STATE OF MICHIGAN

COURT OF APPEALS

KEITH S. ULIN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2012
v GENERAL MOTORS, L.L.C., Defendant-Appellant.	No. 302864 WCAC LC No. 08-000102

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendant General Motors, L.L.C. appeals by leave granted the order of the Workers' Compensation Appellate Commission (WCAC) affirming in part and reversing in part the magistrate's decision on second remand that denied plaintiff Keith S. Ulin's petition for benefits. We conclude that the WCAC erroneously determined that the magistrate did not have authority to address the continuation of benefits for plaintiff's 1980 back injury but agree with the WCAC's conclusion that the magistrate's analysis on second remand regarding plaintiff's establishment of a new wage-earning capacity was incomplete. Therefore, we reverse and remand.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff first began working for defendant on June 19, 1972. Plaintiff performed assembly work at defendant's Detroit Diesel Allison Division in Redford, Michigan. In October 1980, plaintiff suffered a work-related injury to his lower back. Plaintiff initiated a workers' compensation claim in early January 1981. On January 11, 1982, defendant voluntarily began paying plaintiff workers' compensation benefits for his injury. In early January 1989, defendant sought to terminate payment of plaintiff's workers' compensation benefits on the basis that plaintiff was vocationally rehabilitated and had established a wage-earning capacity. On June 7, 1990, Magistrate Lawrence Egan issued an opinion and order finding that defendant's assertion that plaintiff was vocationally rehabilitated and had regained a wage-earning capacity was without factual basis. Magistrate Egan ordered defendant to "resume the payment of weekly compensation based on the October 1980 injury date until further order of the Board."

On November 19, 1997, plaintiff returned to work for defendant after defendant agreed to provide him with reasonable accommodations for his lower-back restrictions. Without filing a petition to stop payment of plaintiff's benefits, defendant stopped paying plaintiff wage-loss

benefits upon his return to work, and plaintiff did not seek such benefits pursuant to Magistrate Egan's 1990 order. Plaintiff, however, continued to submit and be reimbursed for medical expenses for treatment of his lower-back injury. In March 1998, plaintiff "used [his] seniority to move into [a] chipping" position. Other than brief absences from work in 1998, plaintiff's attendance was regular until he stopped working for defendant on May 10, 2004, because of neck and arm difficulties. Upon plaintiff's discontinuance of employment, defendant did not resume payment of wage-loss benefits for the 1980 lower-back injury as awarded in Magistrate Egan's 1990 order, and plaintiff did not seek to enforce the order.

On July 7, 2004, plaintiff filed an application for mediation or hearing seeking medical and wage-loss benefits and, later, amended the application to assert the following disabilities: (1) the 1980 lower-back injury[1] requiring surgery and resulting in a restriction of work; (2) a June 1998 injury to his right knee that required surgery in December 1998; (3) a cervical spine injury on August 13, 2001; (4) a February 2002 injury; (5) an additional injury to his neck on October 29, 2002; and (6) aggravation of his neck and lower-back conditions on May 7, 2004.

In response to plaintiff's application, defendant filed an answer and asserted the following, among other things: (1) plaintiff is not entitled to "any benefits" (either further benefits or new benefits) under the Act; (2) "[p]laintiff has reestablished a new wage earning capacity since his . . . injury, thereby relieving defendant of liability"; (3) "[i]f the plaintiff has terminated active employment and is receiving retirement benefits paid by the employer, the plaintiff does not have a loss of earning capacity"; and (4) plaintiff voluntarily removed himself from the workforce and, thus, is not entitled to benefits.

Plaintiff had neck surgery in August 2004 and reported to work in February 2005. Defendant's supervisor of labor relations, Charles LoPresti, attempted to place plaintiff at a job within his restrictions; however, plaintiff was advised that there was no suitable job available to him because defendant could not accommodate his back restrictions. LoPresti suggested that plaintiff retire on a disability pension, and plaintiff did so effective July 2005. Plaintiff has not sought employment or been offered employment by defendant since that date.

Plaintiff's claim for benefits went to trial in September and October 2006. Plaintiff detailed each of his injuries and their effects on his daily functioning. Plaintiff testified that he was incapable of performing the jobs that he had held during his lifetime because of the lingering effects of his injuries, particularly his lower-back and knee injuries. Plaintiff also testified that he did not give his doctors an accurate history regarding his injuries; he admitted that "it ain't the right thing to do but it's what [he] had to do at the time." Plaintiff testified that, since his retirement, he "pretty much stay[ed] around the home," cutting grass and doing "a little bit of flowering but nothing huge." He also went to "the gym every day" to do rehabilitative exercises,

[1] The July 7, 2004, application listed "11/80" as one of several dates of injury and both "11/80" to "PRESENT" and "5/7/04 LDW" to "PRESENT" as the duration of disablement. On the first day of trial, the magistrate articulated on the record each injury alleged by plaintiff in the July 2004 application, including the 1980 back injury. Plaintiff then requested that his application be corrected so that the date of the 1980 back injury was "10/3/80."

explaining that 40 pounds was the most he could use during the exercises. Plaintiff stated that, before his neck difficulties, he rode his motorcycle "quite a bit" but that riding it for any length of time after his neck and knee surgeries caused him difficulty with his shoulders, arms, and knee. LoPresti testified that plaintiff's chipper job was "a regular job within the plant," necessary to plant operations, within plaintiff's restrictions by its nature, and not designed or modified for plaintiff. Jeff Holstad, a licensed investigator, testified that he performed surveillance on plaintiff in July and August 2006. According to Holstad, he observed plaintiff at the gym lifting weights up to approximately 150 pounds, loading rim-mounted tires that Holstad estimated weighed 45 pounds each into his truck, riding his motorcycle, running, and crawling "on all fours."

In December 2006, the magistrate denied plaintiff's request for benefits. The magistrate found that "[p]laintiff was not a credible witness on his own behalf"; therefore, the magistrate gave plaintiff's testimony on pivotal facts "little weight unless corroborated by other evidence." The magistrate concluded that plaintiff established that he was disabled from December 4, 1998, to December 21, 1998, while off work due to knee surgery but that the two-year back rule, MCL 418.381(2), precluded benefits for the disability. The magistrate further concluded that plaintiff was not disabled relating to either the August 13, 2001, cervical strain or the October 29, 2001, contusion to his head. Moreover, the magistrate opined that plaintiff "failed to establish by a preponderance of the evidence that his present complaints in the right knee, if any, are due to" his work-related knee injury. Finally, the magistrate concluded that plaintiff was no longer entitled to benefits under the prior 1990 award because plaintiff "established a new wage-earning capacity" under MCL 418.301(5) of at least $787.71 by virtue of his six-plus years of employment at the "regular" chipper position.

On appeal, the WCAC concluded that the magistrate erred as a matter of law by applying the post-1982 disability standard, set forth in the statute, to plaintiff's 1980 injury. The WCAC remanded the matter to the magistrate for supplemental findings and a supplemental decision under the law in effect at the time of plaintiff's injury. The WCAC emphasized that it was not disturbing the magistrate's findings "concerning plaintiff's credibility or his interpretation of the medical evidence because neither party request[ed its] review of the findings."

On remand, the magistrate determined that, under the law in effect at the time of plaintiff's 1980 injury, plaintiff was not entitled to any wage-loss benefits for that injury. The magistrate stated:

> Plaintiff is able to perform work activities in excess of his restrictions, and could return to the work he last performed for Defendant, which paid a minimum of $787.71 per week. The compensation payable for the 1980 injury ($188.00) when added to this amount of his residual wage earning capacity ($787.71), exceeds his average weekly earnings at the time of injury ($215.25). Plaintiff is therefore not entitled to any wage loss benefits related to the October 3, 1980 injury date.

Plaintiff appealed to the WCAC for a second time, arguing that the magistrate "again failed to properly apply 1980 law" and lacked the authority to close plaintiff's 1990 award because defendant never filed a petition to stop benefits. Plaintiff further argued that the magistrate's decision was also factually unsound because "there was no dispute [that] plaintiff

remained under restrictions for his back condition." The WCAC concluded that the magistrate "simply failed to provide any findings or analysis consistent with the law in 1980." Therefore, the WCAC remanded the case a second time to the magistrate to apply the law from 1980. In a footnote, the WCAC noted plaintiff's argument that defendant never filed a petition to stop benefits, that the argument had not been fully briefed to the WCAC, and that the issue "may be addressed on remand."

On second remand, a second magistrate concluded that "[the first magistrate's] finding that plaintiff's work from 1997 to 2004 did not constitute favored work controls the decision on remand. The record does not justify an award of disability benefits." As to whether the first magistrate properly considered the issue of plaintiff's eligibility for benefits arising from his 1980 back injury, the second magistrate opined that "the posture in which the parties have left this matter hardly constitutes adequate or full briefing. Consequently, this matter will not be addressed on this remand and is left for possible development before the [WCAC] pursuant to its retained jurisdiction."

In a third appeal, a majority of the WCAC concluded that "[the first magistrate] lacked the authority" to order that plaintiff was not entitled to any further wage-loss benefits for his October 3, 1980, injury. The majority explained that

> defendant did not properly place this issue before [the first magistrate] by filing an Application for Mediation or Hearing, also known (and sometimes referred to . . . as) a Petition to Stop. The magistrate properly held that no additional benefits were owed beyond the ongoing benefits found payable in a final order. However, because defendant did not file a Petition to Stop, it could not pursue the claim that the benefits it was previously ordered to pay should be stopped.
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> Here, defendant was obligated to pay ongoing benefits under the Act until further order. To obtain that further order, MCL 418.841 and MCL 418.847(1) require a request for a hearing. No hearing was requested by defendant; therefore, no further order may be entered in defendant's favor.
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> The magistrate could not enter an order that stopped the payment of benefits required by a previous open award that mandated the ongoing payment of benefits, because his authority to enter such an order was not properly invoked.

The WCAC majority further concluded that the magistrates erred in ruling that defendant demonstrated a right to stop payment for the 1980 injury because "the resolution of that issue by [both magistrates] was incomplete and not in compliance with *Pulley v Detroit Engineering & Machine Company*, 378 Mich 418 (1966)."

Defendant appeals by leave granted the WCAC's order in the third appeal.

II. MAGISTRATE'S AUTHORITY TO ADDRESS THE 1990 OPEN AWARD

Defendant's first contention on appeal is that the WCAC erred by concluding that the Act required defendant to file a petition to stop payment in order to place before the first magistrate the issue of plaintiff's eligibility for continuing wage loss benefits for his 1980 back injury. Defendant insists that the issue was sufficiently placed before the first magistrate by both plaintiff's 2004 application for benefits on the basis of numerous injuries, including his 1980 back injury, and defendant's answer to plaintiff's application wherein defendant contested plaintiff's right to benefits for the 1980 back injury. We agree.

"Judicial review in worker's compensation cases is limited to whether the WCAC applied the correct legal standard and whether there is any evidence to support its factual findings." *Reiss v Pepsi Cola Metro Bottling Co*, 249 Mich App 631, 635; 643 NW2d 271 (2002). "However, questions of law involved in any final order of the WCAC are reviewed de novo." *Id.* When reviewing the WCAC's decision, "we are mindful of precedents instructing that we are to give deference to the WCAC in its construction of the statute. *Charboneau v Beverly Enterprises, Inc*, 244 Mich App 33, 44 n 4; 625 NW2d 75 (2000), citing *Tyler v Livonia Pub Sch*, 459 Mich 382, 388; 590 NW2d 560 (1999). Nevertheless, we are not bound to follow an administrative interpretation of the statute if we conclude that the interpretation is "clearly wrong." *Id.*

The WCAC in the present case construed MCL 418.841(1) and MCL 418.847(1) to require defendant to file a petition to stop payment before the first magistrate could address plaintiff's entitlement to continuing benefits for the 1980 back injury. According to the WCAC, the first magistrate did not have the authority, i.e., the jurisdiction, to address the issue until defendant filed such a petition. We conclude that the WCAC's interpretation of these statutes was "clearly wrong." See *id.*

MCL 418.841(1) provides that "[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable." This provision "confers exclusive jurisdiction of claims under the [Act] on the Bureau of Worker's Compensation." *Harris v Vernier*, 242 Mich App 306, 312; 617 NW2d 764 (2000). A "dispute or controversy" within the meaning of the Act "is a jurisdictional element. Its existence at the time a claim is properly filed with the Work[er's] Compensation Bureau vests the Bureau with jurisdiction over the claim." *Adams v Great Atlantic & Pacific Tea Co*, 81 Mich App 91, 94; 265 NW2d 53 (1978). MCL 418.847(1) provides that, "upon the filing with the bureau by any party in interest of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, the case shall be set for mediation or hearing, as applicable." MCL 418.222 addresses applications for mediation or hearing and provides in pertinent part:

> (1) *After March 31, 1986, the bureau, upon receiving a completed application for mediation or hearing from a claimant, shall forward a copy of the application to the employer and carrier. Within 30 days of receiving a completed application for mediation or hearing from the bureau, the carrier shall file a written response to the application with the bureau upon a form provided by the bureau.* Any

> application for mediation or hearing or any written response which is determined by the bureau to be incomplete shall be returned with an explanation of the additional information needed.
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> (3) *The application for mediation or hearing* shall be as prescribed by the bureau and *shall contain factual information regarding the nature of the injury, the date of injury*, the names and addresses of any witnesses except employees currently employed by the employer, the names and addresses of any doctors, hospitals, or other health care providers who treated the employee with regard to the personal injury, the name and address of the employer, the dates on which the employee was unable to work because of the personal injury, whether the employee had any other employment at the time of, or subsequent to, the date of the personal injury and the names and addresses of the employers, and any other information required by the bureau.
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> (4) *The written response of the carrier* shall be as prescribed by the bureau and *shall specify any legal grounds supporting its position, any factual matters that are disputed*, whether there was a medical examination of the claimant and who performed it, and any other information required by the bureau. [MCL 418.22(1), (3)-(4) (emphasis added).]

There is nothing in the language of MCL 418.841(1) and MCL 418.847(1) that required defendant to file a petition to stop payment, i.e., an application for a hearing, to invoke the magistrate's authority to address plaintiff's entitlement to continuing benefits for the 1980 back injury.[2] MCL 418.847(1) is not a prerequisite to the existence of jurisdiction; rather, broad subject-matter jurisdiction is afforded to the bureau by MCL 418.841(1) over "any dispute or controversy concerning compensation or other benefits" and "over all questions arising under" the Act. MCL 418.847 simply sets forth a procedure for resolving issues under the Act generally. See *Reed v Yackell*, 473 Mich 520, 550-551; 703 NW2d 1 (2005) ("The [Act] sets up comprehensive procedures for resolving disputes "arising under" the act. For example, MCL 418.847(1) provides that a 'party in interest' may apply for a hearing before a worker's compensation magistrate."). The WCAC's interpretation of MCL 418.841(1) and MCL 418.847(1) was, therefore, "clearly wrong."

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[2] It is noteworthy that nothing in the language of the general rules of the Workers' Compensation Agency required defendant to file a petition to stop payment. Rule 10 provides that a "further order or award" must be obtained before compensation being paid under an order or award of a magistrate or workers' compensation appellate commission is discontinued or reduced. R 408.40(1). Rule 10 does not state that a petition to stop payment is required before such "further order or award" can be obtained. Moreover, Rule 4, which addresses petitions for hearing, states that, "[i]n cases of dispute coming under the jurisdiction of the bureau, *any party may petition the bureau for relief*." R 408.34(1) (emphasis added).

Moreover, we conclude that the magistrates in this case had the authority to address plaintiff's entitlement to continuing wage-loss benefits for the 1980 back injury. Plaintiff filed the instant application for benefits on July 9, 2004, wherein plaintiff identified "11/80" as one of several dates of injury and stated that the duration of his disablement was from "11/80 to PRESENT" and from "5/7/04 LDW to PRESENT." See MCL 418.222(3). Plaintiff's description of the nature of his disability included the following statement: "In 1980 (approximately), employee injured his low back requiring surgery and has been performing restricted work since that time." See *id.* Plaintiff's filing of the application for benefits vested the Bureau with jurisdiction and invoked the first magistrate's authority over plaintiff's claim for benefits, which included benefits for his 1980 back injury. See *Adams*, 81 Mich App at 94; MCL 418.841(1). Upon receipt of plaintiff's petition, defendant was required under MCL 418.222(4) to respond in writing by identifying both the factual matters it disputed and the legal grounds supporting its position. Defendant did so, stating that it was contesting plaintiff's entitlement to any and all benefits, including to any further benefits for his prior injury; defendant identified the legal grounds for its position, including that plaintiff had established a new wage-earning capacity that precluded further wage-loss benefits for his prior compensable injury. See MCL 418.222(4). Therefore, the agency, the first magistrate, and plaintiff had notice *before the hearing commenced* that defendant was asserting that plaintiff was not entitled to further payment of compensation for his 1980 back injury. Defendant's answer, required by MCL 418.222(4), was sufficient to notify plaintiff that his claim to benefits—including to continuing benefits for the 1980 injury—was being challenged.[3]

Accordingly, the magistrates had the authority to address plaintiff's entitlement to continuing wage-loss benefits for the 1980 back injury. The WCAC legally erred when it concluded that the magistrates did not have such authority.

III. ESTABLISHMENT OF NEW WAGE-EARNING CAPACITY

Defendant next argues that the WCAC failed to apply the proper standard of review in reversing the magistrates' decisions that plaintiff is not entitled to benefits for his 1980 injury. More specifically, defendant insists that there was substantial evidence that plaintiff established a new wage-earning capacity during his six-plus years of employment with defendant from November 1997 until May 2004. Because the second magistrate's analysis on second remand of whether plaintiff established a new wage-earning capacity was incomplete, we must remand for further consideration of this issue.

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[3] Furthermore, the magistrate on the first day of trial articulated on the record that plaintiff included the 1980 back injury as an injury in his July 2004 application; plaintiff clarified the date of the 1980 injury for the magistrate. Consistent with its asserted defenses, defendant submitted a post-trial "Position Paper" that reiterated its challenge to plaintiff's claim of disability in its entirety. Defendant specifically asserted that "plaintiff is not disabled as a result of his 1980 back injury. Plaintiff established a new wage earning capacity the [sic] bars any claim for that injury" by virtue of his employment in the "regular" or "standard"—and not favored—"chipper" job. The record does not contain a response by plaintiff to defendant's "Position Paper."

"[T]he WCAC's review of the magistrate's decision involves reviewing the whole record, analyzing all the evidence presented, and determining whether the magistrate's decision is supported by competent, material, and substantial evidence." *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 699; 614 NW2d 607 (2000). Substantial evidence "means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion." *Id.* However, this Court's review of a decision by the WCAC "is limited to whether the WCAC applied the correct legal standard and whether there is any evidence to support its factual findings." *Reiss*, 249 Mich App at 635. We review de novo questions of law involved in any final order of the WCAC. *Id.*

At the time of plaintiff's injury in 1980, workers' compensation law in Michigan provided for the following, as articulated by our Supreme Court in *Pulley v Detroit Engineering & Machine Co*, 378 Mich 418, 422-423; 145 NW2d 40 (1966):

> The Michigan workmen's compensation law provides for the payment of a weekly benefit to an injured employee claiming partial or total disability . . . of 66–2/3% of his average weekly wages before the injury but in no case does it permit such claimant to receive benefits which, when added to his current wage-earning capacity, would exceed his average weekly earnings at the time of injury.

Thus, an employee is not entitled to workers' compensation benefits if he or she is able to earn wages equal to or greater than those received before his or her disablement. See *id.* at 422-423, 425. The employee's wage-earning capacity after the injury is a matter of proof and an issue of fact. *Id.* at 423. Indeed, an employee can be disabled and yet suffer no weekly wage loss. *Id.* The method of determining an employee's wage-earning capacity after injury "is a complex of fact issues which are concerned with the nature of the work performed and the continuing availability of work of that kind, and the nature and extent of the disability and the wages earned." *Id.* However, it is well established that, "'[w]hen an employee accepts work and receives wages therefor in a recognized regular employment, with the ordinary conditions of permanency, . . . there is no room for argument that he has not thereby established a present earning capacity equal to such wages, whatever may be his physical condition.'" *Id.* at 425, quoting *Markey v SS Peter & Paul's Parish*, 281 Mich 292, 299-300; 274 NW 797 (1937); see also *Wieland v Dow Chem Co*, 334 Mich 427, 431; 54 NW2d 708 (1952); *Medacco v Campbell, Wyant & Cannon Foundry Co*, 48 Mich App 217, 224; 210 NW2d 360 (1973). Post-injury employment that constitutes "favored work" does not establish a wage-earning capacity. *Evans v United States Rubber Co*, 379 Mich 457, 465; 152 NW2d 641 (1967); *Lynch v Briggs Mfg Co*, 329 Mich 168, 172; 45 NW2d 20 (1950).

Once an earning capacity after injury is established, there is a prima facie assumption that the earning capacity continues "after the discharge of the employee from the employment in which the wages are earned"; "the burden of showing a change in earning capacity when the employment ceases (in order to reinstate the original award or to decrease the set-off against it) is upon the employee." *Pulley*, 378 Mich at 426. "The [prima facie assumption] certainly applies, with at least equal force, to the case where the employee leaves the involved work voluntarily as it does to the case where the employee is discharged or the work ceases." *Id.* In *Pulley*, our Supreme Court held that the prima facie assumption of continued earning capacity after discharge from employment was not rebutted by a showing of a change in earning capacity

where the claimant's discharge from employment was not related to his disabling injury and the claimant "offered no proof whatever of having been rejected for work by any prospective employer because of work limitation attributable to his injury." *Id.* at 427-428.

In this case, the WCAC concluded that, "[o]n second remand, the successor magistrate reiterated the prior [magistrate's] findings with a factual gloss from *Pulley* that did not accurately capture the rule of law expressed therein . . . ." We agree. Although the second magistrate in his opinion on second remand provided a thorough explanation of the facts and procedural history in this case, the magistrate's analysis of the wage-earning-capacity issue was strikingly deficient. The second magistrate's analysis of the issue was as follows, in its entirety:

> On page 11 of his first decision, [the first magistrate] wrote: "Plaintiff and Mr. LoPresti testified that Plaintiff's employment from November 13, 1997, through his last day of work on May 7 [sic], 2004, was at a regular job, not a 'favored' or 'make work' position." [The first magistrate] thus found that the final six and one-half years of plaintiff's employment did not constitute favored work. Given this finding, plaintiff is not entitled to benefits under the law as it existed in 1980. Defendant cites *Pulley v Detroit Engineering & Machine Co.*, 378 Mich 418 (1966). The Michigan Supreme Court in *Pulley* affirmed the denial of disability benefits where plaintiff demonstrated post-injury ability to work and where the cessation of that work was not due to a work injury.

Essentially, the second magistrate concluded that plaintiff was not entitled to benefits for his 1980 back injury solely because of the first magistrate's finding that plaintiff's final six and one-half years of employment was not favored work. This finding alone is plainly insufficient under *Pulley* to deny plaintiff wage-loss benefits for his 1980 back injury; a new wage-earning capacity is not established simply because the new employment is not favored work. See *id.* at 422-426. The second magistrate's analysis was devoid of any discussion of the following necessary considerations articulated by our Supreme Court in *Pulley*: (1) plaintiff's average weekly wage at the time of injury; (2) plaintiff's wage-earning capacity after injury in light of the nature of the work performed, the continuing availability of work of that kind, the nature and extent of plaintiff's disability, and the wages earned; (3) whether plaintiff's employment was with "the ordinary conditions of permanency"; and (4) if plaintiff had a new wage-earning capacity that equaled or exceeded his average weekly wage at the time of injury, whether plaintiff made a showing of a diminished earning capacity as a result of the 1980 injury after his last date of employment with defendant in 2004. See *id.* Therefore, we must remand this case to the magistrate. On remand, the magistrate must determine whether plaintiff had established a new wage-earning capacity that precluded him from recovering wage-loss benefits for his 1980 back injury. The magistrate's determination of this issue must follow the legal framework articulated by the Supreme Court in *Pulley*; specifically, the magistrate must make specific and explicit factual findings regarding the four considerations listed above in addition to whether plaintiff's final six and one-half years of employment was favored work. See *id.*

Reversed and remanded. We do not retain jurisdiction.

/s/ Jane M. Beckering

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COURT OF APPEALS

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v GENERAL MOTORS, L.L.C., Defendant-Appellant.	No. 302864 WCAC LC No. 08-000102

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

SAAD, J. (*concurring).*

I concur in result only.

/s/ Henry William Saad

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GLEICHER, P.J. (*dissenting*).

The question presented is whether the magistrates properly terminated plaintiff Keith S. Ulin's 1990 open award of benefits. In my view, the Workers' Compensation Appellate Commission (WCAC) correctly determined that because defendant General Motors Corporation never filed a petition to stop the open award, the magistrates should not have considered whether Ulin had achieved a wage-earning capacity. Rather than remanding for additional fact-finding on this issue, I would simply affirm the WCAC.

I.

In 1980, Ulin injured his back while working for Detroit Diesel and was unable to return to employment. Detroit Diesel voluntarily paid Ulin workers' compensation benefits. In 1989, Detroit Diesel filed a petition to stop Ulin's benefits, asserting: "Liability is denied and the payment of compensation is disputed as the claimant has been deemed to have been vocationally rehabilitated pursuant to MCL 418.319 and accordingly is considered to have established a wage earning capacity."[1]

In May 1990, Magistrate Lawrence D. Egan issued an opinion rejecting GM's vocational rehabilitation claim. Egan found "wholly unsupported by the evidence" that Ulin had been vocationally rehabilitated and had thereby established a wage earning capacity. GM claimed an appeal from this decision to the Appellate Commission but subsequently withdrew it. Thus,

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[1] In approximately this time frame, GM purchased Detroit Diesel and became Ulin's employer.

Magistrate Egan's finding that Ulin had not gained a wage earning capacity remained unchallenged.

In 1997, Ulin returned to work at a GM facility as a "chipper." This job accommodated Ulin's back injury.[2] Between 1997 and 2004, Ulin sustained several new work-related injuries and aggravated his preexisting back condition. In 1998, he hurt his knee when he stepped into a hole on a catwalk. In 2001, Ulin reported back pain after pulling a 55-gallon drum. In 2002, Ulin injured his neck after hitting his head while walking under a workplace stairwell. In May 2004, Ulin stopped working due to those injuries, and three months later he had neck surgery.

Ulin tried to return to work in February 2005, but GM was unable to find him a position consistent with his neck and back restrictions. A plant representative recommended that Ulin retire on a disability pension, and Ulin did so.

Meanwhile, Ulin filed a petition seeking workers' compensation benefits. The petition alleged as follows:

> In 1980, (approximately), employee injured his low back requiring surgery and has been performing restricted work since that time. Injury to right knee in June of 1998 requiring surgery in December of 1998. On May 10, 1982 he was then sent to return to work and re-injured his back. On August 8, 2001, employee suffered injury to cervical spine. On May 7, 2004, (LDW) employee alleges aggravation of low back condition. Injury to upper back and neck including herniated cervical disc, carpal tunnel syndrome to the right hand as a result of heavy lifting, chipping and springing operations, right epicondylitis as a result of the work activity including operating power spring.

GM filed a general denial and asserted a variety of defenses, including that Ulin had "suffered no accident," "suffers no compensable disability or disease which is the result of any accidental personal injury," and that Ulin had established "a new wage earning capacity since his injury[.]" Despite alleging that Ulin had gained a new wage-earning capacity, GM did not file a petition to stop the 1990 open award.

Magistrate Andrew G. Sloss found that Ulin failed to prove that he suffered any new back injury or that his other post-1997 injuries qualified as permanently disabling. In addition to rejecting Ulin's claim for benefits arising from the post-1997 injuries, Sloss closed Ulin's 1990 open-award. In his opinion, Sloss specifically acknowledged that Ulin had was previously "received an open award of benefits" for "a low back injury," but found that Ulin "ha[d] established a residual wage-earning capacity of at least $787.71 and is therefore not entitled to any further wage-loss benefits for the October 3, 1980, injury date." Sloss grounded the latter finding in MCL 418.301(5).

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[2] Charles LoPresti, a GM labor relations supervisor, testified that the "chipper" position "was within" Ulin's back restrictions, which the parties referred to in summary fashion as "25 pounds limited bending and twisting."

Ulin filed a claim for review with the WCAC, asserting among other arguments that Sloss "improperly applied post-1980 law in closing plaintiff's 1980 open award." The WCAC remanded "for supplemental findings and a supplemental decision that applies the law as it existed in 1980." Sloss's supplemental opinion on remand addressed only the formula for computing wage loss, MCL 418.371(1). The WCAC remanded a second time, finding that Sloss "simply failed to provide any findings or analysis consistent with the law in 1980." The WCAC further noted that GM "never filed a petition to stop plaintiff's benefits resulting from his 19[9]0 open award," and invited further briefing of this issue.

Ulin's supplemental brief averred, "there is a serious question as to whether it is even appropriate to consider" terminating the 1990 open award absent a petition to stop. GM countered that this argument had been "forfeited." Magistrate John P. Baril addressed the WCAC's remand order as follows:

> On page 11 of his first decision, Magistrate Sloss wrote: "Plaintiff and Mr. LoPresti testified that Plaintiff's employment from November 13, 1997, through his last day of work on May 7 [sic], 2004, was at a regular job, not a 'favored' or 'make work' position." Magistrate Sloss thus found that the final six and one-half years of plaintiff's employment did not constitute favored work. Given this finding, plaintiff is not entitled to benefits under the law as it existed in 1980. Defendant cites *Pulley v Detroit Engineering & Machine* [*Co*, 378 Mich 418; 145 NW2d 40] (1966). The Michigan Supreme Court in *Pulley* affirmed the denial of disability benefits where plaintiff demonstrated post-injury ability to work and where the cessation of that work was not due to a work injury. [First alteration in original.]

Ulin again appealed to the WCAC. The WCAC majority held that if GM had intended to place at issue Ulin's entitlement to benefits under the 1990 open award, it should have filed a petition to stop those benefits. In the absence of a petition requesting cessation of the benefits, the WCAC explained, "The authority of the magistrate to stop the payment of benefits that defendant had previously been ordered to pay on an ongoing basis was never properly invoked."

The lead opinion holds that by referencing his 1980 back injury, Ulin's 2006 petition for benefits implicitly placed at issue the 1990 open benefit award. I agree with the WCAC majority that if GM sought to overturn the 1990 open award, it was required to formally place Ulin on notice of that fact by filing a petition to stop.

II.

In *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 257 (1992), the Supreme Court described as follows the principles guiding this Court's review of WCAC opinions:

> If it appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, did not "misapprehend or grossly misapply" the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate, the judicial tendency should be to deny leave to appeal or, if it is

> granted, to affirm, in recognition that the Legislature provided for administrative appellate review by the seven-member WCAC of decisions of thirty magistrates, and bestowed on the WCAC final fact-finding responsibility subject to constitutionally limited judicial review.

The WCAC's findings of fact are conclusive if any competent evidence supports them. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 703-704; 614 NW2d 607 (2000). "[T]he 'any evidence' standard, governing the judiciary's review of the WCAC's findings of fact, provides for less searching review—one that is deferential to the skill and experience of the WCAC in this highly technical area of the law." *Id.* at 703.

The lead opinion asserts, "There is nothing in the language of MCL 418.841(1) and MCL 418.847(1) that required defendant to file a petition to stop payment, i.e., an application for a hearing, to invoke the magistrate's authority to address plaintiff's entitlement to continuing benefits for the 1980 back injury." Because "MCL 418.847 simply sets forth a procedure for resolving issues under the Act generally," the lead opinion posits that the WCAC's interpretation of the statute as a bar to the magistrate's consideration of the 1990 open award was "clearly wrong." I respectfully submit that the lead opinion has read the statutory provisions relied upon by the WCAC far too narrowly and outside their proper context. The statutes governing the initiation of workers' compensation proceedings contemplate that a party places a dispute at issue only by filing a petition specifically identifying the nature of the claim. Adherence to this procedure affords the other side with notice of the contested issues. Absent a petition setting forth GM's intent to overturn an otherwise binding open award, the magistrate erred by evaluating whether Ulin had been vocationally rehabilitated.

The WCAC majority explained that the Workers Compensation Act "sets forth a cohesive, comprehensive process which *any* party must follow to invoke the authority of the magistrate in seeking an adjudication of their rights and responsibilities." (Emphasis in original). The majority then turned to the statutory provisions governing the procedure for commencing a workers' compensation claim: "MCL 418.847(1) and MCL 418.841 provide the ONLY means applicable . . . to obtain a hearing before the magistrate." (Emphasis in original). "Read together," the majority elaborated, "MCL 418.841 and MCL 418.847 require a party to file something so as to provide notice of whatever the contentions might be that are believed to justify the entry of an order." Under the Act, the majority continued, "The party seeking . . . relief must first apply for a hearing with a document containing the required information, the document must be served upon the opposing party, and an opportunity to respond must be allowed." In Ulin's case, the WCAC majority emphasized, "nothing was filed. Nothing was served."

MCL 418.841(1) provides: "Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate." When an interested party files "an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, the case shall be set for mediation or hearing, as applicable." MCL 418.847(1). Simply put, these are notice provisions. Read together, these statutes signal that a party seeking to resolve a workers' compensation dispute must place the other side on notice of

the nature of the dispute. Alternatively stated, our workers' compensation system contemplates trials conducted after specific identification of contested issues rather than by ambush.

In my view the WCAC majority appropriately harmonized MCL 418.847(1) and MCL 418.841, interpreting them to require that the party seeking affirmative relief notify the opposing party of the specific judgment sought. As the WCAC put it, "Here, defendant was obligated to pay ongoing benefits under the Act until further order. To obtain that further order, MCL 418.841 and MCL 418.841(1) require a request for a hearing. No hearing was requested by defendant; therefore, no further order may be entered in defendant's favor." The WCAC's interpretation of the statutes is plausible and consistent with their literal language. As its interpretation does not "conflict with the Legislature's intent as expressed in the" statutory language, *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), I believe this Court should defer "to the skill and experience of the WCAC in this highly technical area of the law." *Mudel*, 462 Mich at 703.

The WCAC majority highlighted that because the initial petition sets forth the specific nature of the dispute to be litigated, its content defines the scope of the proceedings. While an answer raising an affirmative defense places the defense at issue in an ordinary civil case, the Michigan Court Rules do not apply to workers' compensation proceedings, *East Jordan Iron Works v Workers' Compensation Appeal Bd*, 124 Mich App 324, 327; 335 NW2d 23 (1983), and "common-law procedural rules must not be automatically applied in such proceedings." *Brown v Beckwith Evans Co*, 192 Mich App 158, 167 n 2; 480 NW2d 311 (1991). Thus, the fact that GM mentioned in its boilerplate defenses that Ulin "has reestablished a new earning capacity since his or her injury, thereby relieving defendant of liability" does not suffice to automatically enlarge the scope of the proofs.

Moreover, the nature of the issue to be tried not only controls the relevance of the evidence presented, but also determines the burden of proof. A workers' compensation claimant must prove entitlement to compensation by a preponderance of the evidence. MCL 418.851. "On a petition to stop compensation, however, the burden of proof is upon the petitioner." *Johnson v Pearson*, 264 Mich 319, 320; 249 NW 865 (1933). "[I]f the employee's condition improves, his employer may file a petition to reduce or terminate payments." *Pike v City of Wyoming*, 431 Mich 589, 600-601; 433 NW2d 768 (1988). See also *Barham v Workers' Compensation Appeal Bd*, 184 Mich App 121, 134; 457 NW2d 349 (1990) ("[A]n employer may seek to stop payment of benefits if the claimant's disability has changed."). The administrative rules governing the Bureau of Workers' Disability Compensation make specific mention of a petition to stop. Mich Admin Code, R 408.40 addresses the stoppage, reduction, or suspension of compensation. It provides:

> (1) If compensation is being paid under an order or award of the magistrate or workers' compensation appellate commission, then compensation shall not be discontinued or reduced without a further order or award, except as

provided in subrules (3) and (4)[3] of this rule and sections 301(5)(b) and 361(1) of the act. A petition to stop compensation shall include both of the following:

(a) Proof of payment of compensation to within 15 days of the date of the filing of a petition to stop compensation.

(b) An affidavit stating that the employee has returned to gainful employment and substantially describing the nature of the employment, or a signed statement from a physician stating that the employee is able to return to employment.

Thus, a petition to stop is filed when an employer seeks to revisit a prior order or award. When a petition to stop is filed, the parties understand that the burden of proving that circumstances have changed falls squarely on the employer.[4]

Here, GM never filed a petition to stop. Moreover, GM never introduced affirmative evidence at the hearing that Ulin had been vocationally rehabilitated. The WCAC majority found, "During the three days of hearings in this matter, no mention was made of the claim that plaintiff had reestablished any kind of wage earning capacity."[5] In my view, this fact conclusively demonstrates that the parties did not contemplate that the hearing would encompass the validity of the 1990 open award. Had GM truly intended to place that award at issue, likely the parties would have presented the testimony of vocational rehabilitation experts, and placed into evidence detailed information concerning the nature of the work otherwise available to Ulin and within his physical restrictions.[6]

As the WCAC put it, "It is beyond dispute that the employer did not meet any of the requirements of the Act in seeking to stop the payment of benefits it had previously been ordered

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[3] Neither of these exceptions applies in this case.

[4] I respectfully disagree with the lead opinion's conclusion that under MCL 418.222, the "written response of the carrier" suffices to describe the legal issues to be tried. MCL 418.222(4) requires a carrier responding to a petition to specify the "legal grounds supporting its position," but simply does not address whether an employer seeking to *affirmatively* challenge an open award of benefits may do so without filing a petition to stop.

[5] "The findings of fact made by the commission acting within its powers, in the absence of fraud, shall be conclusive." MCL 418.861a(14).

[6] For this reason, I respectfully disagree that this Court should remand for a hearing consistent with *Pulley*, 378 Mich at 423. *Pulley* instructs that the determination of an employee's earning capacity "is a complex of fact issues which are concerned with the nature of the work performed and the continuing availability of work of that kind, and the nature and extent of the disability and the wages earned." That evidence is simply not to be found in this record.

to pay. The 1990 order remains in full force and effect." On this basis, I would affirm the WCAC.[7]

/s/ Elizabeth L. Gleicher

[7] Of course, GM remains free to file a petition to stop payment of Ulin's workers' compensation benefits and could present evidence in support of its case.