WORKERS' DISABILITY COMPENSATION

MARTIN L. CRITCHELL†

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I. INTRODUCTION

The *Survey* period, between May 23, 2007, and July 30, 2008, is framed by the opinions of the Michigan Supreme Court in the important cases of *Karaczewski v. Farbman Stein & Company*[1] and *Bracket v. Focus Hope, Inc.*[2] It includes the other significant workers'

† Shareholder, Conklin Benham, P.C. B.A., 1973 Western Michigan University; J.D., 1976, Wayne State University. Member, the American Society of Writers on Legal Subjects (The Scribes); The Federalist Society for Law and Public Policy Studies. Contributing author, *Employment Law in Michigan (an employer's guide)* (ICLE 2008); *Michigan Insurance Law and Practice* (ICLE 2002).

1. 478 Mich. 28, 732 N.W.2d 56 (2007). The author was counsel for the defendant-appellant.

2. 482 Mich. 269, 753 N.W.2d 207 (2008).

compensation Supreme Court opinion *Stokes v. Chrysler LLC.*[3] and the orders entered by the Court in the associated cases of *Fahr v. General Motors Corporation*[4] and *Simpson v. Borbolla Construction & Cement Supply Company.*[5] The *Survey* also includes the court of appeals' published opinions in *Rodriguez v. A.S.E. Industries, Inc.*[6] and *Bowman v. R.L. Coolsaet Construction Company.*[7] and the unpublished opinion *Hessel v. Chippewa Regional Correctional Facility.*[8]

These cases are important as each represents *the* exposition of a particular area of workers' compensation law having revisited and rejected or clarified the pronouncements made in deciding prior cases. For example, in the first case included by the *Survey*—*Karaczewski*—the Supreme Court revisited the earlier decisions about Michigan subject-matter jurisdiction when the claim for workers' compensation was based on a personal injury that did not occur in the State—*Roberts v. I.X.L. Glass Company*[9] and *Boyd v. W.G. Wade Shows*[10] that had reaffirmed *Roberts*—and rejected both. *Roberts* was invalidated by a subsequent amendment to the Workers' Disability Compensation Act[11] and *Boyd* was overruled as wrong.[12]

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3. 481 Mich. 266, 750 N.W.2d 29 (2008). The author was counsel for the amicus curiae supporting the defendant-appellant.

4. 478 Mich. 922, 733 N.W.2d 22 (2007).

5. 480 Mich. 964, 741 N.W.2d 519 (2007). The author was counsel for the amicus curiae supporting the defendant-appellant.

6. 275 Mich. App. 8, 738 N.W.2d 238 (2007). The author was counsel for the intervening plaintiff-appellee.

7. 275 Mich. App. 188, 738 N.W.2d 260 (2007). The author was counsel for the defendant-appellee.

8. No. 272179, 2008 WL 2389497 (Mich. Ct. App. June 12, 2008).

9. 259 Mich. 644, 244 N.W. 188 (1932).

10. 443 Mich. 515, 505 N.W.2d 544 (1993).

11. *Karaczewski*, 478 Mich. at 44 n.14, 732 N.W.2d at 65 n.14 ("*Roberts* was *legislatively* abrogated by the 1943 amendments of the workers' compensation act. It is unnecessary for this Court to overrule a decision that has already been overruled by legislative action.").

12. *Id.* at 39, 732 N.W.2d at 62:

> MCL 418.845 plainly grants jurisdiction to the bureau only where the injured employee was a resident of the state at the time of the injury *and* the contract of hire was made in Michigan. Because the *Boyd* Court (1) construed the statute to eliminate the residency requirement and (2) failed to recognize that the Legislature abrogated the *Roberts* decision by making the workers' compensation system mandatory in 1943, we conclude that *Boyd* was wrongly decided.
>
> We discern no basis to conclude that *Boyd* has become so fundamental to expectations that overruling it would produce practical, real-world dislocations.

Id.

In the last case included in the *Survey* period—*Brackett*—the Supreme Court reconsidered the descriptions of employee misconduct that will preclude workers' compensation—*Crilly v. Ballou*[13] and *Daniel v. Department of Corrections.*[14] The court rejected the first as dictum[15] and clarified the other.[16] And in the other significant opinion—*Stokes*—the Supreme Court returned to its disability decision in *Sington v. Chrysler Corp.*[17] and reaffirmed the ruling with a clarifying protocol for proving eligibility for weekly compensation.[18] The other cases that were decided by the Supreme Court and court of appeals also concerned earlier pronouncements that were either rejected as distinguishable or reaffirmed with clarification.

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13. 353 Mich. 303, 91 N.W.2d 493 (1958).

14. 468 Mich. 34, 658 N.W.2d 144 (2003). The author was counsel for amicus curiae who supported the defendant-appellant.

15. *Brackett*, 482 Mich. at 279, 753 N.W.2d at 213 ("The dictum in *Crilly* essentially engrafts a 'moral turpitude' requirement onto § 305. The dictum is thus inconsistent with the plain statutory language, *Detwiler* and *Daniel.* The text of § 305 does not create a sliding scale of 'moral turpitude' that tribunals may assess . . . .").

16. *Id.* ("[T]his Court in *Daniel* rejected the Court of Appeals majority's conclusion . . . that the misconduct did not rise to the level of moral turpitude that was intentional and willful. We held that the plaintiff's repeated acts of sexual harassment were voluntary and went beyond negligence or gross negligence. [T]he same analysis applies here.").

17. 467 Mich. 144, 648 N.W.2d 624 (2004). The author was counsel for the amicus curiae supporting the defendant-appellant.

18. *Stokes*, 481 Mich. at 297-98, 750 N.W.2d at 146-47.

> We reiterate that *Sington* overruled *Haske* and, therefore, that the procedures of the workers' compensation process must reflect his change in the caselaw. . . .
>
> To establish a disability, the claimant must prove a work-related injury *and* that such injury caused a reduction of his maximum wage-earning capacity in work suitable to the claimant's qualifications and training. To establish the latter element, the claimant must follow these steps:
>
> (1) The claimant must disclose all of this qualifications and training;
>
> (2) The claimant must consider other jobs that pay his maximum pre-injury wage to which the claimant's qualifications and training translate;
>
> (3) The claimant must show that the work-related injury prevents him from performing any of the jobs identified as within his qualifications and training; and
>
> (4) If the claimant is capable of performing some or all of those jobs, the claimant must show that he cannot obtain any of those jobs.
>
> If the claimant establishes all these factors, then he has made a prima facie showing of disability satisfying MCL 418.301(4), and the burden of producing competing evidence then shifts to the employer. The employer is entitled to discovery before the hearing to enable the employer to meet this production burden. While the precise sequence of the presentation of proofs is not rigid, all these steps must be followed.

Id.

These cases are also remarkable for having used just one method of decision. The method used was based on a statute that is not part of the Worker's Disability Compensation Act (hereinafter *WDCA*). Rather, the cases relied upon M.C.L. Section 8.3a,[19] commonly known as textualism.[20] This method was plainly used to decide *Karaczewski*.[21] And while less apparent, this method was also used to decide all of the other *Survey* period cases. For example, the foundation for both *Fahr* and *Simpson* was a clarification of the meaning of "personal injury" as originally used in *Rakestraw v. General Dynamics Land System, Inc.*.[22] In *Fahr*, the Court reaffirmed *Rakestraw* by explaining the meaning of the term "medically distinguishable condition."[23] The *Simpson* Court

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19. MICH. COMP. LAWS. ANN. § 8.3a (West 2008). It reads:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

Id.

20. *See, e.g.*, Lesner v. Liquid Disposal, Inc., 466 Mich. 95, 101-02, 643 N.W.2d 553, 556 (2002):

> As we have indicated with great frequency, our duty is to apply the language of the statute as enacted, without addition, subtraction, or modification. We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. In other words, the role of the judiciary is not to engage in legislation.

Id. (citations omitted).

21. *Karaczewski*, 478 Mich. at 32-33, 732 N.W.2d at 59, 64:

> MCL 418.845 is clear and unambiguous. It grants the bureau "jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury *and* the contract of hire was made in this state." The meaning of this provision is straightforward: where the injury occurs outside Michigan, the bureau has jurisdiction only where (1) the injured employee was a resident of Michigan at the time of injury and (2) the contract of hire was made in Michigan. Plainly, the use of the conjunctive term 'and' reflects that *both* requirements must be met before the bureau has jurisdiction over an out-of-state injury. . . .
>
> We are obligated to give effect to the statutory text to serve the fundamental expectation of our citizens that *the law means what it says*. The statute here is written in a plain, straightforward manner. Rather than give effect to this language, the *Boyd* Court nullified the clear policy choice made by the Legislature and thereby undermined the legitimate expectations of Michigan citizens that the courts will carry out the laws *as they are written*.

Id.

22. 469 Mich. 220, 666 N.W.2d 199 (2003). The author was counsel for the defendant-appellant.

23. *Fahr*, 478 Mich. 922, 733 N.W.2d 22 (2007):

> The Workers' Compensation Appellate Commission majority misinterpreted this Court's decision in *Rakestraw v. General Dynamics Land Systems, Inc.*, . . .

also reaffirmed *Rakestraw*, explaining that it was not fact-specific, and could not be distinguished, because an "existing condition" was occupational.[24] *Rakestraw* had also been decided through textualism.[25] Textualism has divided the Supreme Court in deciding the *Survey* period cases, but not the court of appeals.

II. *KARACZEWSKI V. FARBMAN STEIN & COMPANY* AND *ROBERTS V. I.X.L. GLASS COMPANY* AND *BOYD V. W.G. WAD SHOWS* RECONSIDERED

Michigan has subject-matter jurisdiction to decide claims for workers' compensation that are based on a personal injury sustained by an employee in Michigan.[26] And Michigan has subject-matter jurisdiction to decide claims for compensation that are based on an injury sustained by an employee *outside* of Michigan, because the first sentence of M.C.L.A. Section 418.845 states that the Bureau "shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury and the contract of hire was made in this state."[27]

The statute was enacted in 1926[28] in response to the decision in *Crane v. Leonard Crossette & Riley*[29] that the place of the injury did not affect the subject-matter jurisdiction of Michigan because participation in the workers' compensation system was a voluntary choice by the employer and the WDCA was considered a part of the employment contract.[30]

> when it asserted that *Rakestraw* does not require a 'pathological change in a pre-existing condition' in order for a plaintiff to establish that a work-related personal injury has occurred. *Rakestraw* clearly requires a plaintiff who is suffering from a pre-existing condition to show that his condition has caused an injury that is medically distinguishable from the progression of an underlying pre-existing condition. This cannot be done merely by showing a worsening of symptoms. Rather, to demonstrate a medically distinguishable change in an underlying condition, a claimant must show that the pathology of that condition has changed.

Id.

24. *Simpson*, 480 Mich. 964, 741 N.W.2d 519 (2007) ("[T]he Court of Appeals . . . erroneously held that *Rakestraw* . . . does not apply to the facts of this case.").

25. *Rakestraw*, 469 Mich. at 224, 666 N.W.2d at 202 ("In interpreting a statute, our obligation is to discern the legislative intent that may reasonably be inferred from the words actually used in the statute. . . . [W]ords used by the Legislature must be given their common, ordinary meaning.").

26. *See* 1921 Mich. Pub. Acts 173.

27. MICH. COMP. LAWS ANN. § 418.845 (West 2008).

28. *See* 1921 Mich. Pub. Acts 173.

29. 214 Mich. 218, 183 N.W. 204 (1921).

30. *See Karaczewski*, 478 Mich. at 33, 732 N.W.2d at 59.

In the 1932 decision, *Roberts v. I.X.L. Glass Co.*, the Court actually expunged the text, "a resident of this state at the time of the injury."[31] The reason was to avoid a conflict with another statute in the WDCA that said that the WDCA established the rights of an employee with no mention of residence.[32] *Roberts* effectively meant that Michigan had subject-matter jurisdiction to consider a claim for workers' compensation based on an extra-territorial injury with one circumstance—hiring in Michigan—not the two circumstances set forth in the first sentence of Section 845.[33]

The Supreme Court revisited the ruling in *Roberts* in *Boyd v. W.G. Wade Shows*.[34] The court reaffirmed *Roberts* because there had been no response by the Legislature to amend the first sentence of Section 845 for more than fifty years afterwards, which suggested application of the judicial canon commonly known as "legislative acquiescence and substantial reliance," which implicated the rule of stare decisis.[35]

The court revisited *Roberts* and *Boyd* in *Karaczewski*. The likely reason for this was the strong criticism of the method for deciding *Boyd*—legislative acquiescence—that was expressed in a post-*Boyd* case, *Donajkowski v. Alpena Power Co.*[36] and the facts (which were stipulated) involved the same situation of an employee who had been *hired* in Michigan, but did not *reside* in Michigan when injured outside of Michigan.[37]

The court held that Michigan only had subject-matter jurisdiction to hear a claim for workers' compensation based on an injury outside of Michigan when an employee was *both* hired in Michigan *and* a resident of Michigan when injured.[38] The basis for this was the associative conjunction "and" in the first sentence of Section 845.[39]

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31. *Roberts*, 259 Mich. at 647, 244 N.W. at 189-90.

32. *Karaczewski*, 478 Mich. at 34, 732 N.W.2d at 59.

33. *See Roberts*, 259 Mich. 64, 244 N.W. 188.

34. 443 Mich. 515, 505 N.W.2d 544.

35. *Id.* at 525, 505 N.W.2d at 548.

36. 460 Mich. 243, 261, 597 N.W.2d 574, 583 (1999) ("'Legislative acquiescence' is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence.").

37. *Id.*

38. *Id.*

39. *Karaczewski*, 478 Mich. at 33, 732 N.W.2d at 59:

> [W]here the injury occurs outside Michigan, the bureau has jurisdiction only where (1) the injured employee was a resident of Michigan at the time of the injury and (2) the contract of hire was made in Michigan. Plainly, the use of the conjunctive term 'and' reflects that *both* requirements must be met.

Id.

The *Roberts* ruling was reconsidered and dismissed as inoperative because of the 1943 amendment that made the WDCA compulsory instead of elective by an employer when *Roberts* was decided.[40] The reconsideration of *Roberts* was comprehensive.[41] The Court surveyed the decisions before and after *Roberts* as well as the case itself[42] and accurately observed that before the case of *Boyd* "two [s]upreme [c]ourt holdings and six [c]ourt of [a]ppeals holdings left no doubt that . . . MCL 418.845 [was] incontrovertibly the law."[43]

The *Boyd* ruling was overruled.[44] *Boyd* was criticized for expunging the residency requirement; *Roberts* was not binding authority after 1943. The Court noted: "Because the *Boyd* Court (1) construed the statute to eliminate the residency requirement and (2) failed to recognize that the Legislature abrogated the *Roberts* decision by making the workers' compensation system mandatory in 1943, we conclude that *Boyd* was wrongly decided."[45]

The Court also emphasized the impracticality of applying the canon of legislative acquiescence by referring to the dissenting opinion by Justice Riley in *Boyd*.[46] During argument, counsel said that it would be difficult to amend the first sentence of Section 845 to repudiate *Roberts* and include residency when already in the statute.[47] The only possibility was adding a subsection actually naming *Roberts* and declaring that it was wrong.[48]

The Court said that the ruling applied to all cases except those in which there was already a final order.[49] The reason for this was the rejection of prospective application as a legislative function.[50]

This decision by the Court in the case of *Karaczewski* should be the definitive exposition of the subject of subject-matter jurisdiction over

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40. *Id.* at 38, 732 N.W.2d at 61-62. ("[T]he Legislature had, responding to *Roberts*, repealed the section (§ 8412) that had caused the predecessor of MCL 418.845 to be inoperable.").

41. *Id.*

42. *Id.* at 33-37, 732 N.W.2d at 59-61.

43. *Id.* at 37, 732 N.W.2d at 61.

44. *See id.* at 38, 732 N.W.2d at 62.

45. *Karaczewski*, 478 Mich. at 39, 732 N.W.2d at 62.

46. *Id.* at 38 n.11, 732 N.W.2d at 62 n.11.

47. *Id.*

48. *Id.*

49. *Id.* at 44 n.15, 732 N.W.2d at 65, n.15 ("[O]ur holding in this case shall apply to all claimants for whom there has not been a final judgment awarding benefits as of the date of this opinion.").

50. *Id.* ("[P]rospective application is, essentially, an exercise of the legislative power to determine what the law shall be for all *future* cases, rather than an exercise of the judicial power to determine what the existing law is and apply it to the case at hand.").

claims to compensation by employees injured outside of Michigan in view of the comprehensive survey and analysis for the WDCA and the case law spanning some seventy-five years. The dissenting opinions offer no basis for ever returning. Justice Weaver agreed that the ruling in the case of *Boyd* was wrong and should be overruled.[51] She only disagreed with the scope of the application, and would have allowed *Boyd* to apply to cases involving an injury sustained on and after the release of *Karaczewski* on May 23, 2007.[52]

Justice Kelly disagreed with the repudiation of *Roberts* and *Boyd* because of the failure of the Legislature to "reenact or amend any precursor to, or the current version of, MCL 418.845 in response to this Court's decision in *Roberts* or *Boyd*."[53] The problem with this observation is that it is important only with the application for the judicial canon of legislative acquiescence, which is not a reliable principle in view of M.C.L. Section 8.3a. And Justice Kelly never explained what amendment could have been enacted to effect a repudiation.[54]

There is a practical consideration for employers after *Karaczewski*. Employers who have workers' compensation insurance through the assigned risk pool only have compensation insurance for claims brought in Michigan. Thus, a claim that would have been insured before *Karaczewski* may not be insured afterwards and expose the employer to direct liability for compensation or penalties for lack of compulsory insurance in the state in which an employee was hurt.

III. *FAHR V. GENERAL MOTORS CORPORATION*: WHAT *RAKESTRAW* MEANT

To decide *Rakestraw*, the Supreme Court described personal injury as set forth in the first sentence of M.C.L. Section 418.301(1), which states, "[a]n employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act."[56] A "personal injury" was a condition that was "medically distinguishable from a preexisting nonwork-related condition."[57] And a

51. *Karaczewski*, 478 Mich. at 45, 732 N.W.2d at 65 (Weaver, J., concurring in part and dissenting in part).

52. *Id.* at 45-46, 732 N.W.2d at 65-66 (Weaver, J., concurring in part and dissenting in part) ("[P]rospective application is appropriate here.").

53. *Id.* at 47, 732 N.W.2d at 66 (Kelly, J., dissenting).

54. *Id.* at 46-63, 732 N.W.2d at 66-75.

56. MICH. COMP. LAWS. ANN. § 418.301(1) (West 2008).

57. *Rakestraw*, 469 Mich. at 222, 666 N.W.2d at 201 ("We hold that a claimant attempting to establish a compensable, work-related injury must prove that the injury is

personal injury was not the symptoms of some existing condition that occurred because of work.[58]

After the *Rakestraw* ruling, arguments arose. Some said that a "medically distinguishable condition" meant a change in the pathology of an existing condition.[59] This argument was based on the ratification of the principle expressed in several earlier cases[60] that an injury was something more than the manifestation of symptoms[61] and on the statement that "[i]t is the responsibility of the Legislature, not this Court, to alter the language of the statute and relieve a plaintiff's evidentiary burden in those cases where the pathological basis of the symptom is difficult to ascertain."[62] Others said that symptoms could be evidence of an injury even though there was no medical test that confirmed that a change in pathology occurred.[63] This was based on the declaration in *Rakestraw* that "[a] symptom such as pain is *evidence* of injury, but does not, standing alone, conclusively establish the statutorily required causal connection to the workplace."[64] These arguments were not resolved by the WCAC.[65] Indeed, the Commission would accept one or another of these arguments to affirm an award or a denial of a claim.[66]

The Court ended this argument by clarifying what was meant by a "medically distinguishable condition" in *Fahr*.[67] The Court directly and

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medically distinguishable from a preexisting nonwork-related condition in order to establish the existence of a 'personal injury' under section 301(1).").

58. *Id.* at 231, 666 N.W.2d at 205 ("[E]vidence of a symptom is insufficient to establish a personal injury . . . .").

59. *See Fiegel v. Rich-Lo Dairy*, No. 04-0429 (Mich. Work. Comp. App. Comm. July 20, 2006), *available at* http://www.dleg.state.mi.us/ham/wcac/06pdfb/14640429.pdf (last visited Feb 18, 2009).

60. *See* McKissack v. Comprehensive Health Servs. of Detroit, 447 Mich. 57, 523 N.W.2d 444 (1994); Farrington v. Total Petrol., Inc., 442 Mich. 201, 501 N.W.2d 76 (1993); Miklik v. Mich. Special Mach. Co., 415 Mich. 364, 329 N.W.2d 713 (1982); Kostamo v. Marquette Iron Mining Co., 405 Mich. 105, 274 N.W.2d 411 (1979). The author was counsel for either a defendant-appellant or an amicus curiae who supported the defendant-appellant in these cases.

61. *Rakestraw*, 469 Mich. at 228, 666 N.W.2d at 204 ("[S]everal cases from this Court have articulated the principle that . . . the claimant must establish the existence of a work-related injury that extends 'beyond the manifestation of symptoms' of the underlying condition.").

62. *Id.* at 233 n.11, 666 N.W.2d at 206 n.11.

63. *See Fahr v Gen. Motors Corp.*, No. 05-0326 (Mich. Work. Com. App. Comm. June 26, 2006), *available at* http://www.dleg.state.mi.us/ham/wcac/06pdfa/10750326.pdf (last visited Feb, 18, 2009).

64. *Rakestraw*, 469 Mich. at 230-31, 666 N.W.2d at 205.

65. *See, e.g.*, William Nole Evans, *Michigan Workers' Compensation in the Aftermath of Sington and Rakestraw*, 51 WAYNE L. REV. 507 (2005).

66. *See id.*

67. *Fahr*, 478 Mich. 922, 733 N.W.2d 22.

bluntly ended the argument by saying that a "medically distinguishable condition was a change in pathology and was not a change in the symptoms.[68] The Court stated that, "*Rakestraw* clearly requires a plaintiff who is suffering from a pre-existing condition to show that his work has caused an injury that is medically distinguishable from the progression of an underlying pre-existing condition. This cannot be done merely by showing a worsening of symptoms."[69]

This clarification affected the portion of *Rakestraw* that had said that the symptoms of an existing condition could be evidence. The Court simply emphasized that part of the statement that this was not enough "standing alone."[70] More was needed. And that is the confirmation of a change in pathology by a qualified medical expert.[71]

With *Fahr* clarifying the *Rakestraw* decision, the Court effectively requires an employee to secure a diagnosis of pathological change. This may require a diagnosis of current physical or mental status, and a review of all prior medical opinions and records from which a comparison would reveal any change in pre-existing pathology.

IV. *SIMPSON V. BORBOLLA CONSTRUCTION & CEMENT SUPPLY COMPANY*: WHEN *RAKESTRAW* APPLIES

The case of *Rakestraw* involved a particular situation. E. Wayne Rakestraw had an existing condition that became painful at work.[72] This existing condition itself was non-occupational.[73] This was of concern.[74] Among the first questions during argument was one about applying the rule when an employee had an occupational injury or illness, resumed work, and then experienced disabling symptoms but no change in the existing, occupational condition.[75] The Court appeared satisfied with the

68. *Id.* ("[T]o demonstrate a medically distinguishable change in an underlying condition, a claimant must show that the pathology of that condition has changed.").

69. *Id.*

70. *Id.*

71. *Id.*

72. *Rakestraw*, 468 Mich. at 222, 666 N.W.2d at 201.

73. *Id.* at 223, 666 N.W.2d at 201-02.

74. *Id.* at 222-23, 666 N.W.2d at 201-02.

75. Transcript of Oral Argument at 3, *Rakestraw*, 469 Mich. 220 (2003) (No. 10):

JUSTICE TAYLOR: If a person has an injury on Job 1 and is out for comp for 1 and goes to Job 2, proceeds along fairly well and then just has symptoms at Job 2 and can't continue at Job 2, is that person out-of-luck in terms of comp?

MR. CRITCHELL: No. In that situation you've described you have a person who is an employee. Have they had a personal injury in your example? Yes. You would go to the next level of inquiry—"arising out of and in the course of employment"—and in your example, there has been. They returned to work

answer—the claim was against the first employer as that was when the personal injury occurred, and the benefits started when the symptoms occurred, as that was when disability occurred—because there was no further colloquy and the recitation of the facts did not say whether the existing condition was occupational.[76] However, the fact that the existing condition was non-occupational was included in the holding about what constituted a "personal injury."[77]

The reference to an existing non-occupational condition in the specific holding, and the fact that the non-occupational illness was involved in all of the authorities that the court reaffirmed, led to speculation that *Rakestraw* was fact-specific and could not apply when an employee had an existing occupational injury or illness that became symptomatic during later employment.[78] And the court of appeals said so in deciding *Simpson v. Borbolla Construction & Cement Supply Co.*[79]

The pronouncement about when *Rakestraw* applied had two serious implications. The first implication was that there were two different rules for understanding the single term "personal injury." One rule—*Rakestraw*—applied when an existing condition was itself non-

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> and have more pain; the pain is disabling that might allow them weekly benefits . . . but personal injury is this amiable stick. But the pain will be disabling but the personal injury will signal who pays. And you would go down and see "by an employer subject to this Act at the time of the personal injury."
> JUSTICE TAYLOR: So in our hypothetical the claimant would make a claim against the first employer.
> MR. CRITCHELL: Exactly correct.

Id.

76. *Rakestraw*, 469 Mich. at 222, 666 N.W.2d at 201. ("The facts in this case are not contested. At the time plaintiff began working for defendant in 1996, he had a preexisting neck condition that was asymptomatic. According to plaintiff, his work for defendant caused his neck pain to return and increase.").

77. *Id.* ("We hold that a claimant attempting to establish a compensable, work-related injury must prove that the injury is medically distinguishable from a preexisting non-work-related condition . . . .").

78. *See generally*, Evans, *supra* note 65 at 533-35.

79. 274 Mich. App. 40, 46, 731 N.W.2d 447, 451 (2007) *vacated*, 480 Mich. 964, 741 N.W.2d 519 (2007). The court explained:

> In *Rakestraw*, the plaintiff's preexisting condition was not work-related, whereas in the instant case, plaintiff's initial left wrist injury occurred during the course of his employment as an ironworker in 1979. Therefore, the instant case is not like *Rakestraw*, where an employee attempted to establish a compensable injury by relying on symptoms that could be attributed to the progression of a preexisting condition unrelated to work. This distinction is of great import, as the focus of *Rakestraw* was clearly on causation, i.e., whether the plaintiff's injury arose out of and in the course of employment.

Id.

occupational and the other—*Simpson*—applied when the existing condition was sustained at an earlier job.[80]

The other problem was determining what the rule of *Simpson* actually *was*. The court of appeals said that *Rakestraw* was not the rule,[81] but then failed to announce what rule *did* apply. The symptoms-only rule that predated *Rakestraw* could not apply, as the court had unambiguously overruled *Carter v. General Motors Corp.*[82] and all its progeny, including *Laury v. General Motors Corp.*,[83] *Mattison v. Pontiac Osteopathic Hospital*,[84] *Rakestraw*,[85] and *Rowland v. Washtenaw County Road Commission*.[86]

It was the limiting of the *Rakestraw* case and the two implications that led the Supreme Court to revisit its ruling.[87]

The Court decided that *Rakestraw* applied when the employee had an existing condition from one job, returned to work, had problems, and claimed compensation from a subsequent employer.[88] Plainly, the Court clarified that the *Rakestraw* ruling that required a change in the pathology of an existing condition applied when the existing condition was itself non-occupational (*Rakestraw*) or was occupational (*Simpson*).[89] Essentially, *Rakestraw* applied to any claim of personal injury under the first sentence of Section 301(1) and was not fact-specific.[90]

The repudiation of the court of appeals' pronouncement was also important because it established that the focus of the *Rakestraw* ruling was only on what constituted a "personal injury," and *not* what was "arising out of and in the course of employment" (causation).[91]

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80. *Id.*

81. *See id.* ("[T]he factual distinctions between *Rakestraw* and the case at bar are significant, such that *Rakestraw* is simply inapplicable.").

82. 361 Mich. 577, 106 N.W.2d 105 (1960).

83. 207 Mich. App. 249, 523 N.W.2d 633 (1994).

84. 242 Mich. App. 664, 620 N.W.2d 313 (2000).

85. 469 Mich. at 229-30. 666 N.W.2d at 204-05 ("*Carter* should not be read to support the holding that mere symptom aggravation, without a change in pathology, constitutes a 'personal injury' . . . To the degree that the court of appeals hold otherwise, they are overruled.").

86. 477 Mich. 197, 731 N.W.2d 41 (2007) (Markman, J., concurring).

87. *Simpson*, 480 Mich. at 964, 741 N.W.2d at 519.

88. *Id.* (citation omitted) ("[W]e vacate the opinion of the Court of Appeals because the panel erroneously held that *Rakestraw* . . . does not apply to the facts of this case.").

89. *Id.*

90. *Id.*

91. *Id.*

V. *STOKES V. CHRYSLER LLC*: PROVING DISABILITY WITH *SINGTON*

The Supreme Court revisited the *Sington* disability[92] decision in *Stokes*. There were two reasons for this. One was the valid concern that the WCAC was reporting that *Sington* had overruled the earlier *Haske v. Transport Leasing, Inc.*[93] decision. The Commission properly elaborated the *Sington,* criteria, but then reverted to an analysis that the *Sington* Court had explicitly repudiated.[94] This was a valid concern. The Commission had accurately reported the overruling of the analysis of *Haske* and properly expounded on the analysis of *Sington,* but then decided the immediate case by the repudiated criteria.[95]

The other reason for revisiting *Sington* was the court of appeals' decision that the absence of evidence about other jobs that were available could prove disability.[96] This, too, was a valid concern. The court of appeals had said that an employee had a disability when proving the inability to resume some job *actually performed in the past* unless the employer proved there was some other, real job that was available.[97] The

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92. The first sentence of MICH. COMP. LAWS. ANN. § 418.301(4) (West 2008) defines "disability" qualifying an injured employee for weekly compensation. It states: "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." *Id.*

93. 455 Mich. 628, 566 N.W.2d 896 (1997). The author was counsel for an amicus curiae who supported the defendant-appellant.

94. *Stokes*, 481 Mich. at 276, 750 N.W.2d at 135. ("[The] opinions [of the Commission] have not always been consistent in their application of the *Sington* standard. There is a tendency to properly set forth the *Sington* standard, but then to apply the standard in a manner that effectively constitutes a reversion to *Haske*.").

95. *Id.* at 281-85, 744 N.W.2d at 138-40. This may have happened because counsel did not present any evidence from which to actually determine any of the criteria other than injury, loss of actual wages, and a relationship between the two, which was the standard of *Haske*. This may have also happened because the Commission was hostile to the implications that a physically-impaired employee could not receive weekly compensation while unemployed.

96. Stokes v. Daimler Chrysler Corp., 272 Mich. App. 571, 290, 727 N.W.2d 637, 648 (2006) ("By finding that claimant had met his burden of proof under *Sington*, in the absence of evidence concerning other jobs for which he might have been qualified, the court of appeals suggested strongly that the burden of proof of showing the existence of such jobs is on defendant.").

97. *Stokes*, 272 Mich. App. at 590, 727 N.W.2d at 648. The Court explained:

> When the employee is disabled from performing all the jobs that the employee has performed or that are within his qualifications and training, the *Sington* standard is met, and unless the employer shows . . . there are real jobs within the employee's qualifications and training that pay the maximum wage, disability is established.

Id.

Court was also concerned with access to an assessment of the employee's qualifications.[98] The court of appeals said that the employer had no right to have a qualified vocational counselor interview the employee to determine his or her particular aptitudes.[99] That was a judgment left to the discretion of a magistrate.[100] The Supreme Court reaffirmed the disability analysis that had been expressed in *Sington* and elaborated on how that analysis must proceed, stating:

> The claimant must show more than a mere inability to perform a previous job. Rather, to establish a disability, the claimant must prove a work-related injury *and* that such injury caused a reduction of his maximum wage-earning capacity in work suitable to the claimant's qualifications and training. To establish the latter element, the claimant must follow these steps:
>
> (1) The claimant must disclose all of his qualifications and training;
>
> (2) the claimant must consider other jobs that pay his maximum pre-injury wage to which the claimant's qualifications and training translate;
>
> (3) the claimant must show that the work-related injury prevents him from performing any of the jobs identified as within his qualifications and training; and
>
> (4) if the claimant is capable of performing some or all of those jobs, the claimant must show that he cannot obtain any of those jobs.

If the claimant establishes all these factors, then he has made a prima facie showing of disability satisfying M.C.L. Section 418.301(4).[101]

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98. *Id.* at 595, 727 N.W.2d at 651.

99. *Id.*

100. *Id.* ("[I]t does not automatically follow that defendant is entitled to have its vocational expert interview plaintiff. What form of discovery is necessary to enable a defendant to investigate an employee's qualifications and training . . . is a matter for the magistrate's discretion.").

101. *Stokes*, 481 Mich. at 297-98, 744 N.W.2d at 146-47. These elements are all strictly necessary. The Court explained that "while the precise sequence of the presentation of proof is not rigid, all these steps must be followed." *Id.* at 298, 744 N.W.2d at 147.

Stokes completed *Sington*. While the *Sington* Court had merely said what was *in*adequate proof of a disability,[102] the *Stokes* Court affirmatively stated what was *adequate* proof, and who is responsible for that evidence.[103]

The foundation for the *Stokes* decision had been the statutory text itself. The first sentence of Section 301(4) describes disability using the term, "a limitation of wage-earning capacity."[104] The Court explained:

> *Sington* requires nothing more than the kind of inquiry in which any reasonable person would engage if he became injured *outside* the workplace and could no longer perform his job. Such a person would naturally inquire, 'Is there another job in which I am employable at a similar wage?' Because the dissent considers this too onerous a burden, it would simply read out of the statute any obligation of the claimant to demonstrate a *limitation* or *reduction* in his wage earning capacity.[105]

The Court also noted that the second sentence of M.C.L. Section 418.851 assigns the burden of proof to a *claimant,* not an employer.[106]

Finally, the *Stokes* Court ruled that an employer had the right to have an injured employee interviewed by a qualified vocational counselor to determine his remaining employment options, stating that an employer is "*entitled* to discovery before the hearing to enable it to meet its burden of coming forward with evidence to rebut [a] claimant's claim of disability."[107]

The ruling applies to all cases other than those that were already adjudicated. There is no question about retroactivity as there was in *Karaczewski,* because the existing case law—*Sington*—was affirmed, not overruled.[109] Certainly, the *Stokes* Court did not limit the application of its ruling.[110] Thus, the *Stokes* decision affects both disability disputes on

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102. *Sington*, 467 Mich. at 155, 648 N.W.2d at 631. ("[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.").

103. *Stokes*, 481 Mich. at 276, 744 N.W.2d at 135.

104. MICH. COMP. LAWS ANN. § 418.301(4) (West 2008).

105. *Stokes*, 481 Mich. at 291, 744 N.W.2d at 143.

106. *Id.* at 287, 744 N.W.2d at 141. ("A *claimant* shall prove his or her entitlement to compensation and other benefits under this act by a preponderance of the evidence.") (emphasis added).

107. *Id.* at 288, 744 N.W.2d at 142 (emphasis added).

109. *See Stokes*, 481 Mich. at 297, 744 N.W.2d at 146.

110. *See supra* notes 103-108 and accompanying text.

appeal and those pending hearing. Cases on appeal should be automatically reversed and remanded for retrial.[111] Cases awaiting an initial hearing may have to be continued or the records reopened to include the evidence *Stokes* requires.[112]

This also affects cases that are voluntarily paid. An employer might voluntarily pay a case for years by the *Sington* terms but now may require that injured employee to attend an assessment of his qualifications for other work.[113] An employee's failure to attend may result in suspending further benefits.[114] Alternatively, an employer could choose to suspend benefits after determining that the injured employee can work at another job paying what he earned years before he was hurt.[115] And an assessment that lesser-paying work is available might establish disability by the terms of *Stokes* but reduce the amount of further benefits to eighty percent of the difference between the wage the employee was earning when he was injured and the lesser wage.[116]

Finally, the *Stokes* decision may create a group of injured employees whose impairments, do not qualify them for weekly compensation because they remain capable of earning their pre-injury wages at another job.[117]

One thing is certain. The only definitive disability authority is the Supreme Court's *Sington* and *Stokes* decisions. The court of appeals' decision was reversed,[118] and the Commission's decisions after *Sington* are not reliable in view of the conflict between the recitation and application of the case and the explicit "bullet points" the *Stokes* Court delineated.

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111. *See id.*
112. *See id.*
113. *See Stokes*, 481 Mich. at 284, 744 N.W.2d at 139.
114. *See id.* at 290, 744 N.W.2d at 143.
115. *See id.*
116. *See* MICH. COMP. LAWS ANN. § 418.361(1) (West 2008):

> While the incapacity for work resulting from a personal injury is partial, the employer shall pay . . . weekly compensation equal to 80% of the difference between the 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.

Id.
117. *See supra* notes 103-108 and accompanying text.
118. *Sington*, 467 Mich. at 146, 648 N.W.2d at 627.

VI. *BRACKETT V. FOCUS HOPE, INC.*: "MORAL TURPITUDE" IS NO PART OF MISCONDUCT

The Supreme Court returned to the leading decisions concerning misconduct that may bar compensation—*Detwiler*,[119] *Crilly*,[120] and *Daniel*,[121] *supra*—to decide *Brackett v. Focus Hope, Inc.*[122] The occasion was the *Brackett* court of appeals' factual distinction between the misconduct alleged in *Daniel*—blatant and repeated sex solicitation[123]—and the alleged *Brackett* misconduct: refusing to attend a Martin Luther King Day rally required by Brackett's employer, Focus Hope.[124] The Court first attended to the text of the misconduct statute, M.C.L. Section 418.305, which states: "if the employee is injured by reason of his intentional and willful misconduct, he shall not receive compensation under the provisions of this act."[125] The Court next discerned the "ordinary meaning" of the statute, as directed by M.C.L. Section 8.3a.[126] It stated that "intentional and willful" means "on purpose," and "misconduct" meant "improper" or "against the rules."[127]

The Court then assessed the three leading cases. *Detwiler* was approved for deciding that there had been no misconduct because the employer had no rule.[128]

The Court then considered *Crilly* and said that the requirement misconduct be a "gross and reprehensible" action was dicta and extra-

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119. 252 Mich. 79, 233 N.W. 350.

120. 353 Mich. 303, 91 N.W. 493.

121. 468 Mich. 34, 658 N.W.2d 144.

122. 482 Mich. 269, 753 N.W.2d 207.

123. *Daniel*, 468 Mich. at 37, 658 N.W.2d at 147.

124. *Brackett*, 482 Mich. at 271, 753 N.W.2d at 209. The Court stated: "The Court of Appeals determined that sufficient evidence supported the finding that plaintiff's conduct was a 'far cry' from the misconduct in *Daniel*." *Id.* at 274, 753 N.W.2d at 210. This was reminiscent of *Simpson*, another case where the supreme court granted review—and revisited *Rakestraw*—because the court of appeals had distinguished *Rakestraw's* facts from that of the immediate case.

125. *Id.* at, 275, 753 N.W.2d at 211 (citing MICH. COMP. LAWS ANN. § 418.305 (West 2008)).

126. *Id.* at 275-76, 753 N.W.2d at 211 (citing MICH. COMP. LAWS ANN. § 8.3a (West 2008)).

127. *Id.* at 276, 753 N.W.2d at 211 ("[C]onduct is 'intentional and willful misconduct' if it is 'improper' and done 'on purpose' despite the knowledge that it is against the rules.").

128. *Id.* at 277, 753 N.W.2d at 212 ("Another employee had 'cautioned' the decedent [employee] against using the elevator because it was dangerous, but the employer had no rule barring its use. The Court [in *Detwiler*] rejected the employer's argument that the decedent's use of the elevator constituted intentional and willful misconduct.").

statutory.[129] The Court was right. The Court's statement in deciding *Crilly* that, "[e]xcluded . . . under the terms of the statute are acts of such gross and reprehensible nature as to constitute intentional and willful misconduct" was indeed dictum.[130] The only question that was involved regarded the "arising out of and in the course of employment."[131] And the statutory text does not include an adjective of misconduct for morality but includes one for intent.[132]

Finally, the Court clarified the *Daniel* Court's definition of "misconduct."[133] The *Daniel* Court had defined "misconduct" as "conduct of a quasi-criminal nature," with "quasi-criminal" meaning "doing something with knowledge that it is dangerous and with wanton disregard of its consequences."[134] Thus, the *Brackett* Court's statement that "intentional and willful misconduct" was conduct that was "on purpose" and "improper" mirrored *Daniel's* definition of "quasi-criminal."[135] The Court has thus retained the "intention" element that the text of Section 305 necessitates, but has rejected the "danger of the action" phrase as extra-statutory.[136]

In sum, *Brackett* establishes that for the "misconduct" exception to apply, the employer must have a rule that the employee actually knows and deliberately violates.[137] The nature or "morality" of the rule does not matter.[138]

VII. *RODRIGUEZ V. A.S.E. INDUSTRIES, INC.*: WHEN COMPENSATION IS A COLLATERAL SOURCE

Rodriguez involved a *compensation carrier's* reimbursement claim against an injured employee, rather than an injured *employee's*

129. *Brackett*, 482 Mich. at 279, 753 N.W.2d at 213 ("The dictum in *Crilly* essentially engrafts a 'moral turpitude' requirement onto § 305 . . . . The text of § 305 does not create a sliding scale of 'moral turpitude' that tribunals may assess in deciding whether to apply the statutory exclusion.").

130. *Crilly*, 353 Mich. at 327, 91 N.W.2d at 506.

131. *Crilly*, 353 Mich. at 328, 91 N.W.2d at 508 (Carr, J., dissenting) ("The question at issue in this case is whether the injury for which Douglas Crilly . . . seeks compensation arose out of and in the course of his employment.").

132. *See* MICH. COMP. LAWS ANN. § 418.305 (West 2008).

133. *Daniel*, 468 Mich. at 45, 658 N.W.2d at 151.

134. *Id.* (citing Fortin v. Beaver Coal Co., 217 Mich. 508, 510, 187 N.W. 352, 352 (1922)).

135. *See Brackett*, 482 Mich. at 276, 753 N.W.2d at 211.

136. *See* MICH. COMP. LAWS. ANN. § 418.305 (West 2008).

137. *See supra* notes 129-131.

138. *See supra* note 130.

compensation claim.[139] The employee had obtained a judgment against the conveyor line equipment manufacturer that had caused her workplace injury.[140] The basis for the employer's claim was M.C.L. Section 418.827(5), which requires an injured employee to use his damage recovery (less attorney fees and costs) to reimburse his employer for worker's compensation the employer has already paid the employee for his injury.[141]

The injured employee did not oppose the claim. The manufacturer opposed the reimbursement, arguing that compensation was a "collateral source" that reduced the judgment amount.[142] The compensation carrier and manufacturer's competing claims required the court of appeals to reconsider *Heinz v. Chicago Road Investment Co.*[143]

In *Heinz*, the court of appeals had said that the "collateral source rule" embodied in M.C.L. Section 600.6303(4)[144] means that compensation is a "collateral source" which reduces the amount of damages an injured employee may recover in a lawsuit—with one exception.[145] The exception is when there is a valid lien for the reimbursement of the compensation.[146] The court explained, "[T]he

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139. *Rodriguez*, 275 Mich. App. 8, 738 N.W.2d 238.

140. 275 Mich. App. at 10, 738 N.W.2d at 240.

141. MICH. COMP. LAWS ANN. § 418.827(5) (West 2008). The statute provides:

> In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his or her dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery and the balance shall immediately be paid to the employee or his or her dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits.

Id.

142. 275 Mich. App. 15, 17, 738 N.W.2d at 243 ("ASE's final argument on appeal is that the trial court erred by failing to reduce the judgment by the amount of worker's compensation benefits paid to plaintiff. . . . ASE further argues that all future worker's compensation benefits payable to plaintiff should have been treated as a collateral source . . . .").

143. 216 Mich. App. 289, 549 N.W.2d 47 (1996).

144. MICH. COMP. LAWS ANN. § 600.6303(4) (West 2000). The statute provides:

> As used in this section, 'collateral source' means benefits received or receivable from . . . worker's compensation benefits. Collateral source does not include . . . benefits paid . . . by a person, partnership, association, corporation, or other legal entity entitled by contract to a lien against the proceeds of plaintiff in a civil action for damages.

Id.

145. *Heinz*, 216 Mich. App. at 296, 549 N.W.2d at 51.

146. *Id.*

second sentence of subsection 4 is an exception to the first: worker's compensation is a collateral source so that a plaintiff's recovery, and a defendant's responsibility to pay damages, are diminished unless there is a valid lien."[147] In *Heinz,* there was no dispute that there was no claim for reimbursement of compensation because the compensation carrier had explicitly waived any lien during a settlement with the injured employee.[148]

The *Rodriguez* court reaffirmed the rule expressed in *Heinz* but distinguished the circumstances to allow the reimbursement of compensation to the compensation carrier.[149] The court found that "the agreement on which ASE relied waived any claim that American Axle [the employer and buyer from the manufacturer] had against ASE [the manufacturer], not any claim that it had against plaintiff [the injured employee.]"[150] The court concluded that the compensation carrier had a valid lien and had not waived the right to reimbursement as in *Heinz.*[151]

Thus, *Rodriguez* establishes that workers' compensation is a collateral source that may reduce the damages that a tortfeasor may have to pay only when the compensation carrier has executed an agreement with the injured employee explicitly waiving the right to reimbursement under M.C.L. Section 418.827(5).[152]

The *Rodriguez* court also revisited the *Van Hook v. Harris Corp.*[153] decision to decide the amount of the workers' compensation that a compensation carrier may recover from a judgment against the manufacturer.[154] In *Van Hook,* the court of appeals had ruled that the ratable amount of negligence by the employer did not affect the amount of the compensation to be reimbursed from a lawsuit by an injured employee.[155] The basis for the decision had been the recognition that M.C.L. Section 418.827(5) "on its face, applies regardless of the concurring negligence of the employer."[156]

The manufacturer in *Rodriguez* sought to avoid the *Van Hook* ruling because of the subsequent enactment of statutes allocating negligence

147. *Id.*

148. *Id.* at 293, 549 N.W.2d at 50 ("As part of the redemption Mr. Heinz' worker's compensation provider waived any lien on future judgments.").

149. *Rodriguez*, 275 Mich. App. at 17, 738 N.W.2d at 243-44.

150. *Id.*

151. *Id.*

152. *See supra* notes 145-152 and accompanying text.

153. 136 Mich. App. 310, 356 N.W.2d 18 (1984).

154. *Rodriguez*, 275 Mich. App. at 19-20, 738 N.W.2d at 244-45.

155. *Van Hook*, 136 Mich. App. at 312, 356 N.W.2d at 19.

156. *Id.*

between a party and a non-party (the "non-party at-fault rules").[157] However, the court of appeals rejected this idea because the statute that had been the basis for deciding *Van Hook*—M.C.L. Section 418.827(5)—had not been changed: "ASE attempts to distinguish our holding in [*Van Hook*] on the basis that it was decided before the Legislature adopted the allocation of fault provisions. But the rationale in *Van Hook* was based on the provisions of [M.C.L. Section] 418.827(5), which have not changed."[158]

The court of appeals was entirely correct. The text "any recovery" in section 827(5) did not permit reducing the amount of compensation for reimbursement by the ratable amount of negligence by the employer; that text had not changed. Moreover, it was problematic that the question was even considered. The *amount* of the judgment the manufacturer had to pay would not be affected. The question only affected the *division* of the payment by that manufacturer between the injured employee and the employer. The party with a *real* interest was the injured employee, who did not propound the question and who did not agree with the manufacturer's argument.

VIII. *BOWMAN V. R.L. COOLSAET CONSTRUCTION COMPANY*: TRAVELING AND COMMUTING EMPLOYEES

The court of appeals revisited its decision in *Bowman v. R.L. Coolsaet Construction Co.*[159] at the Supreme Court's direction.[160] The Supreme Court ordered reexamination after concluding that the basis for the court of appeals' first decision—the so-called "traveling" employee doctrine—was invalid as applied to *Bowman*.[161] The Supreme Court thus remanded the case for examination by the terms of the general rule—the "commuting" rule: "The general rule, that injuries sustained by an employee while going to or coming from work, are not compensable, is applicable even when an employee's residency is temporary because of a job assignment."[162]

The court of appeals recognized that there was no "traveling employee" rule to allow compensation for injuries sustained during

157. *Rodriguez*, 275 Mich. App. at 19, 738 N.W.2d at 244-45.

158. *Id.*

159. Bowman v. R.L. Coolsaet Constr. Co., 272 Mich. App. 27, 723 N.W.2d 583 (2006), *rev'd*, 477 Mich. 976, 725 N.W.2d 49 (2006), *remanded to* 275 Mich. App. 188, 738 N.W.2d 260.

160. *Bowman*, 477 Mich. 976, 725 N.W.2d 49.

161. *Id.* at 976, 725 N.W.2d at 50 ("The [c]ourt of [a]ppeals erred by adopting the 'traveling employee' doctrine under the circumstances of this case.").

162. *Id.*

business travel to and from work and the employee's temporary residence.[163] The court then reiterated the general rule that "[i]injuries sustained by an employee while going to or coming from work generally are not compensable."[164]

Next, the court listed the six established exceptions to the general rule.[165] It methodically considered whether any exception applied, and finding that none did, denied compensation.[166]

The decision is notable for two reasons. First, it confirms that there is just *one* rule (including its exceptions) for deciding whether an injury sustained while commuting to or from work is "in the course of employment."[167] There is no "alternate rule" simply because the employee was lodging at a place other than a principal residence.[168] And it does not matter whether that lodging was "personal"—owned or secured by the employee—or "occupational"—owned or provided at the expense of the employer.[169]

The other notable feature is that the court of appeals did not expand the exceptions from the established six to include a seventh for commuting from a workplace to lodging *other* than a principal residence.[170] Although this had been advocated,[171] the court of appeals rejected it by simply reciting the established six exceptions.[172]

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163. *Bowman*, 275 Mich. App. at 190, 738 N.W.2d at 262-63.

164. *Id.* at 190-91, 738 N.W.2d at 263 (citing Collier v. J.A. Fredman, Inc., 183 Mich. App. 256, 160, 454 N.W.2d 183, 185 (1990)).

165. *Id.* at 191, 738 N.W.2d at 263.

> The exceptions are: (1) the employee is on a special mission for the employer; (2) the employer derives a special benefit from the employee's activity at the time of the injury; (3) the employer paid for or furnished employee transportation as part of the employment contract; (4) the travel comprised a dual purpose combining employment-related business needs with the personal activity of the employee; (5) the employment subjected the employee to excessive traffic risks; or (6) the travel resulted from an irregular working schedule.

Id.

166. *Id.* at 191-93, 738 N.W.2d at 263-64.

167. *See supra* notes 163-165 and accompanying text.

168. *See id.*

169. *See id.*

170. *See supra* notes 166-167 and accompanying text.

171. *Bowman*, 272 Mich. App. at 29, 723 N.W.2d at 585.

172. *See Bowman*, 275 Mich. App. at 191-93, 738 N.W.2d at 263-64.

IX. *HESSEL V. CHIPPEWA REGIONAL CORRECTIONAL FACILITY*: WHEN THERE IS AN "OPINION BY THE COMMISSION"

In *Aquilina v. General Motors Corp.*,[173] the Supreme Court held that a prerequisite for judicial review of a workers' compensation case was an opinion endorsed by a majority of the Workers' Compensation Appeal Board panel.[174] The court of appeals revisited this ruling to decide *Hessel v. Chippewa Regional Correctional Facility*.[175]

Hessel involved an opinion of the WCAC.[176] The opinion was signed by its author, but not by the other two panelists, who only concurred in the result.[177]

The court of appeals simply applied *Aquilina* and returned the case for resubmission and production of an opinion signed by at least two of the three panel commissioners.[178] This indicates the court saw no important distinction between *Hessel's* Appellate Commission and the Appeal Board that it replaced, at least when it comes to producing an opinion capable of judicial review.[179]

However, the court of appeals could have decided the issue without reference to *Aquilina* because M.C.L. Section 418.274(8) provides: "The decision reached by a majority of the assigned three members of the panel shall be the final decision of the commission."[180]

Hessel is not binding precedent since it has not been released for publication, but the Commission will surely recognize it, and thereby end the escalating number of cases with multiple opinions and restricted endorsements (meaning concurrence in result only).

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173. 403 Mich. 206, 267 N.W.2d 923 (1978).

174. *Id.* at 214, 267 N.W.2d at 927 ("A decision is not properly reviewable when some of the majority concur only in the result and do not state the facts upon which that result is based.").

175. No. 272179, 2008 WL 2389497 (Mich. Ct. App. June 12, 2008).

176. Hessel v. Chippewa Reg'l Corr. Facility, No. 03-0436, 2006 WL 1933407 (Mich. Work. Comp. App. Comm. July 6, 2006). The WCAC is the administrative agency that replaced the Workers' Compensation Appeal Board.

177. *Hessel*, 2008 WL 2389497 at *3 ("The WCAC issued an opinion signed by one member of the three-member panel. A second panel member concurred only in the result, and the third member concurred in the result, 'but only because he believ[ed] that the law-of-the-case doctrine mandate[d] this result.'").

178. *Id.*

179. *See id.*

180. MICH. COMP. LAWS ANN. § 418.274(8) (West 2008).

X. CONCLUSION

In the workers' compensation decisions during the *Survey* period, the supreme court and court of appeals have only revisited the existing case law to reconcile it with one or another statute in the WDCA, and either overrule, clarify or distinguish that case law. This effort was particularly focused on the most important areas of personal injury and disability. The success of this can only be determined with time.