THE ROLE OF DISCOVERY IN WORKERS' COMPENSATION PROCEEDINGS IN MICHIGAN: AN ANALYSIS OF *STOKES v. CHRYSLER, LLC*

I. INTRODUCTION

Workers' Compensation remedies grew out of the hazards and problems associated with the rise of modern industry and the realization that injured workers forced to utilize common law remedies often could not recover for their injuries.[1] In response, workers' compensation laws provided injured workers with a streamlined no-fault procedure by which they could avoid the expense and delay inherent in civil litigation.[2] In short, legislatures enacted workers' compensation laws to "provide financial and medical benefits to victims of work connected injuries in an efficient, dignified, and certain form."[3] For these reasons, it should be axiomatic that courts and legislatures would be leery of allowing liberal discovery in a proceeding like workers' compensation, which was designed to alleviate concerns of undue delay and expense.[4] With the Michigan Supreme Court's recent decision in *Stokes v. Chrysler, LLC*,[5] however, parties will now be able to utilize more liberal discovery in workers' compensation proceedings, to the detriment of workers. Workers with no interim means of support will now endure higher costs and longer delays before receiving compensation for their job-related injuries.[6]

This Note will examine the extent of discovery allowed in workers' compensation proceedings. Although it examines how different states address this issue nationwide, its focus is primarily on Michigan's Worker's Disability Compensation Act[7] (WDCA) and the *Stokes* decision.

Part II outlines the history and purposes behind workers' compensation remedies enacted in the late nineteenth and early twentieth centuries. Further, it discusses the commonalities of various workers' compensation statutes throughout the United States and U.S. territories. Lastly, it addresses the role of discovery in workers' compensation

1. *See* 82 AM. JUR. 2d *Workers' Compensation* § 1 (2008).

2. *Id.*

3. Whetro v. Awkerman, 174 N.W.2d 783, 785 (Mich. 1970).

4. *See* Campbell C. Hutchinson, *The Case for Mandatory Mediation*, 42 LOY. L. REV. 85 (1996) (examining the expense and burden of litigation and addressing the role of discovery in the problem).

5. Stokes v. Chrysler, LLC, 750 N.W.2d 129 (Mich. 2008).

6. *See id.*

7. MICH. COMP. LAWS ANN. §§ 418.101-941 (West 2007).

proceedings by discussing the status of discovery in Michigan both prior to and including the *Stokes* decision and by providing an overview of how other states treat discovery.

Part III analyzes the *Stokes* decision, in light of: (1) common canons of statutory interpretation and the clear statutory language of the WDCA; (2) the case law relied upon by the majority; and (3) the purposes underlying the enactment of workers' compensation laws.

Part IV concludes by advocating the position that courts should greatly limit discovery in Michigan under the WDCA, and that Michigan courts should follow the clear mandates of the discovery provisions in the WDCA, without substituting their own wisdom for that of the legislature.

II. BACKGROUND

A. History of Workers' Compensation and Purposes Underlying Creation of Remedy

1. History

According to Margaret Jasper, "[w]orkers' compensation was the first social insurance to develop widely in the United States to try and address the growing problem of work-related injuries and illnesses that accompanied the era of the Industrial Revolution."[8] Before the enactment of workers' compensation remedies, the disabled worker was limited to tort remedies.[9] This meant that employees had to prove negligence on the part of the employer in order to recover for their work-related injuries.[10] Thus, "[m]aintaining a lawsuit was a complex, costly and time-consuming process that often produced unfair results," mostly due to "the availability of common law defenses, such as assumption of risk and contributory negligence."[11] This way of dealing with work-related injuries forced workers and their families to endure financial hardship while waiting for their claims to progress through slow and costly civil litigation, with no means of support in the interim.[12]

In response to the Industrial Revolution, the late nineteenth and early twentieth centuries saw a rise in protections for worker injury in

8. MARGARET C. JASPER, WORKERS' COMPENSATION LAW 2 (Oxford University Press 2008).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

Europe.[13] In turn, the early twentieth century saw a rapid rise in the adoption of workers' compensation statutes in the United States.[14] Today such statutes are in effect in all fifty states and United States territories.[15] In Michigan, the legislature enacted workers' compensation through the passage of Public Act 10 of 1912.[16]

2. The Remedy Generally

From a conceptual standpoint, the law of workers' compensation is relatively simple. As Linda Darling-Hammond and Thomas Kniesner

13. LINDA DARLING-HAMMOND & THOMAS J. KNIESNER, THE LAW AND ECONOMICS OF WORKERS' COMPENSATION 8 (Rand 1980). First, many nations began to see the adoption of "employers' liability laws," which restricted employers' legal defenses. *Id.* at 8. These modifications did little to increase compensation for injured workers, and the tort-based system remained "inadequate, inconsistent, uncertain, slow, administratively expensive, and disruptive of employer-employee relations." *Id.* In response, by 1884, Germany enacted a "Sickness Fund" for injured workers, supported by mandatory contributions from employers and employees. *Id.* Further, "[b]y 1908, compensation acts had been passed by virtually all the Western industrialized nations except the United States." *Id.*

14. *See id.*

15. JASPER, *supra* note 8, at 2-3; *see also* HAMMOND AND KNIESNER, *supra* note 13. According to Hammond and Kniesner, European reforms at the end of the nineteenth century, sparked by industrialization, eventually began to spread to the American states. *Id.* at 7. The move in the United States toward a full workers' compensation system was slow, and consisted of several intermediary steps. *Id.* First, states began restricting the ability of employers to use common law defenses in tort suits for work-related injuries. *Id.* Second, most states by 1920 had workers' compensation in its simplest form. The coverage, however, was extremely limited, and only covered some "accidental injury in highly hazardous occupations." *Id.* By 1949, coverage was in place in all of the states, and saw gradual expansion over the following decades. *Id.* By 1969, coverage was expanded even further, and "[s]ince then, the pace of reform has quickened, and the concepts underlying workers' compensation insurance have begun to change." HAMMOND AND KNIESNER, *supra* note 13, at 7; *see also* ARTHUR LARSON, LARSON'S WORKER'S COMPENSATION LAW §§ 2.01-2.08 (2001) (giving a history on the enactment, development, and expansion of workers' compensation remedies).

16. THEODORE ST. ANTOINE, WORKERS' COMPENSATION IN MICHIGAN: COSTS, BENEFITS, AND FAIRNESS 4 (1984). The original Michigan statute "applied to personal injury and death 'arising out of and in the course of employment,' except for that caused by an employee's own 'intentional and willful misconduct.'" *Id.* From this very basic initial framework, the law gradually evolved and was substantially rewritten by Public Act 317 of 1969. *Id.* Further significant amendments were achieved in 1980 and 1981. *Id.* at 4-5. Of these, the most important modifications included "the coordination of workers' compensation benefits with unemployment compensation benefits, employer-financed wage continuation plans, pension plans, disability insurance plans, and the amount of an employer's contribution to old age benefits under Social Security." *Id.* at 6. Further, the term "disability" was statutorily defined for the first time, and substantive changes were made to workers' compensation insurance. *Id.*

discuss in their work, THE LAW AND ECONOMICS OF WORKERS' COMPENSATION:

> The no-fault foundation of workers' compensation law rests on two cornerstones: (1) the employer is liable for all injuries that arise out of and in the course of employment; and (2) the liability imposed upon the employer by workers' compensation is *exclusive*, that is, no further liability can be assessed against the employer for an injury covered by the compensation law.[17]

It is the second basic premise, exclusivity of remedy, which makes it important to achieve the most efficient and cost-effective remedy possible. Stated simply, exclusivity of remedy means that the various legislatures, by enacting Workers' Compensation Acts (or Laws), negated the worker's right to seek civil damages for work related injuries.[18] The exceptions to this general principle of exclusivity are few and are usually only applicable in the case of an intentional tort by the employer.[19]

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17. HAMMOND & KNEISNER, *supra* note 13, at 1.

18. On exclusivity of remedy, Arthur Larson writes:

> Once a workers' compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or the employee's dependents against the employer and insurance carrier. This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts.

LARSON, *supra* note 15, at § 100.01[1] (2001). *See also* JAMES ROBERT CHELIUS, WORKPLACE SAFETY AND HEALTH: THE ROLE OF WORKERS' COMPENSATION (American Enterprise Institute for Public Policy Research 1977).

19. *See* HAMMOND & KNEISNER, *supra* note 13, at 38-49. The authors give the following general exceptions to the exclusivity of remedy provision: The worker may elect to not file a compensation claims when he feels that the workers' compensation statute will not cover him, either because "(a) the injury occurred outside the course of employment and resulted from the employer's negligence, or (b) the injury by law is not considered to have 'arisen out of' the employment, as in the case of an occupational disease resulting from the employer's negligence but not covered by the compensation act." *Id.* at 39. Further, the worker can elect to utilize common law remedies for intentional torts, use other statutory remedies when available, and sue employers when the employer acts in a "dual capacity" with respect to the worker. *Id.* at 39-40. In Michigan, the exclusivity of remedy provision reads "the right to the recovery of benefits as provided in this act *shall* be the employee's exclusive remedy against the employer for a personal injury or occupational disease." MICH. COMP. LAWS ANN. § 418.131(1) (West 2007) (emphasis added). It further provides that "[t]he only exception to this exclusive remedy is an intentional tort," which the statute defines as existing "only when an employee is injured as a result of a deliberate act of the employer and the employer

In general, workers' compensation acts "disregard negligence as the basis of recovery and replace it with a statutory scheme that . . . provide[s] a form of strict liability requiring employers, regardless of fault, to compensate employees for injuries arising out of and in the course of employment."[20] A defined statutory schedule, based on loss of earning power, usually determines the amount of compensation awarded.[21] In Michigan, compensation will vary based on whether the employee's work-related injury results in death, total disability or partial disability, and the injured worker must look to the applicable statutory provision to determine how to calculate the amount of recovery.[22]

Because state law underlies all workers' compensation remedies, they vary considerably depending on jurisdiction.[23] Despite these

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specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id.* Further, in *Harris v. Vernier*, the Michigan Court of Appeals held that defendant employers may always seek protection from the civil courts under the exclusivity of remedy provision because such a challenge is based on the trial court's subject matter jurisdiction, and thus cannot be waived at any time. Harris v. Vernier, 617 N.W.2d 764, 770 (Mich. Ct. App. 2000).

20. 82 AM. JUR. 2d *Workers' Compensation* § 1 (2008). It is important to note the real theoretical basis behind the workers' compensation no-fault remedy. Workers' compensation "is not insurance in the ordinary sense of the term and is not intended to replace general health and accident insurance. It is not [a] substitute for a pension," and "does not rest upon any implied contract between the employer and the employee." *Id.*

21. 82 AM. JUR. 2d *Workers' Compensation* § 6 (2008). Further, the "usual provision is for payment of a specified amount at regular intervals over a definite period of time. In most instances, provisions are included for furnishing medical, surgical, hospital, nursing, and burial services in addition to payment of compensation." *Id.* (internal citations omitted).

22. Leskinen v. Michigan Employment Sec. Comm'n, 247 N.W.2d 808, 811 n.3 (Mich. 1976). The statutes and relevant case law establish the following procedure for calculating damages: First, the worker must prove that he or she has suffered a personal injury which arose out of and in the course of employment. 25 MICH. CIV. JUR. *Worker's Compensation* § 173 (2008). After this threshold determination has been made, the amount of benefits can be computed. *See Leskinen*, 247 N.W.2d at 811. The purpose of the workers' compensation laws is to compensate the employee, or his or her dependent, for the employee's loss of earning power, regardless of the number of injuries involved. *Id.* "The amount of compensation, determined by statute, compensates an employee injured or disabled as a result of his or her employment . . . *The rights to benefits under workers' compensation statutes are purely statutory, and the legislature has the prerogative to redefine those benefits.*" *Id.* (emphasis added) (internal citations omitted); *see also* Thick v. Lapeer Metal Products Co., 353 N.W.2d 464 (Mich. 1984); Pigue v. General Motors Corp., Oldsmobile Division, 26 N.W.2d 900 (Mich. 1947); Harper v. Lowe, 262 N.W. 260 (Mich. 1935).

23. *See* 82 AM. JUR. 2d *Workers' Compensation* § 6 (2008). Workers' compensation laws are authorized under the police power of the states, which accounts for the varying treatment accorded between jurisdictions. *See* 82 AM. JUR. 2d *Workers' Compensation* § 3 (2008).

differences in statutory form, the evolution of workers' compensation has given rise to a number of common features that unite the laws of the various states.[24]

3. Purposes Underlying the Creation of the Workers' Compensation Remedy

The United States Chamber of Commerce, in a report on workers' compensation statutes nationwide, notes several basic purposes underlying workers' compensation laws.[25] Workers' compensation laws were intended to "[p]rovide sure, prompt and reasonable income and medical benefits to work-accident victims, or income benefits to their dependents, regardless of fault," to "[p]rovide a single remedy and reduce court delays, costs and workloads arising out of personal injury litigation" and to "[e]liminate payment of fees to lawyers and witnesses as well as time-consuming trials and appeals."[26]

In Michigan, case law emphasizes similar purposes underlying the enactment of workers' compensation laws.[27] The WDCA statute itself

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24. Among these commonalities are:

> (1) a right to compensation for all injuries incident to employment, with certain exceptions, (2) abrogation of the common law doctrines of negligence, (3) substitution of a single and inexpensive scheme for securing a prompt settlement of claims, and (4) immunity from suit for the employer although there are some well-recognized exceptions to the rule of exclusivity as a remedy of workers' compensation laws, under which remedies at law may be brought by workers for injuries incurred.

82 AM. JUR. 2d *Workers' Compensation* § 6 (2008) (internal citations omitted).

25. U.S. CHAMBER OF COMMERCE, 1995 ANALYSIS OF WORKERS' COMPENSATION LAWS vii (1995).

26. *Id.* Although not germane to the topic of this Note, workers' compensation is also designed to:

> [r]elieve public and private charities of financial drains – incident to uncompensated industrial accidents . . . [e]ncourage maximum employer interest in safety and rehabilitation through appropriate experience-rating mechanisms, [p]romote frank study of causes of accidents (rather than concealment of fault) – reducing preventable accidents and human suffering." *Id.* Further, in exchange for stipulated liability regardless of fault, employers receive a cap on the benefits to be paid to employees as a result of their work-related injuries.

LARSON, *supra* note 15, at § 1.03[5].

27. *See* Whetro v. Awkerman, 174 N.W.2d 783, 785 (Mich. 1970) (stating that the "legislative policy" of workers' compensation is "to provide financial and medical benefits to victims of work-connected injuries in an efficient, dignified and certain form"); *see also* Crilly v. Ballou, 91 N.W.2d 493, 496 (Mich. 1958) (emphasizing the importance of efficiency and the fact that in giving up common law remedies the worker

also indicates that speed and brevity of the proceedings are important objectives when it mandates that "[p]rocess and procedure under this act shall be as summary as reasonably may be."[28]

B. The Role of Discovery in Workers' Compensation Claims

1. Discovery in Michigan Prior to the Stokes *Decision*

In Michigan, the WDCA states that the "workers' compensation magistrate at the hearing of the claim shall make such inquiries and investigations as he or she considers necessary."[29] Before the Supreme Court of Michigan's decision in *Stokes v. Chrysler, L.L.C.*,[30] cases heard by the Worker's Compensation Appellate Commission tended to emphasize the discretionary authority of magistrates to compel or limit discovery as they deemed necessary.[31]

In *Nessel v. Schenck Pegasus Corp.*,[32] the Commission noted that while "the workers' compensation arena has never had discovery as provided for in the Michigan General Court Rules . . . MCL 418.851 and MCL 418.853 empower magistrates to require disclosure of any relevant information to the issues under consideration."[33] However, the Commission emphasized that "while pre-trial access to information is critical, the extent of discovery and the precise form which disclosure

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got certainty of adequate compensatory payments without recourse to litigation). In *Stokes*, the dissent noted:

> The family of the [injured worker] . . . knew privation and sorrow when injury stopped income. True, the injured workman would not get full "damages" as that term is used in the law. The amount of his recovery was carefully circumscribed. It was limited to interference with earning capacity. The workman might be so grotesquely disfigured as to shock even the insensitive, yet for this harm there was no compensation, unless aided by statute . . . . [T]he workman has given up his common-law action, and can no longer seek damages from a jury. However, there was a giving on both sides. In return for the workman's limited monetary recovery he got the certainty of adequate compensatory payments without recourse to litigation.

Stokes, 750 N.W.2d at 147 (Cavanaugh, J., dissenting) (citing Crilly v. Bayou, 91 N.W.2d 495 (Mich. 1958)).

28. MICH. COMP. LAWS ANN. § 418.853 (West 2007).

29. MICH. COMP. LAWS ANN. § 418.851 (West 2007).

30. 750 N.W.2d 129.

31. *See* Nessel v. Schenck Pegasus Corp., 2003 Mich. A.C.O. 272 (2003). *See also* EDWARD M. WELCH & DARYL C. ROYAL, WORKER'S COMPENSATION IN MICHIGAN: LAW AND PRACTICE §§ 17.12-17.17 (5th ed. 2007) (giving the overall scheme of discovery in workers' compensation generally accepted by practitioners prior to the *Stokes* decision in 2008).

32. 2003 Mich. A.C.O. 272.

33. *Id.* at *7.

may take, is commended to the *broad discretion* of workers' compensation magistrates."[34] The Commission went on to note that the magistrate should assess the need for particular information on a "case-by-case basis."[35] In contrast to the rather reserved language used by the Commission in *Nessel*, some members of the Commission prior to the *Stokes* decision were openly hostile toward the idea of liberal discovery in workers' compensation cases.[36]

2. The Stokes *Decision*

In *Stokes v. Chrysler, L.L.C.*, the Supreme Court of Michigan carved out a new rule of discovery in workers' compensation proceedings.[37] The Plaintiff in *Stokes* was a forklift driver from 1971 to 1999.[38] During the last five years of his employment, his work consisted of driving a forklift and performing dispatch work.[39] As time progressed, the Plaintiff began to experience pain in his neck and arms. As of 1999, he was no longer

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34. *Id.* at *8. While the Commission was sure to point out that information must be assessed on a case-by-case basis, it did find that detailed proofs and findings in the following areas would be necessary:

> (1) The employee's full employment history, including wages earned at each job and the physical demand of the jobs and the skill sets required; (2) Other skills and training, including non-work activities, that show an ability to work and earn wages or why they do not as the case may be; (3) The employee's medical limitations, and how these limitations impact the ability to perform all the work within the employee's qualifications and training; (4) The employee's ability to work at other jobs, if any, and the availability of such work; (5) The history of subsequent employment or applications for employment after injury and the reasons why the employee is not working.

Id. at *7.

35. *Id.*

36. *See* Ronchon v. Grede Foundries, Inc., 14 MICHIGAN WORKERS' COMP. LAW REP. ¶ 1135 (Pryzbylo, Comm., dissenting). The Commissioner wrote of the discovery provision in the WDCA:

> First, the statute and cases interpreting the statute forbid a full civil court discovery process for a worker's compensation hearing. In addition, even courts of general jurisdiction do not permit the overly broad and numerous discovery requests granted by the magistrate in this case. As detailed in the majority opinion, discovery is not permissible under the WDCA. While the act mandates the exchange of medical records, it does not allow any other form of discovery. Such omission of other discovery tools acts as a natural prohibition of discovery . . . When the Legislature directs the procedure, we must uphold its decision and read any judicial expansion as narrowly as possible.

Id.

37. *Stokes*, 750 N.W.2d at 139.

38. *Id.* at 132.

39. *Id.* at 133.

able to continue working.[40] After undergoing surgery on his spinal cord, the Plaintiff filed a petition for workers' compensation benefits.[41] At the hearing, both experts agreed that the Plaintiff suffered a disability, though the employer contended that the cause of the disability was Plaintiff's preexisting arthritis.[42] Following the hearing of the claim, the magistrate granted an open award of benefits.[43]

On appeal to the Workers' Compensation Appellate Commission (WCAC), the WCAC affirmed the ruling, but remanded for consideration of the disability issue under the Michigan Supreme Court's decision in *Sington v. Chrysler Corp.*,[44] which was decided in the interim.[45] Prior to the remand hearing, the employer filed "a motion to compel the claimant to submit to an interview by the employer's vocational rehabilitation counselor."[46] The magistrate, exercising his discretion, denied the motion.[47] After once more giving the Plaintiff an open award of benefits under the new standard, the Defendant appealed to the Michigan Court of Appeals.[48]

The court of appeals affirmed, holding that although "the magistrate possessed the authority to order discovery," he "had *not abused his discretion* in concluding that an interview was unnecessary" because the employer had sufficient prior testimony to give to the expert.[49] The Michigan Supreme Court reversed, and held that the magistrate erred in refusing to require discovery when the employer requested that the claimant submit to the employer's vocational expert.[50]

In its decision, the majority relied on the reasoning in *Boggetta v. Burroughs Corp.*[51] to hold that the "employer has a right to discovery

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Stokes*, 750 N.W.2d at 133. In awarding benefits, the magistrate relied on *Haske v. Transport Leasing, Inc.*, 566 N.W.2d 896 (Mich. 1997), *rev'd on other grounds*, Sington v. Chrysler Corp., 628 N.W.2d. 624 (Mich. 2002), to determine whether or not the plaintiff suffered from a "disability" within the terms of the WDCA. *Id.*

44. 648 N.W.2d 624 (Mich. 2002). For a full discussion of the definition of "disability" before and after the *Sington* decision, see William Nole Evans, *Annual Survey of Michigan Law: Worker's Disability Compensation*, 50 WAYNE L. REV. 801 (2004).

45. *Stokes*, 750 N.W.2d at 133.

46. *Id.*

47. *Id.*

48. *Id.* at 134.

49. *Id.* (emphasis added) (citing Stokes v. Chrysler Corp., 727 N.W.2d 637 (Mich. Ct. App. 2006)).

50. *Id.* at 139-42.

51. 118 N.W.2d 980 (Mich. 1962). The *Stokes* majority noted:

under the reasoning of *Boggetta* if discovery is necessary for the employer to sustain its burden and present a meaningful defense."[52] The court stated that "[i]f discovery is necessary for the employer to sustain its burden of production and to present a meaningful defense, then the magistrate abuses his discretion in denying the employer's request for discovery."[53] So, if the employer decides to hire a vocational expert, then "[t]hat expert *must* be permitted to interview the claimant and present the employer's own analysis or assessment."[54]

3. Discovery in Other Jurisdictions

Just as the workers' compensation statutes vary from jurisdiction to jurisdiction, so do the provisions relating to discovery. What follows is a brief description of two entirely opposite approaches to the extent of discovery allowed by state statute.

i. States That Limit Discovery

Colorado takes an approach that seeks to curb the extent of discovery in workers' compensation proceedings.[55] The applicable discovery statute states that "[i]n connection with hearings, the director and administrative law judges are empowered to . . . upon written motion *and for good cause shown*, permit parties to engage in discovery."[56] In requiring good cause in order to obtain discovery, Colorado has made it difficult for parties to engage in liberal discovery without consent.[57] A review of the various statutes indicates that at least seventeen other states

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> In *Boggetta* . . . this Court quoted with approval the opinion of the Workmen's Compensation Appeal Board (WCAB), which stated that a hearing referee's responsibility is "broad enough to require the answering of interrogatories requested by one of the parties if such answers are necessary to a proper inquiry into the facts."

Stokes, 750 N.W.2d at 134 n.1.

52. *Id.*

53. *Id.*

54. *Id.* at 140 (emphasis added).

55. *See generally* COLO. REV. STAT. ANN. § 8-43-207 (West 2003).

56. *Id.* (emphasis added). The statute does make an exception to the good cause requirement if both parties are represented by attorneys and they stipulate to engage in discovery. *Id.*

57. *See* DOUGLASS PHILLIPS & SUSAN D. PHILLIPS, 17 COLO. PRAC. WORKERS' COMPENSATION PRACTICE & PROCEDURE § 15.18 (2008) (describing the "formal route for discovery . . . through written interrogatories and depositions").

have tried to limit discovery to some extent in the context of the workers' compensation remedy.[58]

58. Alabama makes workers' compensation discovery available in the same way as discovery in civil cases, but subject to certain restrictions, the effect of which is to limit workers' compensation discovery. *See* ALA. CODE. § 25-5-81 (West 2008) (limiting parties to two depositions without leave, 25 interrogatory questions, and further stating that "it is the intent of this section that *limited* discovery be available"); *see also* ALASKA STAT. § 23-30-005 (West 2008) ("process and procedure under this chapter shall be as summary and simple as possible"); ARK. CODE ANN. § 11-9-708 (West 2008); CAL. LAB. CODE § 3208.4 (West 2009) (requiring that the complainant in sexual harassment cases "establish specific facts showing good cause for that discovery on a noticed motion to the appeals board"); DEL. CODE. ANN. tit. 19, § 2348 (2009) (stating that the board "shall make such inquiries and investigations as it deems necessary"); D.C. CODE § 32-1525 (2009); 820 ILL. COMP. STAT. ANN. 305/16 (West 2008); ME. REV. STAT. ANN. tit. 39-A, § 309 (2008) (providing expressly for certain limited forms of discovery, and stating that "discovery beyond that specified in this section is available only upon application to the board, which may approve the application in the exercise of its discretion"); MINN. R. 1420.2200 (2005) (stating that upon motion, a compensation judge may order additional discovery if it is needed for proper presentation of a party's case, the discovery is not for purposes of delay, and the issues and amounts in controversy are substantial enough to warrant the additional discovery); NEB. REV. STAT. § 48-168(1) (2008) (explaining that the workers' compensation court "may make the investigation in such manner as in its judgment is *best calculated* to ascertain the substantial rights of the parties and to carry out justly *the spirit* of the Nebraska Workers' Compensation Act") (emphasis added); N.C. GEN. STAT. ANN. § 97-80(a) (West 2008) (noting that the discovery procedures are intended to be as summary and simple as reasonably possible); TEX. LAB. CODE ANN. § 410.158 (Vernon 2006) (limiting discovery to "(1) depositions on written questions to any health care provider; (2) depositions of other witnesses as permitted by the hearing officer for good cause shown; and (3) interrogatories as prescribed by the commissioner" and stating that discovery "may not seek information" that is otherwise available or duplicative); VIRGINIA WORKERS' COMPENSATION COMMISSION RULE 1.8 (2008) (stating that the Commission may "limit the frequency or extent of discovery if it is unreasonably cumulative, duplicative, expensive or if the request was not timely made"); W. VA. CODE R. § 85-7-8 (2009) (stating that discovery shall be engaged in "only with the consent of the hearing officer," and that discovery may only be had if "not unduly burdensome" and "material to the issues to be heard"); Brewer v. Republic Drywall, 145 S.W.3d 506 (Mo. Ct. App. 2004) (holding that Missouri rules of Civil Procedure do not apply in workers' compensation actions); State ex rel. Lakeman v. Siedlik, 872 S.W.2d 503 (Mo. Ct. App. 1994) (holding that the only available methods of discovery are those permitted under the Workers' Compensation Law); TAMARA LEE RICCIARDONE, WORKERS' COMPENSATION PRACTICE IN MASSACHUSETTS, 11-1 (2001) (remarking that Massachusetts law mandates that "procedures within the division of dispute resolution shall be as simple and summary as reasonable," and as a result "relatively few formal discovery rules exist under 452 C.M.R. 100, et seq."); JO ANN F. WASIL & MARK E. MASTRANGELO, OHIO WORKER'S COMP. L. § 14:126 (2008) (stating that in Ohio, "the scope of discoverable information can be limited where it works an undue hardship, appears to be harassment, or discloses confidential and privileged information which is not relevant to the appeal in court").

ii. States that Allow Liberal Discovery

On the opposite end of the spectrum is the approach taken by Georgia, which simply imports the general discovery provisions applicable to civil lawsuits into workers' compensation proceedings.[59] So Georgia, in contrast to Colorado, provides for very liberal discovery in workers' compensation proceedings.[60] Other states have similar provisions, and despite the clear purposes underlying workers' compensation remedies, give litigants in workers' compensation cases great latitude in discovery.[61]

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59. *See* GA. CODE ANN. § 34-9-102(d) (West 2008). Georgia law provides that "[d]iscovery procedures shall be governed and controlled by Chapter 11 of Title 9, 'Georgia Civil Practice Act,'" and mandates that "the term 'administrative law judge' shall be substituted for the word 'court' when construing any procedural rule." *Id.*

60. *See* JAMES B. HIERS, JR. & ROBERT R. POTTER, GA. WORKERS' COMP. LAW & PRACTICE § 12-5 (2008) (reiterating that workers' compensation cases in Georgia are governed by the Civil Practice Act with regard to discovery procedures).

61. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-941(h) (West 2008); FLA. ADMIN. CODE ANN. r. 60Q-6.114 (2009) (indicating the same discovery procedures in workers' compensation proceedings as provided for in the Florida Rules of Civil Procedure); IND. CODE ANN. § 22-3-1-3 (West 2009); IOWA ADMIN. CODE r. § 876-4.35 (2009); MISS. CODE ANN. § 71-3-55(1) (West 2008); OKLA. STAT. ANN. tit. 85, § 4-30 (West 2008) (expanding the scope of discovery to that of the general discovery provisions applicable to civil proceedings); OR. REV. STAT. ANN. § 656.285 (West 2009) (providing that "[Oregon Rule of Civil Procedure] 36 C shall apply to workers' compensation cases, except that the Administrative Law Judge shall make the determinations and orders required of the court in ORCP 36 C, and in addition attorney fees shall not be declared as a matter of course but only in cases of harassment or hardship"); Bermond v. Casino Magic, 874 So.2d 480 (Miss. Ct. App. 2004) (holding that Workers' Compensation Commission itself has discretion to enlarge the scope of the record and relax rules of discovery applicable to hearings); Drew v. Quantum Systems, Inc., 661 N.E.2d 594 (Ind. Ct. App. 1996) (holding that trial rules for civil discovery are applicable to proceedings before the workers' compensation board); Stephens v. Southern Furniture Transports, Inc., 420 So.2d 904, 905 (Fla. Dist. Ct. App. 1982); Josam Mfg. Co. v. Ross, 428 N.E.2d 74 (Ind. Ct. App. 1981) (holding similarly); Camelback Contractors, Inc. v. Industrial Comm'n, 608 P.2d 782 (Ariz. 1980) (holding that discovery before the industrial commission should not be more restrictive that that employed in superior court); Pollack v. Deere & Co., 282 N.W.2d 735 (Iowa 1979) (holding that the "discovery rules are to be liberally construed to effectuate the disclosure of relevant information to the parties"); Raban v. Indus. Comm'n, 541 P.2d 950 (Ariz. Ct. App. 1975).

III. ANALYSIS

A. The Michigan Supreme Court Erred in its Interpretation of the Discovery Provisions of the Michigan Workers' Compensation Statute

1. Statutory Interpretation

In analyzing the majority's decision in the *Stokes* opinion, it is important to first examine the text of the statute itself and view the mandates contained therein in light of common canons of statutory interpretation.

It has long been a rule of statutory construction that the judiciary should not tamper with the clear, distinct, and unequivocal wording of a statute.[62] Further, courts "must apply legislative enactments in accordance with the plain intent and language used by the Legislature."[63] When faced with clear statutory language, judicial construction is normally "neither necessary nor permitted," and the courts should enforce the text of the statute as written.[64] The courts may only depart from the literal construction of a statute when an unjust and absurd result, inconsistent with the statute in light of the purposes of the act, would otherwise occur.[65] However, when statutory language is clear, such an argument about the production of absurd results holds no weight.[66]

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62. *See* Staiger v. Liquor Control Comm'n, 59 N.W.2d 26, 27 (Mich. 1953) (explaining that the Court will not tamper with statutory wording if there is neither "vagueness nor doubt"); *see also* Kingsford v. Cudlip, 241 N.W. 893, 895 (Mich. 1932) (holding that courts cannot tamper with clear and unequivocal meaning of words used in a statute).

63. St. Helen Resort Ass'n v. Hannan, 33 N.W.2d 74, 77 (Mich. 1948).

64. Michigan Mun. Liab. & Prop. Pool v. Muskegon County Bd. Of Country Rd. Comm'rs, 597 N.W.2d 187, 190 (Mich. Ct. App. 1999) (citing Lorenz v. Ford Motor Co., 483 N.W.2d 844, 847 (Mich. 1992)).

65. *See* 22 MICH. CIV. JUR. STATUTES § 120 (2008) (stating in the alternative that "statutes must be construed to prevent absurd results, injustice or prejudice to the public interest") (citing Muskegon Area Intermediate Sch. Dist., 343 N.W.2d 579 (Mich. Ct. App. 1983) (citing also Rafferty v. Markovitz, 602 N.W.2d 579 (Mich. Ct. App. 1983))); MacQueen v. City Comm'n of City of Port Huron, 160 N.W. 627 (Mich. 1916); Kubick v. Child & Family Serv. of Michigan, Inc., 429 N.W.2d 881 (Mich. Ct. App. 1988); Santia v. Bd. of State Canvassers, 391 N.W.2d 504 (Mich. Ct. App. 1986).

66. *See* 22 MICH. CIV. JUR. STATUTES § 120 (citing Folkerts v. Powers, 3 N.W. 857 (Mich. 1879); Detroit Automobile Inter. Ins. Exch. v. Felder, 287 N.W. 364 (Mich. Ct. App. 1979)); *see also* Fidelity Ins. & Guar. Co. v. Michigan Catastrophic Claims Ass'n, 731 N.W.2d 481, 491-92 (Mich. Ct. App. 2007) (courts will not apply the "absurd and unjust results" doctrine to reach a result at odds with the plain language of the statute, and courts may not second-guess the wisdom of legislation).

Achieving precision in the interpretation of statutory language and in the execution of statutory commands is arguably more important in the context of workers' compensation law than it is in other fields, given the exclusivity of remedy that the statute demands.[67] As the Supreme Court of Michigan has stated: "The workmen's compensation law is a departure, by statute, from the common law, and its procedure provisions speak all intended upon the subject. Rights, remedies, and procedure thereunder are such and such only as the statute provides."[68] The court has also noted the "longstanding respect that this Court has afforded to the careful balance crafted by the people's representatives in the WDCA: '[T]he WDCA is in derogation of the common law, and its terms should be literally construed without judicial enhancement.'"[69] For these reasons, it is imperative that the courts, when reviewing the decisions of the Workers' Compensation Commission, strictly construe them so as to carry out the clear legislative intent, without modifying the express terms of the statute.

In terms of the WDCA, the statutory language is abundantly clear on the matter. The relevant discovery provision states that the "worker's compensation magistrate at the hearing of the claim shall make such inquiries and investigations *as he or she considers necessary.*"[70] The clear, distinct, and unequivocal meaning of "as he or she considers necessary" does not dictate the majority's holding in *Stokes* that the employer's expert "*must* be permitted to interview the claimant and present the employer's own analysis or assessment."[71] There is no plain meaning interpretation of the statutory language that yields this new "right" to discovery found by the majority. As Justice Cavanaugh writes in his dissenting opinion, "[t]he legislature knows how to require discovery when it wants to. It did so regarding medical information."[72]

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67. *See, e.g.*, MICH. COMP. LAWS ANN. § 418.131(1) (West 1999). The statute provides that "the right to the discovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." *Id.* The only exception to this rule is when there is an intentional tort. *Id.*

68. Paschke v. Retool Indust., 519 N.W.2d 441, 445 (Mich. 1994).

69. *Stokes*, 750 N.W.2d at 148 (Cavanaugh, J., dissenting) (citing *Paschke*, 519 N.W.2d at 445).

70. MICH. COMP. LAWS ANN. § 418.851 (West 1999) (emphasis added).

71. *See Stokes*, 750 N.W.2d at 140 (emphasis added).

72. *Id.* at 153 (Cavanaugh, J., dissenting). Here, Justice Cavanaugh is speaking of M.C.L.A. § 418.385, which states:

> After the employee has given notice of injury and from time to time thereafter during the continuance of his or her disability, if so requested by the employer or the carrier, he or she shall submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, furnished and paid for by the employer or the carrier. If an examination

However, it "did not [do so] regarding a transferable-skills analysis or *any other form of discovery* related to a claimant's qualifications and training."[73] The majority clearly erred in holding that employers have a right to discovery, and the court ran afoul of the principle that the courts "cannot write into the statutes provisions that the legislature has not seen fit to enact."[74] Further, the applicable discovery provisions in the WDCA do not lead to an absurd result. The only absurdity is that the *Stokes* court deemed it necessary to insert its own language into a carefully crafted piece of legislation.

2. Case Law

The *Stokes* majority's reliance on *Boggetta v. Burroughs Corp.*[75] in its holding that employers have a right to discovery is also misplaced. As the dissent in *Stokes* made apparent, the Michigan Supreme Court disposed of the *Boggetta* case on jurisdictional grounds, making its comments on the scope of discovery merely dicta.[76] Further, the opinion in *Boggetta* "stated that its advisory comments were grounded 'by the statute quoted in the appeal board's ruling.'"[77] The statute in place at the time of the court's ruling in *Boggetta*, however, was substantially different from the current discovery provision in the WDCA.[78] The

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relative to the injury is made, the employee or his or her attorney shall be furnished, within 15 days of a request, a complete and correct copy of the report of every such physical examination relative to the injury performed by the physician making the examination on behalf of the employer or the carrier. The employee shall have the right to have a physician provided and paid for by himself or herself present at the examination. If he or she refuses to submit himself or herself for the examination, or in any way obstructs the same, his or her right to compensation shall be suspended and his or her compensation during the period of suspension may be forfeited. Any physician who makes or is present at any such examination may be required to testify under oath as to the results thereof. If the employee has had other physical examinations relative to the injury but not at the request of the employer or the carrier, he or she shall furnish to the employer or the carrier a complete and correct copy of the report of each such physical examination, if so requested, within 15 days of the request. If a party fails to provide a medical report regarding an examination or medical treatment, that party shall be precluded from taking the medical testimony of that physician only. The opposing party may, however, elect to take the deposition of that physician.

MICH. COMP. LAWS ANN. § 418.385 (West 1999).

73. *Stokes*, 750 N.W.2d at 153 (Cavanaugh, J., dissenting).

74. *See* Passeli v. Utley, 282 N.W. 849, 851 (Mich. 1938).

75. 118 N.W.2d 980 (Mich. 1962).

76. *Stokes*, 750 N.W.2d at 153.

77. *Id.* (quoting *Boggetta*, 118 N.W.2d at 982).

78. *Id.*

former statute provided that "the member or deputy member of the commission assigned to any hearing in accordance with the provisions of [former MCL 413.7] shall make such inquiries and investigations as it shall deem necessary."[79] The Michigan Legislature later repealed and replaced this statute with the current discovery statute, MCL Section 418.851, which itself underwent subsequent revision to bring it to its current form.[80] Since the legislature has altered the former statute, "the amended language appears to call into question even the limited advisory holding of *Boggetta*."[81] Therefore, the *Stokes* majority's new discovery ruling cannot be said to properly rely on precedential case law, and is therefore further in error when it "*compels* discovery between the parties, which the act does not expressly allow," and "strips the statutorily mandated discretion of the magistrate."[82]

It is therefore readily apparent that the new discovery provisions mandated in the *Stokes* opinion are supported neither by statutory command nor binding precedential authority. The majority's reliance on the statute and on the *Boggetta* opinion are clearly in error, and in so holding, the Court simply inserted into the clear statutory language its own judicially-created right.

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79. *Id.* (quoting MICH. COMP. LAWS ANN. § 413.8 (West 2007)).

80. *Id.* at 153-54.

81. *Id.* at 154. At least one dissenting opinion from the Workers' Compensation Appellate Commission shares in Justice Cavanaugh's view that the *Stokes* majority's opinion is neither mandated nor supported by *Boggetta*. *See, e.g.,* RONCHON, 14 MICHIGAN WORKERS' COMP. LAW REP. ¶ 1135. In the dissenting opinion, Commissioner Pryzbylo wrote:

> Some limited discovery, under the unique circumstances of a death case, may occur according to *Boggetta*, supra. However, the practical necessity of a limited number of interrogatories cannot reasonably extend to permit 200 interrogatories and further requests for production of documents. The *Boggetta* case explained that five interrogatories aimed at discovering the cause of a worker's death did not circumvent the Legislature's intent for no formal discovery in worker's compensation cases. No portion of that decision remotely suggests that death cases enjoy special status which evokes an immediate right to full discovery privileges. The restraint evidences judicial appreciation for the separation of powers and the Legislature's sovereignty to decide such matters. Moreover, it honors the agreement of labor and management groups that the monetary and temporal expenditures of discovery outweigh any benefit.

Id.

82. *Stokes*, 750 N.W.2d at 154 (Cavanaugh, J., dissenting).

B. The New Discovery Rights Frustrate the Purposes of the Worker's Disability Compensation Act

Apart from the clear overreaching from statutory language, and the improper reliance on *Boggetta*, the *Stokes* majority's decision frustrates some of the chief aims of workers' compensation generally. It does so by infringing on the brevity of proceedings, the cost-effectiveness of the remedy, and the attractiveness of using workers' compensation as a way to avoid the ills of litigation. These concepts are all significantly intertwined, and are vital to the effectiveness of the workers' compensation remedy.

Sanctioning mandatory discovery seriously infringes on the brevity of proceedings. In workers' compensation cases, it is imperative that the magistrates have discretion over the type of discovery permitted, as they are the sole disinterested party in the matter. As a general proposition, when any litigant has the power to delay proceedings and burden the other party with unnecessary discovery requests in the hope that they will become frustrated and consider settlement to be a more viable option than continued litigation, it is likely that it will take advantage of this power. Under the authority of the discovery provision in the WDCA before *Stokes*, a magistrate had the ability to seriously curtail this tendency by requiring discovery only as he or she felt was necessary to fairly decide the claim. Eliminating this discretion seriously undermines the important purposes of workers' compensation remedies.[83] In doing so, the majority in *Stokes* "exercise[d] its creativity, in opposition to the purposes of the act, at the risk of injured workers."[84] The majority opinion, written by Justice Markman, vigorously disagreed on this point.[85] However, the dissent in *Stokes* is spot on when it asserts that the

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83. *See* U.S. CHAMBER OF COMMERCE, *supra* note 25.

84. *Stokes*, 750 N.W.2d at 157 (Cavanaugh, J. dissenting).

85. *Id.* at 142 n.4. The majority stated:

> The procedures set forth in this opinion are more consistent with *Sington* than the procedures of the Court of Appeals, and *Sington* is more consistent with the statute than is *Haske*. Moreover, it must be said, although it does not influence this opinion, that the procedures set forth here will almost certainly lead to a far more efficient use of human and economic resources in Michigan than the procedures introduced by this Court in *Haske*. Injured employees who are able to continue to work will be encouraged to do so instead of having their skills wasted, workers' compensation costs will be reduced for employers, and the competitiveness of Michigan as a workplace with other states will be enhanced. Not only does the dissent misconstrue these observations by ignoring our prefatory language, [citations omitted], but one cannot help but glean from the dissent a sense that it is somehow better that a person who, while unable to perform Job A as a result of a workplace injury, could perform Job B at an

majority's decision "improperly adds to the burden and expense of injured workers seeking compensation for work-related injuries."[86]

C. Discovery in Workers' Compensation Claims Should be Greatly Restricted

To what extent *should* discovery be allowed in workers' compensation proceedings? It is this author's opinion that the historical underpinnings and the purposes underlying the creation of the remedy should bear most heavily. Any determination on the proper scope of discovery, therefore, should reflect that legislatures created workers' compensation "to provide financial and medical benefits to victims of work connected injuries in an efficient, dignified, and certain form."[87] Any deviation from this seemingly simple purpose serves only to frustrate the aims of workers' compensation and eliminate its benefits to workers as a statutorily mandated alternative to civil litigation.

> equivalent compensation should be encouraged not to do so, thereby imposing higher workers' compensation costs on his employer. To what conceivable end?

Id.

86. *Id.* at 158 (Cavanaugh, J., dissenting). It is also worth noting that the standards defining "disability" have been changing constantly, also burdening workers' compensation claimants. *See* Alfano v. Sysco Corp., 2009 WL 473444 (Mich. Work. Comp. App. Comm.). In *Alfano*, the WCAC noted:

> The multiple changes in legal standards concerning disability created an impossible situation for litigants. They could not make an informed decision about the evidence to introduce at the hearing. Under Haske v Transport Leasing, Inc., Indiana, 455 Mich 628 (1997), the decisions were simple. Plaintiff introduced proof that he could not perform any single job and proof that his injury caused his wage loss. Then, defendant introduced proofs that plaintiff could perform other jobs. *Sington* changed that, but did not create a clear mandate about what proofs would satisfy the new standard. Since *Sington*, the parties have been subject to a constantly changing mandate. In short, we keep moving the target. In some cases, the standard changed three times between plaintiff's filing and the actual hearing. In fact, the Supreme Court addressed the inconsistent application of the *Sington* standard in its *Stokes* decision. These constant changes prevent a fair process and require a remand in almost every case.

Id. at 2. Fredie Stokes himself, the Plaintiff in the *Stokes* case, has been through difficult times in his decade-long path through multiple appeals and lengthy litigation resulting from his disability. *See* Chris Christoff, *Man's struggle for workers comp brings tough changes: Experts say it'll be harder to get help*, DETROIT FREE PRESS, Jan. 25, 2009, *available at* 2009 WLNR 1450953 (detailing Mr. Stokes' personal hardships and the *Stokes* decision's effect on workers' compensation law in Michigan).

87. *Whetro*, 174 N.W.2d at 785.

For these reasons, discovery in workers' compensation should be only as broad as is necessary to properly adjudicate the claim. Certainly, statutory provisions like that of Georgia, which simply import the discovery provisions of civil litigation into workers' compensation, do not serve to promote the efficiency and cost-effectiveness at the heart of workers' compensation.[88] Rather, statutory provisions like that of Colorado, requiring the claimant to show "good cause" for discovery requests, maintain efficiency and adhere more closely to the purposes underlying workers' compensation statutes. Colorado's statute, like Michigan's, allocates the decision-making authority to the magistrate to ensure worker protection from unnecessary discovery requests and lengthy, burdensome proceedings that begin to resemble civil litigation. The courts in Michigan, in seeking to impose the proper scope of discovery in workers' compensation claims, need look no further than the abundantly clear statutory language.

IV. CONCLUSION

Workers' compensation provides vital protection to injured workers, who would otherwise be limited to tort action for their work-related injuries. In crafting the WDCA, the Michigan legislature took great pains to enunciate the procedures and standards that would guide the administrative process. In doing so, it gave the magistrates the power to use their discretion in determining the extent of discovery necessary to fairly decide the claim. However, with the Michigan Supreme Court's ruling in *Stokes*, it is clear that even when faced with clear statutory commands, the court is willing to create new rights for workers' compensation litigants, at the risk of injured workers.

By keeping in mind the historical background and the purposes underlying the creation of workers' compensation remedies, the courts should strictly construe the provisions of the WDCA, and apply them in accordance with their ordinary, plain meaning. In the case of discovery, this entails honoring the legislative command that the magistrate has the power to only make "such inquiries and investigations as he or she considers necessary."[89] It is in the best interest of injured workers to allocate this power to neutral, detached magistrates, rather than parties to the adversarial process whose motives behind seeking voluminous discovery may be less than pure. Hopefully, with changing composition

88. *See* GA. CODE ANN. § 34-9-102(d) (West 2006).
89. MICH. COMP. LAWS ANN. § 418.851 (West 1999).

on the Michigan Supreme Court,[90] the near future will see a reversal of the *Stokes* decision and a restoration of the workers' compensation magistrate's discretionary authority to order discovery as he or she sees fit.

DANIEL J. PHILLIPS

90. On November 6, 2008, Democrat Diane Hathaway was elected to the Michigan Supreme Court, replacing Republican Chief Justice Clifford Taylor. *See* Dawson Bell, *Balance tilts on state Supreme Court: Chief justice's defeat, internal feud weaken GOP bloc*, DETROIT FREE PRESS, Nov. 6, 2008, *available at* 2008 WLNR 21188472. Bell further notes that while the Court still has four Republican justices, Justice Weaver's feud with the other Republicans has led her to split with them on key rulings in recent years. *Id.*