7
Disability Defined

I. Introduction

§7.1 The current definition of *disability* has developed over time, the result of complex and often contradictory caselaw and amendatory legislation. An examination of how we got to where we are today can be helpful in understanding the current definition.

It should be noted that a finding of disability is not the end of the analysis. Disability does not itself entitle an injured worker to benefits. There must also be a loss of wages for a worker to be entitled to benefits, except in the case of an amputation or other "specific loss." See §§11.7–11.8. This wage loss must be connected to the work-related injury or disease, and this concept is not as simple as it may sound. See §7.16.

Chapter 8 discusses various ways in which subsequent events can affect a disabled worker's entitlement to benefits. Two of them are particularly relevant with regard to this discussion of disability. If a worker refuses an offer of reasonable work, benefits stop. See §§8.5–8.17. In addition, if a worker returns to work for a period of time and then leaves, that work may establish a wage-earning capacity, which in turn reduces the individual's right to benefits. See §§8.18–8.28. However, employers may sometimes reduce a claimant's benefits by virtue of postinjury wage-earning capacity, whether or not he or she has actually returned to work. See §§7.17 and 7.18.

II. Disability Before 1987

A. Disability Before 1982

§7.2 Surprisingly, before 1982, the Worker's Disability Compensation Act did not explicitly define disability. As a result, the courts looked to the predecessor to what is now Section 371(1) for guidance, looking to language referencing impairment of the employee's earning capacity in the employments in which that employee was working at the time of the personal injury. *See Foley v Detroit United RR*, 190 Mich 507, 515, 157 NW 45 (1916). This became the standard in the absence of anything more definitive.

The statute's focus on the work the employee was doing at the time of his or her injury led to a distinction between skilled employment and unskilled employment (which also came to be known as "common labor").

A skilled worker was totally disabled if unable to perform the specific skilled job he or she had performed before an injury occurred, even if he or she remained fully capable of working in another field. *MacDonald v Great Lakes Steel Corp*, 274 Mich 701, 265 NW 776 (1936). On the other hand, an unskilled laborer was totally disabled only if unable to perform any kind of work within the general field of common labor and partially disabled if unable to perform some but not all of the jobs in the general field of common labor. *Miller v S Fair & Sons*, 206 Mich 360, 171 NW 380 (1919).

B. Disability Between 1982 and 1987

§7.3 Effective January 1, 1982, the legislature for the first time incorporated into the Act a definition of disability, adding Section 301(4), which then read, "As used in this chapter, 'disability' means a limitation of an employee's wage-earning capacity in the employee's general field of employment resulting from a personal injury or work related disease." Although the statutory definition was amended again effective May 14, 1987, the court of appeals held that this amended definition did not apply to those injured before its effective date. *Turrentine v GMC*, 198 Mich App 572, 499 NW2d 411 (1993).

In fact, the new language was so similar to that used in various court decisions over the years that it could be forcefully argued that the legislature merely intended to codify the already-existing definition of disability discussed in §7.2. In fact, the author of this language has indicated that no change was intended. *See* Gillman, *The Rise and Fall of Reasonableness: Favored Employment in Michigan Workers' Compensation,* 1 Cooley L Rev 177, 206 (1982).

However, in *Wright v Vos Steel Co*, 205 Mich App 679, 517 NW2d 880 (1994), the court of appeals held that the 1982 amendments eliminated the distinction between skilled and unskilled work.

III. The 1987 Definition of *Disability*

A. The 1987 Statute

§7.4 Effective May 14, 1987, the legislature added the following language to Sections 301(4) and 401(1) (see the statutes before the 2011 amendments):

> 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.

While this language would not appear to be complicated, it led to extensive litigation and conflicting interpretations. There have since been additional amendments that took effect on December 19, 2011, which are discussed in further detail in §§7.8–7.9.

B. The Short-Lived *Haske* Doctrine

§7.5 The supreme court first interpreted the 1987 definition of disability in *Haske v Transport Leasing*, 455 Mich 628, 566 NW2d 896 (1997). The court defined "disability" as "a personal injury or work-related disease that prevents an employee from performing any work, *even a single job,* within his qualifications and training." *Id.* at 634. This relatively short-lived holding was overturned five years later in 2002.

C. *Sington* Supersedes *Haske*

§7.6 The supreme court took another look at the disability standard in *Sington v Chrysler Corp*, 467 Mich 144, 648 NW2d 624 (2002). It subsequently

overruled *Haske v Transport Leasing*, 455 Mich 628, 566 NW2d 896 (1997), and came to very different conclusions.

The *Sington* court held that, to establish disability, a claimant must prove that he or she "is no longer able to perform *any* of the jobs that pay the maximum wages, given the employee's training and qualifications." 467 Mich at 157 (emphasis added). The court explained, "So understood, a condition that rendered an employee unable to perform a job paying the maximum salary, given the employee's qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training would not constitute a disability." *Id.* at 155. However, this determination is not made in a vacuum. Other factors come into play beyond merely whether plaintiff is physically capable of performing work.

The *Sington* court pointed out that a claimant's actual wages might not be a true indicator of his or her wage-earning capacity. For example, the court held that there must be a "substantial job market" for the work a claimant could perform before that work can establish a true capacity to earn wages. *Id.* at 157. In addition, even a return to a "regular job" may not be enough, in and of itself, to prevent a finding of disability. If an injured worker could only perform the regular job because of accommodations provided by his employer, his wage-earning capacity might be less than the wages he earned or even nonexistent. However, an injury that had only a "de minimus" effect on the employee's duties might not constitute a disability. *Id.* at 165–166. The court suggested the following approach:

> A useful perspective for the WCAC [Workers' Compensation Appellate Commission] in considering this case on remand might be considering whether plaintiff's injuries would prevent him from competing in the marketplace with other workers for the "regular job." The WCAC might also consider whether defendant would have continued plaintiff in the "regular job" at the same rate of pay if he was injured in a non-work-related incident. If plaintiff would have been hired or retained despite his injury, this would indicate that plaintiff did not suffer a disability because the pertinent injury did not impair his wage earning capacity. Conversely, if defendant would not have hired plaintiff or would not have accommodated plaintiff's injury except for it being work related, that would be indicative of a limitation in wage earning capacity.

Id. at 166. As this analysis indicates, it is important to look at the nature of any postinjury job the claimant performs, to determine whether it is truly representative of his or her wage-earning capacity "in the marketplace."

The appellate commission applied this doctrine in *Sandvig v Grand Traverse County*, 2009 ACO #141, a case in which the claimant had returned to full-time work, but only with accommodations granted by his employer. The commission wrote, "A return to full-time work does not prevent a finding of disability," adding that "[d]isability focuses on whether the plaintiff's work injury caused a limitation in his maximum wage earning capacity in work suitable to his qualifications and training, not whether the defendant was willing to accommodate him with restrictions." The panel rejected the employer's argument that the restrictions were "'de

minimus,'" noting that the task the injured employee was no longer required to perform was more than merely "an isolated work task."

D. *Stokes* Further Interprets the 1987 Statute

§7.7 The supreme court's opinion in *Sington v Chrysler Corp*, 467 Mich 144, 648 NW2d 624 (2002), did not explain how the standard it set forth was to be applied from a practical standpoint. The appellate commission's attempts to fill in the blanks were somewhat inconsistent. As a result, the supreme court revisited the disability standard in *Stokes v Chrysler LLC*, 481 Mich 266, 750 NW2d 129 (2008)

In *Stokes,* the supreme court set forth four factors necessary for a claimant to prove disability:

1. The claimant must disclose, in full, his or her qualifications and training.
2. The claimant must establish the universe of jobs he or she was qualified or trained to perform at the time of the injury that paid the same as his or her maximum earning capacity at that time. This inquiry includes jobs the claimant had never held before the injury, as long as he or she is qualified and trained to perform them.
3. The claimant must establish whether his or her work-related injury prevents the performance of some or all of the jobs identified as within his or her qualifications and training and paying maximum wages.
4. If the claimant remains capable of performing some of those jobs, there must be a showing that he or she cannot obtain them. A good-faith attempt to find work paying the same or a higher salary is part of this final element.

If the claimant satisfied these requirements, a showing of disability had been made. The burden of producing evidence to rebut this showing then moved to the employer. The employer was entitled to discovery if "necessary for the employer to sustain its burden … and to present a meaningful defense." *Id.* at 284. This could include the procurement of testimony from a vocational expert, and, if such testimony was necessary, the expert was permitted to interview the claimant.

IV. The 2011 Amendments

A. Additions to the Basic Standard

§7.8 The new language added by the 2011 amendments applies to injuries occurring on or after December 19, 2011. Section 891(4). However, it closely tracks the holdings of *Stokes v Chrysler LLC*, 481 Mich 266, 750 NW2d 129 (2008), applicable to earlier injuries, and largely just codifies those holdings.

The new amendments retain the basic definition requiring "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training." Section 301(4)(a). However, the definition for the first time expressly provides that a limitation of wage-earning capacity occurs only if the personal injury leaves the employee unable to perform *all* jobs paying maximum wages in work suitable to that employee's qualifications and training. *Suitable work* includes jobs that might be performed using the employee's transferable skills. *Id.*

In addition, the statute distinguishes between those totally and those partially disabled. An employee is totally disabled if unable to earn wages in any suitable job paying maximum wages and partially disabled if he or she retains a wage-earning capacity at a pay level less than maximum wages in suitable work. Section 301(4)(a). Partial disability is further discussed in §§7.17–7.19.

Importantly, "wage earning capacity" is defined as wages the employee earns or is capable of earning at a job reasonably available to that employee, whether or not wages are actually earned. Section 301(4)(b). This provision imposes an "affirmative duty" to seek work reasonably available to the employee, taking into account his or her limitations from the work-related injury or illness. A magistrate may consider the claimant's good-faith job efforts in determining whether jobs are reasonably available. Section 301(4)(b). A different "wage earning capacity" is applied to certain police officers and fire fighters. See §11.1.

B. Codification of *Stokes*

§7.9 As noted, the statute includes what is essentially a codification of the multipart test from *Stokes v Chrysler LLC*, 481 Mich 266, 750 NW2d 129 (2008). Pursuant to Section 301(5), an employee can establish disability by doing all of the following:

- disclosing his or her qualifications and training, including education, skills, and experience, not limited to the plaintiff's job at the time of injury
- providing evidence about any jobs he or she is qualified and trained to perform "within the same salary range as his or her maximum wage earning capacity at the time of the injury"
- demonstrating that the work injury prevents the performance of jobs identified in the prior step
- proving that he or she cannot perform or obtain any of these jobs, including a showing of a good-faith attempt to procure postinjury employment if suitable jobs at maximum wages exist

Once the initial showing is made, the burden shifts to the employer to produce rebuttal evidence. The employer has a right to discovery, if necessary to present a meaningful defense. The employee, in turn, may produce his or her own rebuttal evidence. Section 301(6).

V. The Current Standard of Disability

A. In General

§7.10 Technically, the 2011 amendments apply only to those injured on or after December 19, 2011. Section 891(4). *Stokes v Chrysler LLC*, 481 Mich 266, 750 NW2d 129 (2008), remains applicable to all prior injury dates. However, the current statute largely represents a codification of principles from prior caselaw, particularly *Stokes.* As a result, that caselaw is instructive regarding the interpretation of the new amendments and will be included in the discussion below.

Some matters seem clear, for all cases with injury dates since 1987: