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**WORKERS' COMPENSATION ALERT**

**TO: Our Clients and Friends**  
**FROM: Bleakley, Cypher, Parent, Warren & Quinn, P.C.**  
**RE: MICHIGAN SUPREME COURT ISSUES *STOKES* DECISION  
REGARDING DISABILITY STANDARDS**  
**DATE: June 13, 2008**

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In our continuing effort to provide the best legal services available with respect to workers' compensation matters in the State of Michigan, we apprise you that the much anticipated case of *Stokes v Daimler Chrysler Corp.* has now been decided by the Michigan Supreme Court. The Supreme Court issued its decision on June 12, 2008. Therein the Court attempts to provide future claimants and employers with a consistent and workable standard as it relates to the disability inquiry under the Workers' Disability Compensation Act.

**DEFINITION OF DISABILITY**

With respect to the definition of disability, the Supreme Court specifically reaffirmed its previous holding in *Sington* that, pursuant to §301(4), an employee must establish a work-related injury and a loss of maximum earning capacity in all jobs within one's qualifications, training, and experience. For example, it is not enough that a work-related injury renders an employee unable to perform the job that was performed at the time of injury. The employee must still establish that the injury caused the inability to perform any and all jobs reasonably available in the ordinary marketplace that pay at or above the maximum earning capacity level.

Since the Supreme Court's 2002 *Sington* decision, a variety of issues surrounding disability have been hotly litigated. Relevant questions have included what types of proofs are sufficient to meet the above standard, who has the burden to establish such proofs, is vocational testimony necessary in every case, and is discovery permitted in the Worker's Compensation arena? These types of lingering issues lead to the Court's willingness to clarify a workable and practical standard for all parties to obtain the necessary answers to those questions. The Court has now addressed these issues in *Stokes*.

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## **BURDEN OF PROOF**

The Supreme Court made it clear that a workers' compensation claimant bears the burden of proving that he is disabled and that the burden does not shift to the employer. To establish a prima facie case of disability under the Workers' Disability Compensation Act, the claimant must prove a work-related injury and a reduction of his or her maximum earning capacity in work suitable to his or her qualifications and training.

From a practical standpoint, in order to meet the burden of proof, the claimant must establish his work qualifications, training, work experience and universe of jobs related thereto, as well as an inability to perform same.

After the establishment of qualifications, training, and the universe of jobs those qualifications and training translate to, the claimant must establish that a work-related injury prohibits the performance of all jobs reasonably available in the ordinary marketplace.

With respect to what constitutes "qualifications and training," the Supreme Court adopted prior Appellate Commission decisions that defined the phrase as formal education, work experience, special training, skills, and licenses.

When determining whether available work is "suitable" to one's qualifications and training, the Supreme Court explained that an employee need not have performed the job in the past. Rather a job that afforded an employee an opportunity to be hired because he possesses the minimum experience, education, and skill, would constitute a suitable job.

## **TRANSFERABLE SKILLS ANALYSIS**

While the Supreme Court specifically indicated that the statute does not demand a transferable-skills analysis, the Court went on to explain that a claimant must provide "some reasonable means to assess employment opportunities to which his qualifications and training might translate." The Supreme Court limited the examination to jobs that pay in the maximum salary range.

In other words, the claimant needs to provide some proof that no reasonable employment options exist in the ordinary marketplace. To do so, the claimant must explore the marketplace, i.e. look for jobs. Thus, the Supreme Court's decision can be interpreted to require the claimant demonstrate that he considered work and/or looked for a job in the ordinary marketplace.

### **VOCATIONAL EXPERT AND/OR TESTIMONY**

The claimant does not need to hire an expert or present a formal report to establish a compensable disability, but again must present evidence that there are “no reasonable employment options available.” Thus the claimant has a duty to look for work in order to establish a compensable disability.

While the claimant is not required to submit expert or vocational testimony to establish a compensable disability, the Supreme Court specifically articulated that under the appropriate circumstances, an employer has the right to have the claimant evaluated by a vocational expert to examine the claimant’s qualifications, training, physical restrictions, and whether there are actual jobs that fit within those parameters in the ordinary marketplace. The Supreme Court specifically provided that in the appropriate case where an employer chooses to hire vocational experts to challenge the claimant’s proof, the expert must be permitted to interview the claimant face-to-face.

### **DISCOVERY**

The Supreme Court made it abundantly clear that discovery does exist in the Workers’ Compensation arena. In particular, the Supreme Court explained that an employer has the right to discovery necessary to meet its burden and present a meaningful defense. While the magistrate has the authority to require discovery when necessary, the Supreme Court made it clear that a magistrate cannot ordinarily make a proper determination of a case without being fully informed of all the relevant facts. In other words, if an employer presents tangible evidence that discovery is needed by way of vocational testimony, subpoena, interrogatories, or otherwise, the magistrate will be considered to have abused his discretion if he denies such requests.

### **EMPLOYER’S BURDEN OF PRODUCTION**

As noted above, the claimant bears the burden of proving that he is disabled and the burden does not shift to the employer. That being said, if a claimant establishes a prima facie case of disability, the “burden of production” shifts to the employer to come forth with evidence to refute the claimant. Thus, if the claimant does present sufficient evidence to establish a compensable disability, the employer is afforded the opportunity to present evidence that would challenge the existence of any disability. That may be done with vocational testimony and/or other evidence of actual jobs within the ordinary marketplace

that are within the claimant's qualifications, training, and experience and that pay at the maximum level.

### **WAGE LOSS**

The Supreme Court in the *Stokes* decision specifically decided not to address the issue of wage loss. However, the Court did make it clear that it is an entirely separate issue from the establishment of disability. The Court further explained that even if a claimant establishes a disability, a claimant must also prove a wage loss.

Thus, while the Supreme Courts' decision did not articulate a practical interpretation of the wage loss concept, it did specifically state that a claimant must also establish wage loss. Under the wage loss concept, an employee is not entitled to wage loss benefits to the extent that actual jobs exist in the ordinary marketplace. Accordingly, even if the claimant establishes the inability, due to a work related injury, to perform all jobs at the maximum earning capacity level, if jobs that pay less exist, then the employer is entitled to a credit/offset represented by actual jobs (that are available) in the ordinary marketplace.

The issues surrounding partial wagemloss remain unresolved, although it is important to point out that several decisions from the Appellate Commission have recently articulated wage loss as a viable concept. The Supreme Court's decision reaffirmed that the wage loss concept is alive and well. There will most certainly be further litigation regarding that issue in the future and we will keep you apprised of all developments.

### **CONCLUSION**

In conclusion, as part of his burden to establish the inability to perform all jobs within ones qualifications and training, a claimant must prove that at a minimum he has looked for work in the ordinary marketplace in order to prove that no job at his maximum earning capacity is available.

It is also noteworthy that employers do have access to discovery and, under appropriate circumstances, need to consider viable tools such as subpoenas, interrogatories, and vocational experts. With respect to vocational efforts, the Supreme Court has specifically indicated that a vocational expert is entitled to meet face-to-face with an employee before trial.

Finally, while the issue of wage loss and residual earning capacity was not specifically addressed by the court in *Stokes*, the issue remains viable and employers should continue to investigate the availability of any and all jobs, regardless of whether they pay at

or above the employee's maximum earning capacity at the time of injury. The investigation may very be that the claimant has a residual earning capacity and the employer is entitled to mitigate its damages.

The Court's decision in *Stokes* consisted of a 33 page majority opinion (with four justices constituting the majority) and two dissents totaling 24 pages (with three justices dissenting). While the above summary represents the high points of the Stokes opinion, the Court's decision is riddled with nuance. Application of this decision to particular facts may produce varying results over the coming weeks and months.

Therefore, if you have any questions, please do not hesitate to contact the attorneys at Bleakley, Cypher, Parent, Warren, & Quinn for further explanation and/or application of this *Stokes*' decision.

As always, we will continue to keep you apprised of all developments.