



**BLEAKLEY
CYPHER
PARENT
WARREN
& QUINN**

ATTORNEYS AT LAW

Thomas H. Cypher
Michael C. Mysliwicz
John A. Quinn
Thomas E. Kent
Michael D. Ward
Mark C. White
Roger N. Martin
Douglas J. Klein
Brian R. Fleming
James J. Helminski
Julie A. Jackimowicz
Joshua M. Britten
James A. Crocker
Steven C. Highfield

PARALEGALS

C. Mac Ward
Michele L. Niehof, MSCC
Melissa D. Gritter, MSCC
Heidi L. Lewis

OF COUNSEL

Frederick W. Bleakley, Sr.
Alfred J. Parent
William J. Warren

GRAND RAPIDS

OFFICE

**120 Ionia Avenue SW
Suite 300
Grand Rapids, Michigan
49503**

Phone

616/774-2131

Fax

616/774-7016

www.bcpwq.com

SATELLITE OFFICE

**Lansing, Michigan
48864**

517/349-4238

WORKERS' COMPENSATION ALERT

TO: Our Clients and Friends
FROM: Bleakley, Cypher, Parent, Warren & Quinn, P.C.
**RE: Supreme Court Order offers guidance on partial disability issue;
Chief Magistrate Jay Quist accepts new position**
DATE: June 8, 2011

We at Bleakley, Cypher, Parent, Warren & Quinn would like to update you on recent developments in the Workers Compensation arena, including an Order from the Michigan Supreme Court, as well as a change in positions for Chief Magistrate Jay Quist.

SUPREME COURT ORDER

On June 3, 2011, the Michigan Supreme Court issued an Order in *Harder v. Castle Bluff Apartments* that provided further guidance regarding how the Court views the issue of partial disability.

To establish disability under MCL 418.301(4) and *Stokes*, a plaintiff must show that he is incapable of performing all work within his qualifications and training that pay him his maximum wage. However, the Michigan Workers' Disability Compensation Act also contains a partial disability provision, which applies to plaintiffs who still have the ability to earn, albeit at a lesser wage. MCL 418.361(1). In 2008, the Michigan Supreme Court decided *Lofton v. Autozone, Inc.* There, the Supreme Court remanded the case to the Appellate Commission, specifically requiring that if the plaintiff was found disabled consistent with MCL 418.301(4) and the disability was only partial, the Magistrate must compute wage loss benefits under MCL 418.361(1) based upon what the plaintiff remains capable of earning.

Lofton suggested that the Court was going to interpret the partial disability provision as allowing Magistrates to reduce plaintiffs' compensation rates by considering the amount they are still able to earn post-injury. However, the Supreme Court provided little guidance in *Lofton* with regard to the applicability or administration of the partial

disability provision as it relates to wage loss analysis, and subsequent cases have done little to clarify the precedential value, if any, of *Lofton*.

Now, in *Harder v. Castle Bluff Apartments*, the Supreme Court has issued an Order where four of the seven Justices join to cite *Lofton* and state that partial disability analysis under Section 361(1) applies in all cases involving partially disabled plaintiffs (those who retain some wage earning ability). While this Order does not have the same effect as a published opinion of the Court, it does provide strength to *Lofton* and suggests that a plaintiff's residual earning ability is still a relevant inquiry in all cases. Establishing a plaintiff's partial disability and residual wage earning ability has always been important for the purposes of post-injury job offers and work avoidance issues. Now the issue is given even more importance, and evidence of lesser paying jobs that the plaintiff can still perform should be preserved and pursued in every case, as the Supreme Court has indicated in this recent Order that it may be once again moving toward a reduction in a compensation rate based on Section 361's "able to earn" provision.

CHIEF MAGISTRATE RESIGNATION

As most of you know, Magistrate Jay Quist accepted in January 2011 the position of Chairman of the Workers Compensation Board of Magistrates. However, Magistrate Quist has recently decided to accept a new position in the workers' compensation/unemployment benefits system. It is expected that he will no longer be the acting chief magistrate. Instead, his new position will be in an administrative/supervisory capacity. We will be sure to update you when a new Chief Magistrate is appointed, and when we receive any additional information regarding Magistrate Quist's new position.

As always, if you have any questions or concerns, please do not hesitate to contact any of the attorneys at Bleakley, Cypher, Parent, Warren & Quinn, P.C., directly.