of *Sington* so that future claimants and employers will have the benefit of a consistent and workable standard in assessing their rights and obligations under the law.” *Stokes*, 481 Mich at 289-290. The Court stated:

First, the injured claimant must disclose his qualifications and training. This includes education, skills, experience, and training, whether or not they are relevant to the job the claimant was performing at the time of the injury. . . .

Second, the claimant must then prove 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. . . .

* * *

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.

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.

Upon the completion of these four steps, the claimant establishes a prima facie case of disability. [*Id.* at 281-283 (citations omitted).]¹

¹ The Legislature largely incorporated the standard set forth in *Stokes* when it amended the WDCA in 2011 PA 266, effective December 19, 2011. For example, the *Stokes* steps are reflected in current MCL 418.301(5) and (6). The parties do not argue that the amendments are relevant to this appeal.

The Court discussed the second step in detail, explaining:

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.

We are cognizant of the difficulty of placing on the claimant the burden of defining the universe of jobs for which he is qualified and trained, because the claimant has an obvious interest in defining that universe narrowly. Nonetheless, this is required by the statute. Moreover, because the employer always has the opportunity to rebut the claimant's proofs, the claimant would undertake significant risk by failing to reasonably consider the proper array of alternative available jobs because the burden of proving disability always remains with the claimant. The finder of fact, after hearing from both parties, must evaluate whether the claimant has sustained his burden. [*Stokes*, 481 Mich at 282-283.]

In the conclusion section of its decision, the Court in *Stokes* described the second step of the prima facie case as, "[T]he claimant must consider other jobs that pay his maximum pre-injury wage to which the claimant's qualifications and training translate[.]" *Id.* at 298.

In *Stokes*, the Court concluded that the claimant had not satisfied his burden of establishing a disability. *Id.* at 285. The Court explained that the claimant had testified about his employment and educational background, but failed to present any evidence that he had considered any work other than that which he had been performing for years. *Id.* at 286. The Court concluded that the claimant "did not meet his burden of proving a disability under the WDCA because he only presented evidence of an inability to perform his prior job." *Id.* at 287. The Court explained:

At a minimum, claimant was required by the WDCA to show that he had considered other types of employment within his qualifications and training that paid his maximum wages and that he was physically unable to perform any of those jobs or unable to obtain those jobs. There is no evidence in this case that

claimant sought any post-injury employment or would have been willing to accept such employment within the limits of his qualifications, training, and restrictions. [*Id.* at 286.]

Thus, the claimant's proofs were deficient because he "presented no evidence that he considered whether there were any other jobs paying appropriate wages that he could perform[.]" *Id.* at 291.

In this case, the denial of wage-loss benefits stems from the WCAC's determination that the magistrates erred in concluding that plaintiff satisfied step two of the *Stokes* analysis. On remand from the WCAC, the magistrate analyzed *Stokes* as follows:

I find that plaintiff has disclosed all of his qualifications and training. Plaintiff is a high school graduate who took some classes at Delta College. His employment history consists entirely of working as a general laborer. He has done construction work, maintenance work, janitorial work and has worked on an assembly line. The work he did for E T 4 Inc. was especially physically demanding for the first seven or eight years of his employment. It became somewhat less demanding when he became a crane operator/crew leader; however, he would usually be helping the crew with physical labor when he was not required to perform other activities or if they were short of laborers. This was especially true when he went out to remote jobs sites.

Claimant's highest pre-injury wage was \$11.50 per hour. He earned this while working on the assembly line at Steering Gear. With this Defendant his maximum wage was \$9.50 per hour. Plaintiff has no qualifications or training to speak of. All of his jobs involved heavy physical labor. Plaintiff, in an attempt to secure employment, registered at Michigan Works and put his resume online. He continues to go to Michigan Works and reports on a regular basis. When he goes in he sends out his resume and applies for certain specific jobs. He applies for every job that is available. Additionally he has applied directly for different jobs. He applied at U-Haul, Pet Control, video stores and "a lot of different places." He testified he has done everything he can to find a job and he has applied for every job he could but no one has offered him a job. Someone contacted him once but after he told them what his "position" was they said he could not work. In Plaintiff's looking for work he has never seen jobs posted which paid what he made when employed by the Defendant, let alone what he made at Steering Gear. Therefore Plaintiff meets part two of the *Stokes* analysis since he has considered other jobs even though they did not pay his maximum pre-injury wage. Since he really does not have any qualifications or training he was applying for any position he could find.

Plaintiff's qualifications and training direct him to manual labor type jobs. There was some testimony about being a crew leader and operating a crane and forklift truck, but those seemed to be done very infrequently and without any real training. Plaintiff testified that he could not perform any of his previous jobs. Magistrate Kent found him credible. Magistrate Kent relied upon Dr. Awerbuch's testimony in finding a work related injury and the extent of his

inability to work. Dr. Awerbuch placed restrictions on Plaintiff, for the carpal tunnel syndrome. Plaintiff was to avoid repetitive activities involving the wrists and hands, avoid forceful gripping or grasping, avoid power or vibratory tools and limit lifting to five pounds occasionally. With regard to the neck the doctor placed restrictions on Plaintiff to avoid repetitive movement of the neck, flexion/extension and rotation. He should avoid work above shoulder level and should avoid other pushing, pulling or torquing. Plaintiff should avoid power tools and limit lifting to ten pounds occasionally below shoulder level. He should also try to avoid activities where there would be a potential to jar or hyperextend his neck. These restrictions greatly limit plaintiff's ability to perform any employment and completely eliminate any of the jobs he has had in the past or those that he has been qualified or trained to do. This includes the crew leader type position (because by definition those include performing part of the assigned work) and operating a crane or forklift truck due to the restrictions placed on neck movements and to avoid jarring his neck. All jobs he has had in the past require active movement of the neck and the ability to push, pull or torque and lift weights greater than ten pounds. The claimant is not capable of performing any jobs that he is qualified and trained to do and, despite that, he has filled out applications for such jobs and has not been offered a job and cannot get a job – let alone a job that pays what he was making at this employer.

In conclusion, it clearly appears that Plaintiff meets the definition of disability as defined by *Stokes* and he has met his burden of proof by showing that there is no reasonable employment option available to him to allow him to avoid a decline in wages. His wage loss is directly attributable to his work injury.

The WCAC opined that the magistrate's analysis "failed to hold plaintiff to his burden of proof under step 2[.]" The WCAC stated:

Plaintiff is required under step 2 of *Stokes* to "provide some reasonable means to assess employment opportunities to which his qualifications and training might translate." Plaintiff did not do so in this case. Plaintiff must establish "the job listings for which the claimant could realistically apply given his qualifications and training." Plaintiff did not do so in this case. Plaintiff must establish that there are "no reasonable employment options available for avoiding a decline in wages." Plaintiff did not do so in this case. Plaintiff must "reasonably consider the proper array of alternative available jobs." Plaintiff did not do so in this case. These requirements do not focus on plaintiff's ability to perform work; they are simply a means to establish the range of work that is "suitable to [plaintiff's] qualifications and training." MCL 418.301(4). Consequently, although plaintiff may have disclosed his qualifications and training, he did not establish what work is "suitable" to his qualifications and training.

The WCAC explained that the magistrate moved to the third step, addressing inability to perform jobs, without first requiring plaintiff to establish the appropriate range of jobs as required by step two:

Plaintiff's (in)ability to perform work arises under step 3 of *Stokes*, which poses the question of whether plaintiff is unable to perform "some or all of the jobs identified as within his qualifications and training that pay his maximum wages," but only *after* the appropriate range of jobs is identified under step 2. By looking ahead at what jobs the magistrate found plaintiff could perform, the magistrate failed to hold plaintiff to his burden of proof under step 2 of *Stokes*. Plaintiff's obligation was not only to "consider[] other jobs," but also to "reasonably consider the proper array of alternative available jobs." An unfocused, unsuccessful search for employment is not a "proper array" of alternative jobs and did not in this case supply enough information to draw the inference noted in *Hood v Wyandotte Oil & Fat Co*, 272 Mich 190 (1935) and *Pulley v Detroit Engineering & Machine Company*, 378 Mich 418 (1966), that the work-related injury caused a limitation in the capacity to earn wages when an injured worker seeks employment, but is not hired, and it is to be noted here that the magistrate did not draw the inference.

In this case, there is no showing that the magistrate or plaintiff considered the fact that "[t]here 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" and, if there are not, it is plaintiff's burden to establish this.

We agree with plaintiff that the WCAC committed legal error in its application of *Stokes*.

Stokes establishes that presentation of evidence of an inability to perform prior jobs does not satisfy a claimant's burden of proving a disability. *Stokes*, 481 Mich at 287. We would agree that if plaintiff's testimony about his prior jobs and his inability to perform them were the only evidence concerning limitation of his wage-earning capacity, plaintiff would have failed to satisfy his burden of proof. However, plaintiff's job search evidence distinguishes this case from *Stokes* and the examples of deficient proof mentioned in *Stokes*.

Stokes establishes the significance of job search efforts in several ways. *Stokes* favorably discussed *Stanton v Great Lakes Employment*, 2003 Mich ACO 129, which relied on an unsuccessful job search to establish a prima facie case of disability. The *Stokes* Court stated:

[I]n *Stanton v Great Lakes Employment*, 2003 Mich ACO 129, pp 2-3, the claimant's work-related injury precluded him from being able to perform most of his previous jobs because they required him to stand all day. However, the claimant had applied for an estimated 50 jobs, some of which were the types of jobs he had performed in the past, and others were jobs that he had never performed. *Id.* at 1-2. The claimant had also contacted the previous employer from which he had earned his highest pre-injury wages but received no offer. *Id.* at 4. The WCAC determined that the claimant had satisfied the threshold level of disability on the basis of the following factors: the severity of the claimant's injury; that most of his training and qualifications required significant standing and walking; that the claimant had proved his desire to return to work by applying for an estimated 50 jobs; that the claimant had not been offered employment by

his employer or another employer; that the employer had not accommodated the claimant's physical restrictions; and that no job had been made known to him for which he failed to apply. *Id.* at 3. The burden of going forward then shifted to the employer, which produced no evidence that there were actual jobs available at the maximum wage within the claimant's qualifications and training. *Id.* at 4. [*Stokes*, 481 Mich at 279-280.]

The Court stated that "*Stanton's* application of the *Sington* standard represented a much more accurate and thorough analysis than the analyses of previous cases," and an "accurate summation[] of what is required in the application of *Sington* to the facts of a WDCA case." *Stokes*, 481 Mich at 280-281. In discussing the second step, the Court stated that a vocational expert is not needed and that a claimant could instead present evidence concerning a job search. *Id.* at 282. The Court also explained:

At a minimum, claimant was required by the WDCA to show that he had considered other types of employment within his qualifications and training that paid his maximum wages and that he was physically unable to perform any of those jobs or unable to obtain those jobs. There is no evidence in this case that claimant sought any post-injury employment or would have been willing to accept such employment within the limits of his qualifications, training, and restrictions. [*Id.* at 286.]

Decisions of the WCAC reflect its understanding that job search evidence may provide a reasonable means for assessing employment opportunities to which the claimant's qualifications and training might translate to satisfy the second step of *Stokes*. In *Childs v Delphi Auto Corp*, 2009 Mich ACO 198, the WCAC determined that although the claimant failed to provide complete information regarding her transferable skills, the evidence of an unsuccessful job search "plugged" "the holes in her proofs":

We agree that absent the plaintiff's job search efforts, her proofs would have been lacking under *Stokes* We agree the plaintiff did not provide complete information on her transferable skills or the amount of money her previous occupations currently pay. However, the holes in her proofs are plugged by her valid and unsuccessful job search efforts.

* * *

We disagree with the defendant's claim that plaintiff impermissibly narrowed her job search efforts. Under *Stokes* the plaintiff must prove there are no jobs within her qualifications and training, that pay the maximum wage, that are reasonably available to her. In *Stokes*, the Court noted a plaintiff need not present vocational testimony that establishes the transferable skills, as long as the plaintiff provides a "reasonable means [for the magistrate] to assess employment opportunities to which [plaintiff's] qualifications and training might translate." *Id.* at 282. We find the plaintiff submitted sufficient proofs to meet the disability standard in *Stokes*.

The plaintiff testified she had looked for work. She has looked for jobs she has performed in the past and some she has not performed in the past. She checks the newspaper want ads and looks for jobs on-line. She has applied for secretarial jobs, investigated getting a job at her local school district and in the intermediate school district. The plaintiff testified she has applied for 25 jobs and has not been offered a job. While she agreed she could work as a bank teller, one of her previous jobs, as long as she was allowed to sit on a stool, she had not found any jobs as a bank teller in her job search efforts. . . . Her job search efforts have been unfruitful.

To that end, we believe the plaintiff's proofs are consistent with a WCAC opinion that the *Stokes*' Court viewed favorably.

The WCAC quoted the discussion of *Stanton* from *Stokes*, 481 Mich at 279-280, and then continued:

We believe the proofs in this case establish disability. Ms. Childs' injury and restrictions are severe. The restrictions from her treating surgeon of no lifting more than 25 pounds, no rising from low chairs, sedentary work only, no pushing or pulling and limited walking of a ¼ mile two times a day, and the restrictions from Dr. LaClair of lifting no more than 15 pounds, a sit/stand option and no squatting, kneeling crawling or repetitive stair climbing, are significant restrictions. The plaintiff cannot return to work as a tool and die maker where she earned her highest average weekly wage. The defendant does not have appropriately restricted work available for Ms. Childs. The plaintiff earned her maximum average weekly wage of \$1,946.54 at Delphi as a tool and die worker, a job she is no longer physically able to perform because of the work related condition. She has searched for work, applied for approximately 25 jobs, including jobs that are consistent with positions she has held in the past. She has also looked for work that is outside of her past job duties. There were no proofs that jobs were made known to her for which she failed to apply. Given the above factors, we believe the proofs in this case are sufficient to establish disability, as they are similar to proofs cited in the *Stanton* case above. [*Childs*, 2009 Mich ACO at 7.]

In *Stornello v Dept of Corrections*, 2011 Mich ACO 115, the Michigan Compensation Appellate Commission (MCAC), the successor to the WCAC, noted the significance of job search evidence:

Importantly, plaintiff offered no evidence of a comprehensive job search where she attempted to find work that fit her restrictions. When the job search covers all jobs suitable to plaintiff's qualifications and training, the search can satisfy plaintiff's burden under *Stokes*. But, without any job search, plaintiff must offer other evidence. [*Id.* at 5.]

In this case, unlike in *Stokes*, plaintiff testified about his efforts to find other employment. The credibility of his testimony is not disputed. The magistrate found that plaintiff had not

discovered any posted jobs that paid as much as defendant, that he posted his resume online, that he registered at Michigan Works, and that he applied for numerous other jobs, and considered other jobs even if they did not pay his maximum pre-injury wage. However, the WCAC discounted the job search evidence in this case. Its reasons for concluding that plaintiff's job search efforts did not satisfy his burden under *Stokes* are suggested in the following passage from the WCAC's decision:

Plaintiff's obligation was not only to "consider[] other jobs," but also to "reasonably consider the proper array of alternative available jobs." An unfocused, unsuccessful search for employment is not a "proper array" of alternative jobs and did not in this case supply enough information to draw the inference noted in *Hood v Wyandotte Oil & Fat Co*, 272 Mich 190 (1935) and *Pulley v Detroit Engineering & Machine Company*, 378 Mich 418 (1966), that the work-related injury caused a limitation in the capacity to earn wages when an injured worker seeks employment, but is not hired, and it is to be noted here that the magistrate did not draw the inference.

This criticism echoes a point the WCAC made in its criticism of the magistrate's analysis of the second step of *Stokes*. The WCAC stated that "[a] search for employment must, at least, conform itself to 'those jobs that afford a plaintiff *an opportunity for consideration to be hired* because he possesses the minimum experience, education, and skill.'" Thus, the WCAC's principal criticism of plaintiff's job search appears to be that it was too broad ("unfocused") and was not limited to jobs that afforded him an opportunity for consideration to be hired.

To the extent that the WCAC concluded that an "unfocused" search fails because it does not establish the "proper array of alternative jobs," its reasoning is flawed. In *Stokes*, 481 Mich at 282-283, the Court explained:

We are cognizant of the difficulty of placing on the claimant the burden of defining the universe of jobs for which he is qualified and trained, because the claimant has an obvious interest in defining that universe narrowly. Nonetheless, this is required by the statute. Moreover, because the employer always has the opportunity to rebut the claimant's proofs, *the claimant would undertake significant risk by failing to reasonably consider the proper array of alternative available jobs* because the burden of proving disability always remains with the claimant. The finder of fact, after hearing from both parties, must evaluate whether the claimant has sustained his burden. [Emphasis added.]

The Court's warning concerns a claimant who defines the universe of jobs too narrowly, not too broadly. *Stokes* does not indicate that a claimant fails to consider a "proper array" when he conducts a job search that may be overly broad.

The WCAC's opinion also indicates that the unfocused search was inadequate because it did not supply the information to draw the inference that was recognized in *Hood*, 272 Mich 190, and *Pulley*, 378 Mich 418. Those cases, which were decided before the definition of "disability" was adopted, address when one may infer that an unsuccessful job search was the result of the claimant's injury or limitations, as opposed to the weakness of the labor market in general.

When the WCAC refers to the inference to be drawn from *Hood* and *Pulley*, the inference concerns how a claimant may establish that a limitation in earning capacity *resulted from* a work-related injury, not how a claimant establishes that his wage-earning capacity is limited. See *Peacock v Gen Motors Corp*, 2003 Mich ACO 274 at 19. That causal connection is distinct from how one establishes a prima facie case of disability under *Sington* and *Stokes*. A claimant is required to establish a causal connection between the disability and wage loss. *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 9; 760 NW2d 586 (2008). But, establishing wage loss is a different inquiry than whether there is a disability. *Stokes*, 481 Mich at 275 n 2.

The WCAC's discounting of plaintiff's job search evidence on the basis that it was "unfocused" is not consistent with *Stokes*. The thrust of *Sington* and *Stokes* is that a claimant whose consideration of other jobs is too restricted does not establish a limitation in wage-earning capacity as necessary to satisfy the definition of "disability." A holding that discounts job search evidence because the claimant considered too broad a spectrum of jobs is contrary to the logic and reasoning of those decisions. Plaintiff was not required to present a transferable-skills analysis. *Stokes*, 481 Mich at 286. Rather,

[a]t a minimum, claimant was required by the WDCA to show that he had considered other types of employment within his qualifications and training that paid his maximum wages and that he was physically unable to perform any of those jobs or unable to obtain those jobs. [*Id.* at 286.]

Considering that the WCAC has repeatedly recognized the significance of job search evidence in meeting a claimant's burden under *Stokes*, the discounting of plaintiff's job search evidence in this case because it was "unfocused" reflects an inaccurate understanding of *Stokes*. Accordingly, we vacate in part the portion of the WCAC's decision that eliminates the award of wage-loss benefits to plaintiff and remand for reconsideration of that issue. If the MCAC deems it necessary on remand, it may remand the matter to the magistrate for further proceedings. MCL 418.861a(12).

Vacated in part and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Donald S. Owens