

STATE OF MICHIGAN  
IN THE SUPREME COURT  
ON APPEAL FROM THE COURT OF APPEALS  
(Fitzgerald, P.J., and Saad and Whitbeck, JJ.)  
AND THE WORKER'S COMPENSATION APPELLATE COMMISSION

SCOTT M. CAIN,

Plaintiff-Appellee,

Supreme Court Nos. 116389 and  
116945

V

Court of Appeals Nos. 222496 and  
214445

WASTE MANAGEMENT, INC., and  
TRANSPORTATION INSURANCE COMPANY,

L.C. Nos. WCAC 98-0390 and  
94-0010

Defendants-Appellants,

and

SECOND INJURY FUND (TOTAL AND  
PERMANENT DISABILITY PROVISIONS),

Defendant-Appellant.

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AMICUS CURIAE BRIEF OF WORKERS' COMPENSATION SECTION  
OF STATE BAR OF MICHIGAN (THE DEFENSE PERSPECTIVE)

SUBMITTED BY:

WORKERS' COMPENSATION  
SECTION OF THE STATE BAR (The Defense Perspective)  
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ISSUES

I.

**IS THE DETERMINATION OF WHETHER A WORKERS' COMPENSATION CLAIMANT HAS SUFFERED A "TOTAL AND PERMANENT LOSS OF INDUSTRIAL USE OF BOTH LEGS" TO BE MADE BY EVALUATING THE USE OF THE LEGS WITH CORRECTIVE DEVICES?**

II.

**MUST THE QUESTION OF WHETHER PLAINTIFF IS ENTITLED TO TOTAL AND PERMANENT DISABILITY BENEFITS BE RESOLVED BEFORE RESOLUTION OF DEFENDANT-EMPLOYER'S ARGUMENT REGARDING APPLICATION OF §301(5)? AND, DID THE COURT OF APPEALS AND WORKER'S COMPENSATION APPELLATE COMMISSION CORRECTLY RULE THAT PLAINTIFF DID NOT SUFFICIENTLY PLEAD A CLAIM FOR SPECIFIC LOSS BENEFITS WITH RESPECT TO HIS LEFT LEG?**

## STATEMENT OF FACTS

[Numbers in parentheses refer to the pages of the appendix filed by defendant-appellant-Second Injury Fund (Total And Permanent Disability Provisions) unless otherwise indicated].

*Amicus curiae* adopts the Statements of Facts contained in the briefs on appeal filed by defendants-appellants. The only additional fact pertinent to this brief is that, in granting leave to appeal, this Court “invite[d] the Workers’ Compensation Section of the State Bar of Michigan to file briefs *amicus curiae* in support of each side of this dispute.” (79a).

This is the Workers’ Compensation Section’s *amicus curiae* brief from the defense perspective.

## ARGUMENT I

### **THE DETERMINATION OF WHETHER A WORKERS' COMPENSATION CLAIMANT HAS SUFFERED A "TOTAL AND PERMANENT LOSS OF INDUSTRIAL USE OF BOTH LEGS" IS TO BE MADE BY EVALUATING THE USE OF THE LEGS WITH CORRECTIVE DEVICES.**

From the defense perspective, the Court of Appeals has legally erred in its construction of what constitutes "[p]ermanent and total loss of industrial use of both legs" under MCL 418.361(3)(g). The Court of Appeals has held that the relevant inquiry does not contemplate evaluation of use of the legs with corrective devices. The Court of Appeals held:

We reverse that portion of the WCAC's decision which holds that a claim for T&P disability benefits must be analyzed under the corrected test. While use of the corrected test is mandated in vision cases, *Hakala, supra*, and has been expanded to cases involving implants, *O'Connor, supra*, its use has not been extended to cases involving prosthetics or braces. In the instant case, plaintiff wears a prosthetic right leg and a brace on his left leg. The brace is not permanently attached to plaintiff's leg. In holding that use of the corrected test was required in this case, the WCAC read *Hakala, supra*, and *O'Connor, supra*, too broadly. (77a).

In order to provide the Court with a full understanding of this highly technical and often confusing area of workers' compensation law, *amicus curiae* offers the following as background.

#### A. General Disability Benefits: Wage Loss Payments For Total And Partial Disabilities

The Worker's Disability Compensation Act [the Act] describes different types of compensable disabilities. Attached to the conclusion of this brief is a chart which can serve as an overview of the different categories of disabilities.

The most used definition of disability is MCL 418.301(4).<sup>1</sup> This

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<sup>1</sup> "As used in this chapter, "disability" means 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. The establishment of disability does not create a presumption of wage loss."

provision is often referred to as the “general disability” provision. Its two sentences require a two-fold inquiry into: (1) whether a work injury limits the employee in work commensurate with his or her qualifications and training; and, (2) whether wage loss subsequent to the work injury is linked to that work injury as opposed to a non-work-related reason. *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628; 566 NW2d 896 (1997).

An employee who satisfies this general definition of disability receives weekly compensation benefits that are intended to act as wage replacement benefits.<sup>2</sup> The duration of such weekly benefits is without a prescribed limit and, thus, potentially for the remainder of the employee’s life. The amount of the weekly benefit is dictated by one of two rate provisions. If the general disability is “total,” then calculation and payment of the weekly benefit rate is made pursuant to the payment formula in the total disability rate provision, MCL 418.351(1).<sup>3</sup> If the general disability is “partial,” then calculation and payment of the weekly benefit rate is made pursuant to the partial disability rate provision, MCL 418.361(1).<sup>4</sup>

Not surprisingly, the total disability rate is more generous than the partial disability rate. A totally disabled employee receives 80% of his or her after-tax average weekly wage (subject to a maximum rate announced each year pursuant to MCL 418.355). By contrast,

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<sup>2</sup> *Hutsko v Chrysler Corp*, 381 Mich 99, 102; 158 NW2d 874 (1968); *Redfern v Sparks-Withington Co*, 403 Mich 63, 79-80; 268 NW2d 28 (1978).

<sup>3</sup> “While the incapacity for work resulting from a personal injury is total, the employer shall pay, or cause to be paid as provided in this section, to the injured employee, a weekly compensation of 80% of the employee’s after-tax average weekly wage, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. The conclusive presumption of total and permanent disability shall not extend beyond 800 weeks from the date of injury and thereafter the question of permanent and total disability shall be determined in accordance with the fact, as the fact may be at that time.”

<sup>4</sup> “While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid as provided in this section, to the injured employee, weekly compensation of 80% of the difference between the employee’s after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.”

a partially disabled employee receives 80% *of the difference* between his or her after-tax average weekly wage before the work injury and the after-tax average weekly wage which the employee is *able to earn* after the injury (subject to the same maximum announced in §355).

General disability and its rate provisions are not the major issue here. They were not addressed in the Court of Appeals' opinion quoted above. The general disability inquiries are only potentially a secondary issue. And, such inquiries may be moot depending upon how the Court resolves the main issue which is: does the total and permanent loss of industrial use inquiry contemplate measurement of the employee's loss with or without assistive devices?

**B. Scheduled Benefits: Specific Loss Benefits And Total And Permanent Disability Benefits.**

Besides the general disability benefits described above, the Act also provides weekly compensation for other disabilities. The Act provides weekly compensation for disabilities related to losses of certain parts of the body. The Act refers to these disabilities as "schedule[d]" disabilities. MCL 418.361(2).<sup>5</sup>

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<sup>5</sup> In cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:

- (a) Thumb, 65 weeks.
- (b) First finger, 38 weeks.
- (c) Second finger, 33 weeks.
- (d) Third finger, 22 weeks.
- (e) Fourth finger, 16 weeks.

The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of ½ of that thumb or finger, and compensation shall be ½ of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand.

- (f) Great toe, 33 weeks.
- (g) A toe other than the great toe, 11 weeks.

The loss of the first phalange of any toe shall be considered to be equal to the loss of ½ of that toe, and compensation shall be ½ of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire toe.

- (h) Hand, 215 weeks.
- (i) Arm, 269 weeks.

An amputation between the elbow and wrist that is 6 or more inches below the elbow shall be considered a hand, and an amputation above that point shall be considered an arm.

- (j) Foot, 162 weeks.

The Act from the time of its inception has listed losses of certain parts of the body and prescribed payment of benefits pursuant to a corresponding specific schedule. For example, per the original Act, a person who lost an eye due to a work injury received 50% of his average weekly wage for 100 weeks. 1912 PA 10 § 10. There were similar provisions for loss of a hand, foot, *etc.* Section 10 of the Act's original scheduled benefit list concluded with:

The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of section nine.

Originally, this was the only type "total and permanent disability". There was no such thing as total and permanent disability for "loss of industrial use" of body members. That came later.

The scheduled benefits for loss of a finger, loss of one hand, loss of one foot, *etc.*, are referred to in workers' compensation parlance as "specific loss" benefits. The loss of two members, *e.g.*, both legs, both arms, so as to constitute total and permanent disability is referred to in workers' compensation parlance as "T&P" benefits or sometimes "P&T" benefits. Such T&P benefits are a type of scheduled benefit, but they are distinct from the scheduled specific loss benefits. T&P benefits are intended for those who sustain the more catastrophic loss of more than one member.

The distinction between scheduled specific loss benefits and scheduled T&P benefits is clearer in the arrangement of the modern Act. Unlike the original Act, these two

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(k) Leg, 215 weeks.

An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.

(l) Eye, 162 weeks.

Eight percent loss of vision of 1 eye shall constitute the total loss of that eye.

categories of disabilities are now separated in different provisions with specific losses in MCL 418.361(2) and T&P cases in MCL 418.361(3).<sup>6</sup>

Important to the instant controversy, the different types of T&P benefits were expanded to include more than the purely anatomical, amputated losses recited in the original Act. In 1956 the Legislature provided that, in addition to the historical, loss of 2 legs, loss of 2 arms, *etc.*, the following would also constitute T&P:

*Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury. 1956 PA 195 (emphasis added).*

### C. Why Scheduled Benefits?

A legitimate question is: why did the Legislature bother to, after creating the general disability provisions, create the specific loss and T&P categories of disability? That is, would not a person who has lost one arm or both legs receive weekly workers' compensation benefits under the general disability provision since they obviously have a limitation in their wage-earning capacity, the threshold inquiry under the general disability provision?

The answer to that question is that these two additional categories of disabilities compensate employees in a special way unrelated to the effect of the work injury on earning

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<sup>6</sup> Total and permanent disability, compensation for which is provided in section 351 means:

- (a) Total and permanent loss of sight of both eyes.
- (b) Loss of both legs or both feet at or above the ankle.
- (c) Loss of both arms or both hands at or above the wrist.
- (d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).
- (e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.
- (f) Incurable insanity or imbecility.
- (g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury.

capacity. An employee who loses a finger as a result of a work injury might never lose a day of work as a result of that injury. Therefore, under the general disability provision, she would not prevail because wages earned offset weekly compensation under the general disability provision. The idea behind scheduled benefits is to provide weekly benefits for such an injury irrespective of the injury's effect on the employee's earning capacity.<sup>7</sup> Put differently, the rationale is to compensate for the work injury's effect on the employee's *non-vocational* life as well.<sup>8</sup> There is one exception, however, and that exception is at issue here.

The exception is the "loss of industrial use" category of T&P benefits inserted into the statute in 1956. By its very name, this particular category of T&P benefits contemplates an award for the effect of the injury on one's function in industry. As this Court has said, "Loss of industrial use requires proof of impaired wage-earning capacity." *Johnson v Harnischfeger Corp.*<sup>9</sup> Not present in the original Act, this new category created recovery for T&P where there was no statutory anatomical loss. That is, even if an employee did not suffer amputation of both legs so as to qualify for T&P benefits under the anatomical loss provision of T&P, T&P recovery

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<sup>7</sup> Thus, if an employee with a specific loss or T&P disability continues working, then he receives the prescribed benefits for the statutory duration regardless of how much the employee earns during that period of time. *Hutsko, supra*. After conclusion of the prescribed period, the employee might still recover thereafter under the general disability provisions, but that inquiry will depend upon the employee's continued ability to earn. Employees deemed totally and permanently disabled enjoy a longer duration of exemption from general disability rules. Employees deemed totally and permanently disabled enjoy a conclusive presumption of total and permanent disability for 800 weeks from the date of injury and thereafter the question of total and permanent disability is determined as a matter of fact. MCL 418.351(1). Therefore, a totally and permanently disabled employee may earn wages for 800 weeks with no offset. There are other advantages to obtaining scheduled benefits. Employees who receive either specific loss or total and permanent disability benefits are assured a minimum weekly benefit. MCL 418.356(3). Persons who are totally and permanently disabled are also eligible to receive "differential benefits", an amount of benefits beyond those payable by the employer or carrier available through the Second Injury Fund, pursuant to MCL 418.521(2). Finally and importantly, persons who are entitled to specific loss benefits and persons entitled to total and permanent disability benefits are exempt from the coordination of benefits provision. MCL 418.354(1). This means that their weekly workers' compensation benefits cannot be reduced by other employer-provided payments. That legislative directive strengthens the idea that specific loss and T&P payments are different than general disability's wage-replacement benefits.

<sup>8</sup> *Redfern, supra* at 80.

<sup>9</sup> 414 Mich 102, 116; 323 NW2d 912 (1982).

could still be had under the “loss of industrial use” type of T&P if the employee’s wage-earning capacity was sufficiently affected.

In this way, the “loss of industrial use” category of T&P benefits differs from the other T&P categories. If a person actually has both legs amputated, there is no necessity to inquire into the “total and permanent” effect of such loss on the employee’s ability to earn wages in industry. Compensation is in fact payable even if the individual without legs is still able to work at a sitting job and earn as much or more as she was at the time of injury. But, if there has been no statutory anatomical loss of both legs, then the “loss of industrial use” category of T&P benefits requires investigation into the employee’s ability to use her legs in an industrial setting. As the Court has said, T&P benefits “are payable without regard to loss of wage-earning capacity, except for the distinctive and atypical ‘industrial use’ loss”. *Redfern*.<sup>10</sup>

D. How Case Law Created The Idea Of “Loss Of Industrial Use” That Later Became A Statutory Category For Total And Permanent Disability.

The “loss of industrial use” category only exists *by statute* in the T&P category. There was no such thing as “loss of industrial use” in the specific loss category at the inception of the workers’ compensation system, nor is there any such concept *in the statute* today with respect to specific loss disabilities.

Although the concept of “loss of industrial use” does not exist within the statute for the specific loss category, it does exist in that category via case law. In fact, in the years following the inception of the Act, *it was in specific loss cases that the Court coined the term “loss of industrial use”* and that term began appearing in court cases over the years. By 1956, the phrase “loss of industrial use” had reached such common usage in workers’ compensation

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<sup>10</sup> 403 Mich at 80.

that the Legislature used the phrase in creating that type of T&P benefits. It is worthwhile for purposes of this case to appreciate, however, that the term originated in specific loss cases.

The term originated in specific loss cases as a result of the Court's increasing unwillingness to demand total anatomical loss before awarding specific loss benefits. The Court began by demanding strict compliance with the requirement that the member actually be wholly amputated, rejecting "the proposition that the statutory provision relative to loss of a member should be construed as including the loss of the use of a member." *Wilcox v Clarage Foundry & Manufacturing Co*, 199 Mich 79, 85; 165 NW 925 (1917). But, this view did not hold. In *Lovalo v Michigan Stamping Co*, 202 Mich 85, 89; 167 NW 904 (1918), the Court noted that the employee's hand, while not entirely amputated, was "left . . . practically useless in manual employment . . . In that sense and for such uses plaintiff has lost his right hand." Shortly thereafter, the Court in the specific loss category remarked a member may be "of no use in industrial pursuits or any other vocation." *Stammers v Banner Coal Co*, 214 Mich 215, 217; 183 NW 21 (1921); *Powers v Motor Wheel Corp*, 252 Mich 639, 644; 234 NW 122 (1931).

The phrase "loss of industrial use", while coined in deciding the more prevalent specific loss cases, then began to be used – still prior to its statutory insertion into the Act in 1956 – in T&P cases. By 1938, the Court said: "It is argued that we should not permit recovery for the loss of industrial use of the hands in absence of definite legislative enactment. However, our holding of industrial loss of use is well established. (citations omitted)." *Rench v Kalamazoo Stove & Furnace Co*, 286 Mich 314, 320; 282 NW 162 (1938).

E. The Court Should Overrule Case Law's Creation Of A Loss Of Industrial Use In The Specific Loss Category.

Confusion has resulted from the judicial creation of “loss of industrial use” in the specific loss category. The Legislature did not intend the specific loss category to encompass any economic inquiry; that is the province of the general disability provision. Yet, judicial creation of this non-statutory category of specific losses has necessitated an economic inquiry within a category designed to compensate for non-economic loss, for *how can one measure loss of industrial use except by reference to the effect of the use of the member in the industrial marketplace?*

The Court should consider therefore overruling prior case law which created the wholly non-statutory loss of industrial use in the specific loss category. The Legislature inserted a “loss of industrial use” provision into the Act in the total and permanent disability category *only* in 1956. It could have done so in the specific loss category too, but did not. It still has not. The Court should infer that the Legislature’s insertion of a loss of industrial use inquiry in the total and permanent disability section with no corresponding addition to the specific loss section means that the Legislature wants no such economic inquiry in the specific loss category. The Court should correct this problem in this case.

Such correction not only places application of the law in line with the statute, but does away with the anomalous result that benefits designed by the Legislature to compensate for the effect on one’s *non*-vocational life have been judicially transformed to compensate for the effect on one’s vocational life. That is what has happened. It creates needless confusion in an already difficult area.

F. An Uncorrected Test Is Appropriate For Specific Loss Cases And Reflects The Present State Of The Law.

Once the law is placed back in accord with the statute, it becomes evident that the determination of whether a person has suffered the statutory anatomical loss should not take into account the remedial effects of corrective devices. A person who has a leg amputated and is fitted with a prosthesis has, despite the prosthesis, suffered the loss of a leg. In the context of the instant case, plaintiff's right leg was amputated and he has been fitted with a prosthesis. He has suffered the actual specific loss of the right leg and has received specific loss benefits for that loss.

This *amicus curiae* therefore has no quarrel with an uncorrected test, *i.e.*, evaluation of loss without reference to the corrective devices, in specific loss cases so long as there has been – as the Legislature designed – the statutory anatomical loss. Since the purpose of the specific loss section is to award weekly benefits *without* reference or consideration of the loss' effect on the employee's wage-earning capacity, inquiry into how the plaintiff functions in the labor marketplace with corrective devices should be irrelevant in specific loss cases. It is presently the law that an uncorrected test applies in specific loss cases. *Lindsay v Glennie Industries, Inc.*<sup>11</sup>

G. A Corrected Test In Permanent And Total Loss Of Industrial Use Cases Is Appropriate And Reflects The Present State Of The Law.

The “loss of industrial use” inquiry under the T&P provision is statutory and therefore legitimate. The inquiry takes into account the effect of the injury on the body members as it relates to their use in an industrial setting. As explained and as noted by the Court, this is an

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<sup>11</sup> 379 Mich 573; 153 NW2d 642 (1967).

economic inquiry into the effect of the losses on wage-earning capacity.<sup>12</sup> It is therefore distinctly opposite from the inquiry into the effect of the injury on the employee's non-vocational life under the specific loss disability category and under the total and permanent disability anatomical losses which immediately precede it in the statute. Also, the entire T&P category, unlike the specific loss category, is designed to compensate only "permanent" losses. As the Court of Appeals, relying on Professor Larson's respected treatise, has said:

The concept of permanence is necessarily one of status, involving an assessment of medical deterioration, stabilization, or improvement, *and consideration of medical treatment options*. See 1C Larson, *Workers' Compensation Law*, §§57.12(b), (c), pp 10-19 to 10-46. *O'Connor v Binney Auto Parts*, 203 Mich App 522, 533; 513 NW2d 818 (1994) (emphasis added).

Thus, the present state of the law is that a corrected test applies in T&P cases.

The one time when the Court implied otherwise in *Hilton v Oldsmobile Division, General Motors Corp*, 390 Mich 43; 210 NW2d 316 (1973), the Court explicitly overruled such implication in *Hakala v Burrows Corp (After Remand)*, 417 Mich 359, 364; 338 NW2d 165 (1983).<sup>13</sup> *Hakala* says:

We are persuaded that the Legislature intended compensation for a specific loss without regard to whether the vision could be "corrected" or restored after the injury. *Lindsay, supra*.

We are now persuaded that the Legislature intended that a different standard be used in determining total and permanent disability in as much as it provided that only "total and permanent loss of sight" would constitute the qualifying eye loss for such benefits. We are satisfied that to carry out the legislative intent a "corrected" vision standard should hereafter be used in assaying claims for total and

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<sup>12</sup> *Johnson, supra*, at 116; *Redfern, supra* at 80.

<sup>13</sup> *Hakala* was a T&P case involving loss of vision, which has been the most litigated condition. Prevalent litigation of that type of loss may be due in part to the difference between the reference to loss of "eye" in the specific loss category and loss of "sight" in the T&P category. As will be seen, if corrective measures are to be considered in T&P cases not geared to assessing the economic impact of the injury as in *Hakala*, they must be applied in T&P loss of industrial use cases.

permanent disability involving the loss of sight. *Hakala, supra* at 362.

See also, *Nulf v Browne-Morse Co*, 402 Mich 309; 262 NW2d 664 (1978).

H. Evaluation Of The Economic Effect Of An Injury Has Typically Encompassed An Evaluation After Medical Assistance For The Injury Is Provided.

Evaluation of the *economic* impact of an injury has historically been measured with reference to the effect of the injury after medical amelioration of the injury has occurred. Assessment of disability is made at the time of the hearing of the claim. That is, if a person contracts work-related carpal tunnel syndrome that is fully ameliorated by surgery by the time of hearing, the award of weekly benefits will terminate (typically called a “closed award”) on a date prior to the hearing, *i.e.*, the date corresponding with the date of recovery of earning capacity. See generally, *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160; 294 NW2d 165 (1980); *Carter v General Motors Corp*, 361 Mich 577; 106 NW2d 105 (1960); *Thomas v Chrysler Corp*, 164 Mich App 549; 418 NW2d 96 (1987). That is to be contrasted with a work-related condition that continues in its disability properties through the time of hearing. The latter generates an “open award,” *i.e.*, an award of weekly benefits continuing indefinitely “until further order” as indicated on the pre-printed Bureau forms. See generally, *Flynn v General Motors Corp*, 162 Mich App 511, 513; 413 NW2d 444 (1987); *McDonald v Meijer, Inc*, 188 Mich App 210, 216; 469 NW2d 27 (1991). The point is then that the inquiry is *not*: is the employee disabled without reference to the surgery, but instead is he disabled post-surgery?

Consider also that the general rule in Michigan has been that an employee must undergo surgery to correct an injury if the surgery is not dangerous and offers a reasonable chance of success.<sup>14</sup> If an injured employee refuses such surgery, the law is that the employee is

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<sup>14</sup> *Kricinovich v American Car & Foundry Co*, 192 Mich 687; 159 NW 362 (1916); *Couch v Saginaw Malleable Iron*, 42 Mich App 223 (1972).

not entitled to benefits. The employee thus has the obligation to mitigate the effect of his or her injury where such mitigation is reasonable and where it can be expected to cure the injury's

effect on the person's wage-earning capacity.

Similarly, in *Brown v Premiere Mfg Co*,<sup>15</sup> the Court of Appeals, adopting Professor Larson's viewpoint, said that an employee has the obligation to undergo therapeutic exercises where there is the reasonable chance that they will improve the employee's condition and neither pain nor age prohibits doing the exercises. The employee's failure to undertake such reasonable exercises to cure the effects of the work injury ceases entitlement to ongoing weekly benefits.

A final example is the Act's requirement that the employer see to it that the employee receives at employer expense "reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment . . . when they are needed." MCL 418.315(1).

Important for this case is the additional provision in §315(1):

The employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury.

*Amicus curiae* submits that is incongruous to, on the one hand, require the employer to provide medical treatment, artificial limbs, crutches, and braces and, on the other hand, demand economic evaluation of the employee without medical treatment, artificial limbs, crutches, or braces. Where the legal inquiry is the impact of the work injury on one's use of members in industry, that impact can only be reasonably measured by use of the members as aided and corrected by the devices the Act requires be provided.

#### I. The United States Supreme Court's *Sutton* Decision Is Instructive.

The United States Supreme Court recently decided a case under the Americans

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<sup>15</sup> 77 Mich App 573; 259 NW2d 143 (1977).

with Disabilities Act [ADA] that is instructive for resolution of this case. In *Sutton v United Airlines, Inc.*,<sup>16</sup> the Court had to determine “whether disability is to be determined with or without reference to corrective measures” under the ADA’s definition of disability. *Sutton, supra* at 481.

The ADA defines “disability” as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual”, 40 USC § 12102(2)(A). This definition thus does not explicitly say the determination is to be made with reference to corrective devices or without. *Id.* at 478. The Equal Employment Opportunity Commission and the Department of Justice issued guidelines saying that the disability determination is to be made without regard to mitigating measures. *Id.* at 480. There was a conflict in the circuits as to whether or not mitigating measures were to be considered in making the determination. *Id.* at 477.

The Supreme Court held that the determination is to be made with reference to the mitigating measures, saying:

. . . we hold that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment, including, in this instance, eyeglasses and contact lenses. *Id.* at 475.

The Court’s reasoning is instructive here because the ADA disability provision, like the T&P provision at issue here, does not explicitly answer the question. For that reason, the *Sutton* Court looked to “the Act as a whole” for direction. *Sutton, supra* at 482. In so doing, the *Sutton* Court found that the ADA directed inquiry into whether the impairment “substantially limits” the individual. *Id.* This inquiry “requiring that a person be presently – not potentially or hypothetically – substantially limited” meant that the legislation contemplated “mitigating

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<sup>16</sup> 527 US 471 (1999); 119 S Ct 2139; 144 L Ed 2d 450 (1999).

measures” being taken into account. Even more so here, § 361(3)(g) contemplates inquiry into the employee’s present status as explained above, and contemplates inquiry into the future [“not less than 30 days before the expiration of 500 weeks from the date of injury”, MCL 418.361(3)(g)].<sup>17</sup> Just as in *Sutton* where “a person whose physical and mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not ‘substantially limi[t]’ a major life activity,” *Sutton, supra* at 283, so too here a person whose physical and mental impairment is corrected by mitigating measures still has an impairment but as corrected it may not amount to “permanent” and total loss of “industrial use” of both legs. The important inquiry under the ADA and here is: how is the individual able to function with a mitigating device for it is that function [industrial use, here] that is the cornerstone of the inquiry.

*Sutton* also relied upon the ADA’s desire that disability determinations be individualized. Likewise in Michigan, a disability determination for loss of industrial use has always been considered a question of fact because it depends upon the particular individual’s ability to use his or her member in industry. *Mitchell v Metal Assemblies, Inc*, 379 Mich 368, 375; 151 NW2d 818 (1967). While the preceding types of T&P benefits apply to all persons who have anatomically lost both legs, an award under loss of industrial use must naturally be dependent on the particular facts of the individual case. *E.g., Ettinger v Hooker Motor Freight*, 117 Mich App 246; 323 NW2d 334 (1982); *Villaneuva v General Motors Corp*, 116 Mich App 436; 323 NW2d 431 (1982).<sup>18</sup>

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<sup>17</sup> Recall also, *O’Connor, supra* at 533.

<sup>18</sup> Another reason given by the *Sutton* Court is not relevant one way or the other to the instant case. The third reason given by the *Sutton* Court was the number of persons with disabilities (43 million) cited by Congress in the ADA.

Therefore, similar to the United States Supreme Court in *Sutton*, the Court should here hold that a person has not permanently and totally lost the industrial use of his legs “if the ‘disability’ determination is made with reference to these [mitigating] measures.” *Sutton, supra* at 481. This Court’s decision in *Cihmielewski v Yermic*,<sup>19</sup> construing Michigan’s Handicappers’ Civil Rights Act correctly anticipated *Sutton* in resolving this type of issue. This case should be in accord with *Sutton* and *Chmielewski*.

J. The Error Of The Court Of Appeals’ Analysis.

The Court of Appeals reasoned that it must reverse the Worker’s Compensation Appellate Commission’s [WCAC]’s analysis because “[w]hile use of the corrected test is mandated in vision cases, *Hakala, supra*, and has been expanded to cases involving implants, *O’Connor, supra*, its use has not been extended to cases involving prosthetics or braces.” (77a).

The most fundamental problem with this analysis is that the Court of Appeals has, in effect, imported the specific loss uncorrected inquiry into an economic inquiry of “permanent and total loss of industrial use.” It is the Court of Appeals who is expanding concepts not the WCAC. Economic inquiries into impairment of wage-earning capacity *do* take into account corrective devices under the general rules discussed earlier. The Court of Appeals is, in effect, saying that at the time of hearing plaintiff should remove any assistive devices and his wage-earning capacity should be evaluated without them. That is the equivalent of pretending an employee’s carpal tunnel syndrome had not been corrected by surgery and then evaluating the employee’s wage-earning capacity as if the surgery did not occur.

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<sup>19</sup> 457 Mich 593; 580 NW2d 817 (1998).

The Court of Appeals also does not recognize that *Hakala* does not say its rule only applies to vision cases.<sup>20</sup> *Halaka* said that an uncorrected test is to be used in that T&P case even though the inquiry was not “loss of industrial use”. It is no “exten[sion]”, therefore, of *Halaka* to say it applies to T&P loss of industrial use cases. A corrected test would be more – not less – applicable in a “permanent and total loss of industrial use” case where the inquiry is economic than in a strict physical impairment situation as in *Hakala*. Non-economic T&P cases demand a corrected test because “the concept of permanence . . . involv[es] . . . consideration of medical treatment options.” *O’Connor*, citing *Larson*. That “concept of permanence” plus an economic inquiry most assuredly requires evaluation with assistive devices.

It is also no extension of *O’Connor* to apply the corrected test here. *O’Connor* was a T&P case. *O’Connor* noted that the questions of implants derived from specific loss claims not total and permanent disability claims. *O’Connor, supra* at 534. *O’Connor* was not so much connecting discussion of implants to T&P cases as pointing out that even under the specific loss type of analysis Mr. O’Connor would not prevail.

#### K. Conclusion.

The Court should take the opportunity in revisiting this troublesome area of the

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<sup>20</sup> Perhaps the Court of Appeals was confused with *Hakala’s* statement, “It is apparent from both [WCAB] opinions that the board believes that a corrected – or uncorrected – vision standard in every case for every claim would best serve the purpose of the act. We are not so persuaded.” *Hakala, supra* at 363. If the Court of Appeals read this to mean that *Hakala* relegated its corrected versus uncorrected inquiry to vision cases, then the Court of Appeals was in error. There is no such limitation in *Hakala*. *Hakala* in this quote appeared to be addressing the apparent desire of the Workers’ Compensation Appeal Board to have one test for both T&P and specific loss.

A point of distinction between *Hakala* and the instant case that could have been made by the Court of Appeals but was not is that in *Hakala* the losses were sequential, *i.e.*, a preexisting non-work-related loss of vision and a later work-related loss of the hand. Here, the loss of both members was via one work injury. Not to overcomplicate these matters, but the Second Injury Fund pays T&P-type benefits in sequential loss cases under MCL 418.521(1) and also T&P cases where the work injury caused both losses. The important point is that there is no distinction in the T&P statute of § 361(3) between how to measure T&P depending upon whether each loss was work-related or not. Therefore, there must be one rule for determining T&P under § 361(3).

law to bring it clarity. The Court should overrule the judicially created idea that there is such a thing as loss of industrial use in the specific loss category of scheduled benefits, MCL 418.361(2). The Legislature has never seen fit to create such a category there, although seeing fit to create such a category for total and permanent disability under MCL 418.361(3).

In resolving this total and permanent disability loss of industrial use claim, the Court should hold that the statute and case law contemplate that in order to determine whether a disability “permanent and total” and whether it constitutes “loss of industrial use” the inquiry necessitates evaluation of use of the body member with assistive devices.

## ARGUMENT II

**THE QUESTION OF WHETHER PLAINTIFF IS ENTITLED TO TOTAL AND PERMANENT DISABILITY BENEFITS MUST BE RESOLVED BEFORE RESOLUTION OF DEFENDANT-EMPLOYER'S ARGUMENT REGARDING APPLICATION OF §301(5). AND, THE COURT OF APPEALS AND WORKER'S COMPENSATION APPELLATE COMMISSION CORRECTLY RULED THAT PLAINTIFF DID NOT SUFFICIENTLY PLEAD A CLAIM FOR SPECIFIC LOSS BENEFITS WITH RESPECT TO HIS LEFT LEG.**

Defendant-employer as an appellant has a secondary argument that the WCAC erred in its second decision in this case with respect to application of MCL 418.301(5), typically called the “reasonable employment” [a/k/a favored work] provision of the Act. *Amicus curiae* submits that plaintiff’s claim for total and permanent disability benefits must be resolved first (and with finality) before considering any §301(5) issue. The Court of Appeals has remanded the case to the WCAC to determine whether plaintiff is totally and permanently disabled by the loss of industrial use of his legs under an uncorrected test. If the answer to that question at the WCAC is that plaintiff is totally and permanently disabled, then there is no §301(5) issue. There would be no §301(5) issue because a finding of total and permanent disability carries with it a conclusive presumption of total and permanent disability for 800 weeks. MCL 418.351(1). We are still within 800 weeks (approximately 15 years) from the time of plaintiff’s 1988 injury. The §301(5) issue would also be moot because §301(5) per its opening clause applies to general disability cases. MCL 418.301(5) [“If disability is established pursuant to subsection (4),” *i.e.*, pursuant to the general disability standard]. As explained in the preceding Argument, general disability cases and the scheduled benefits category of disabilities are different and distinct.

Therefore, the §301(5) issue may be moot. Only if the Court reverses the Court of Appeals in CA No. 214445 and reinstates the WCAC's order denying T&P benefits does defendant-employer's §301(5) issue in CA No. 222496 become relevant.<sup>21</sup>

Second, the Court of Appeals affirmed the WCAC's ruling that plaintiff did not sufficiently plead with respect to his left leg that he was seeking specific loss benefits for that leg. Specific loss benefits and total and permanent disability benefits (which plaintiff did plead) are distinct categories, as explained in the preceding argument. Plaintiff's application did not suggest a claim for specific loss benefits for the left leg. It is plaintiff's obligation in that application to "in writing state the general nature of any claims as to which any dispute or controversy may have arisen" so that such claim can be adjudicated. MCL 418.847(1). The Court of Appeals and WCAC correctly noted that given the inadequate pleading of a specific loss claim, plaintiff cannot seek recovery for such in this action.

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<sup>21</sup> Even in that event, there is reason for the Court to proceed cautiously regarding the §301(5) issue on this record. The record appears clouded by the counting of weeks worked post-injury; there may have been a miscounting that matters greatly. See MCL 418.301(5)(d). (45a of defendants-appellants' Waste Management, Inc. and Transportation Insurance Company's appendix, including n 2). This confusion should create some reluctance by the Court to delve into this question.

**RELIEF**

WHEREFORE, *amicus curiae*, the Workers' Compensation Section of the State Bar (the defense perspective) respectfully request that the Court reverse the Court of Appeals in CA No. 214445 and also hold that there is no loss of industrial use in the specific loss category of disabilities in MCL 418.361(2). With respect to CA No. 222496, this *amicus curiae* submits that the issue unique to that case not be considered until final resolution of CA No. 214445's §361(3) issue.

Respectfully submitted,

BY: \_\_\_\_\_  
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Dated: August 29, 2001

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| <p style="text-align: center;"><u>General Disability</u></p> <p style="text-align: center;">/                  \</p> <p>Total                          Partial</p> | <b>SCHEDULED BENEFITS</b>   |  |
|  | <p><u>Specific Loss</u></p> <p>Loss of industrial use only via case law</p> <p>Uncorrected test for specific losses</p> | <p><u>T &amp; P</u></p> <p>Loss of industrial use = statutory</p> <p>Corrected test for loss of industrial use</p> |



that being their address, and depositing same in the United States post office in the City of  
Birmingham, Michigan, with postage fully prepaid.

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GINA L. BARBER

Subscribed and Sworn To Before Me  
on this 30<sup>th</sup> day of August, 2001.

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Notary Public, Oakland County, MI  
My Commission Exp. \_\_\_\_\_