SUPREME COURT
APR 2002
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STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(JUDGES SMOLENSKI, JANSEN, AND FITZGERALD)
AND THE WORKER'S COMPENSATION APPELLATE COMMISSION

CHARLES SINGTON,

Plaintiff-Appellee,

v

CHRYSLER CORPORATION, a/k/a
DAIMLERCHRYSLER CORPORATION,

Defendant-Appellant.

S. C. NO.: 119291

C.A. NO.: 225847

L.C. NO.: WCAC 99-0110

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ISSUES

I.

PLAINTIFF WAS ABLE TO WORK AFTER HIS WORK INJURY WITHIN HIS QUALIFICATIONS AND TRAINING IN HIS REGULAR DEPARTMENT DOING JOBS HE HAD DONE PRE-INJURY AND EARNING AS MUCH AS HE HAD PRE-INJURY. PLAINTIFF CONTINUED AT THIS WORK UNTIL A NON-WORK-RELATED STROKE FORCED HIM TO STOP. IS PLAINTIFF NOT "DISABLED" UNDER A CORRECT READING OF THE DEFINITION OF DISABILITY IN THE FIRST SENTENCE OF SECTION 301(4)? WAS *HASKE* WRONG TO SAY OTHERWISE? AND, HAS *HASKE* CREATED CONFLICT IN THE LAW, WHEREAS THE STATUTE ITSELF CONTAINS NO CONFLICT?

II.

WAGE LOSS MUST BE CONNECTED TO A WORK INJURY. WHERE THERE IS NO CONNECTION, IS THERE NO WORKERS' COMPENSATION LIABILITY FOR WAGE LOSS, EVEN UNDER *HASKE?* IF THE COURT DOES NOT OVERRULE *HASKE*'S INTERPRETATION OF THE FIRST SENTENCE IN § 301(4), THEN SHOULD THE COURT APPLY *HASKE*'S INTERPRETATION OF 301(4)'S SECOND SENTENCE AND HOLD THAT THE INTRODUCTORY CLAUSE TO § 301(5) REQUIRES THE PLAINTIFF TO SATISFY BOTH SENTENCES IN § 301(4)? DOES PLAINTIFF NOT SATISFY *HASKE*'S INTERPRETATION OF 301(4)'S SECOND SENTENCE?

STATEMENT OF FACTS

(Numbers in parentheses refer to the pages of Appellant's Appendix).

Plaintiff worked for defendant from 1971 to 1997 (25a). He last worked at defendant's Warren Stamping Plant for 15 years without a specific job title; he testified that he was considered a "floater" (37a). This classification meant plaintiff performed various production jobs, such as an assembler, press operator, and a job stacking and racking parts such as car doors (17a).

In 1985, prior to any work injury, plaintiff suffered a non-work-related stroke which affected the left side of his body, including his left shoulder (17a). Plaintiff testified that he did not experience disabling left shoulder complaints, however, until he slipped and fell at work years later on June 24, 1994 (9a). Plaintiff underwent surgery on his left shoulder and returned to work for defendant on January 3, 1995 (9a). Defendant voluntarily paid plaintiff workers' compensation benefits during this absence (18a).

Upon his return to work, plaintiff had precautionary and permanent restrictions with respect to his shoulder precluding him from "above-left-shoulder" work (18a; 9a).

Plaintiff continued working in his normal department thereafter, but he was not assigned tasks beyond his restrictions (*Id.*). He did, however, continue to perform the same job that he had been performing at the time of his injury, *i.e.*, stacking and racking car doors, because such job did not involve working above the mid-chest level (18a).

Plaintiff later suffered a non-work-related right shoulder problem (26a). He underwent surgery on his right shoulder, returned to work on November 15, 1996, and worked thereafter with bilateral restrictions relating to both shoulders. The restrictions precluded lifting, pushing, or pulling over 20 pounds (9a; 18a).

With these restrictions, plaintiff's job remained similar to what it had been (18a). Plaintiff continued to be "assigned work in any department within the plant," except for skilled trades positions for which he was unqualified (18a; 11a). His restrictions were always observed in assigning him tasks (*Id.*).

Plaintiff suffered a second stroke on March 10, 1997 leaving him unable to use his right arm and fingers at all (18a). He has not returned to work since that stroke and has been granted a permanent total disability pension by defendant (*Id.*).

Plaintiff now seeks workers' compensation benefits. His position is that the intervening non-work-related stroke on March 10, 1997 reactivated his eligibility of workers' compensation benefits because he had been laboring at post-injury work which favored his work-related left shoulder condition.[1]

The case was tried before Magistrate Wierzbicki at the Bureau of Workers' Disability Compensation. The Magistrate concluded that plaintiff had "all along, been performing a regular plant job - before and after his injury" (15a). The Magistrate found that plaintiff was not entitled to benefits under MCL 418.301(4) and *Haske v Transport Leasing, Inc., Indiana*, 455 Mich 628; 566 NW2d 896 (1997) because the reason for his inability to continue at such work was a non-work-related ailment (15a).

On plaintiff's appeal to the Worker's Compensation Appellate Commission, the Commission affirmed (17a).

On plaintiff's further appeal to the Court of Appeals, the Court reversed (25a). The Court of Appeals held that, since the jobs plaintiff performed subsequent to his work injury favored his restrictions, plaintiff labored post-injury at "reasonable employment" under MCL

[1] Such post-injury work has traditionally been called "favored work." In statutory terms, it is called "reasonable employment." MCL 418.301(5) and (9).

418.301(5). The Court of Appeals then concluded that the Worker's Compensation Appellate Commission and Magistrate erroneously denied benefits under *Haske* because:

> Injured employees engaged in "reasonable employment" who subsequently lose their jobs are not required to prove that the job loss was causally connected to the work-related injury. (35a).

Defendant applied to this Court for leave to appeal. The Court granted the application in its order, entered January 4, 2002, and consolidated the case with *Richardson v Woodbridge*, S.C. No. 119821. As part of the order granting leave, the Court directed the parties to discuss certain issues which defendant discusses in Argument I (36a).

Defendant submits that the Court should reverse the Court of Appeals and reinstate the orders of the Worker's Compensation Appellate Commission and Magistrate.

SUMMARY OF ARGUMENT I

This case provides an illustration of problems caused when a statute's text is not applied as written. The Legislature defined "disability" for workers' compensation purposes as: "a limitation of *wage-earning capacity* in work suitable to one's qualifications and training *resulting from*" a work injury. MCL 418.301(4) [first sentence]. A majority of the Court in *Haske*, departing from its original ruling on this statute, read the italicized portions of the preceding sentence out of the definition of disability. As a result, the next provision in the Worker's Disability Compensation Act - which conditions its operation on fulfillment of the definition of disability - becomes operable at inappropriate times.

This case is one of many where that has happened. The result is that the Court of Appeals held that plaintiff, who was able to work following his work injury at no wage loss and at tasks he had performed pre-injury in the same department, was awarded weekly workers' compensation benefits when a stroke completely unrelated to his employment precluded him from continuing work. Workers' compensation is not meant to compensate for non-work-related injuries, but that was the ruling here.

The solution to this problem is for the Court to overrule *Haske*'s interpretation of the definition of disability. The Court should restore the meaning the Legislature provided and the meaning the Court had originally given the definition. The net effect of doing so will reconcile that which appears presently irreconcilable in workers' compensation law.

ARGUMENT I

PLAINTIFF WAS ABLE TO WORK AFTER HIS WORK INJURY WITHIN HIS QUALIFICATIONS AND TRAINING IN HIS REGULAR DEPARTMENT DOING JOBS HE HAD DONE PRE-INJURY AND EARNING AS MUCH AS HE HAD PRE-INJURY. PLAINTIFF CONTINUED AT THIS WORK UNTIL A NON-WORK-RELATED STROKE FORCED HIM TO STOP. PLAINTIFF IS NOT "DISABLED" UNDER A CORRECT READING OF THE DEFINITION OF DISABILITY IN THE FIRST SENTENCE OF SECTION 301(4). IN SO CONCLUDING, THE COURT SHOULD OVERRULE *HASKE*'S INTERPRETATION OF THE FIRST SENTENCE OF SECTION 301(4). OVERRULING *HASKE* RETURNS THE DEFINITION OF DISABILITY TO WHAT THE STATUTE SAYS AND ALSO HAS THE SALUTARY EFFECT OF RECONCILING SECTIONS 301(4), (5) AND (9).

Plaintiff resumed work after his work injury in the same department he had previously worked. He continued performing many of the same jobs he had performed pre-injury. He earned as much money after his work injury as he had pre-injury (15a, 9a; 20a). Plaintiff continued working until he suffered a non-work-related stroke that precluded all further employment (25a). The immediate legal question presented on such facts is: whether the non-work-related stroke makes plaintiff eligible for weekly workers' compensation benefits given that he still had physical restrictions left by his work injury? Two decisions of this Court, *Haske*[2] and *Powell*,[3] suggest different answers to this question. The case presents an even larger question: how the definition of disability in Michigan's Worker's Disability Compensation Act[4]

[2] *Haske v Transport Leasing, Inc., Indiana*, 455 Mich 628; 566 NW2d 896 (1997).
[3] *Powell v Casco Nelmor Corp*, 406 Mich 332; 279 NW2d 769 (1979).
[4] MCL 418.101, *et. seq.* [hereinafter "the act"].

in Section 301(4) interacts with the post-work injury "reasonable employment" provisions in the sections following it, Sections 301(5) and (9). The Court has asked for discussion of whether *Haske* and *Powell* can be reconciled and how each case might be reconciled with Sections 301(4), (5), and (9).

Defendant's answer to the question of reconcilability of *Haske* and *Powell* is: passage of 301(4) overruled that aspect of *Powell* which conflicts with 301(4).

Defendant's answer to the question of the reconcilability of *Haske* with Sections 301(4), (5), and (9) is: the Court should overrule *Haske*'s interpretation of Section 301(4)'s first sentence because it was wrong. *Haske* cannot be reconciled with the disability determination as it reads in § 301(4)'s first sentence, nor can it be reconciled with this Court's original decisions on 301(4). See *Rea* and *Michales*, both *infra*. Once the Court fixes *Haske*, that will have the salutary effect of reconciling 301(4), (5), and (9) which are in conflict presently as a result of *Haske*. [Compare, the Court of Appeals' decision in the instant case with the Court of Appeals' decision in *Greenman v Ralston Co*, one of the consolidated cases styled as *Rangel v Ralston Purina Co*, 248 Mich App 128; 638 NW2d 187 (2001)]; [See also: 38a *et. seq.* and 41a *et. seq.*].

Applying the Court's renewed, correct understanding of 301(4)'s first sentence to this case, the Court should reverse the Court of Appeals and reinstate the administrative orders denying benefits because plaintiff is not "disabled" under 301(4).

A. <u>An Overview And The Statutes At Issue</u>

The primary statutes at issue here are three, as recognized in the Court's order granting leave. Before addressing those statutes, it is worth noting that the act was legislatively designed to loosely proceed in a serial manner.[5] Appreciation of this point is important to this

[5] *See e.g., Leskinen v Michigan Employment Security Comm*, 398 Mich 501, 508-509; 247 NW2d 808 (1976).

case. Satisfaction of one provision generally leads to progression to a following provision. Failure to satisfy one provision ends the progression.

As a general illustration, Chapter 1 of the act defines who is and who is not considered an "employee" under the act. MCL 418.161. Only an "employee" can obtain the benefits afforded by the workers' compensation system. An "employee" seeking benefits must next demonstrate under the opening provision of Chapter 3 that he or she "receive[d] a personal injury arising out of and in the course of employment by an employer who was subject to the act at the time of injury" in order to "be paid compensation as provided in this act." MCL 418.301(1). An "employee" who meets this requirement may seek to demonstrate "disability" under MCL 418.301(4) in order to receive wage loss benefits, in addition to the medical benefits afforded by MCL 418.315.

Section 301(4) is the first specific section engaged in this case. Proof that a work injury is of "disability" proportions entitles the employee to wage loss benefits payable in the form of "weekly compensation." "Weekly compensation" is based on "the proportionate extent of the impairment of the employee's wage earning capacity." MCL 418.371(1). Therefore, persons whose impairment is "total," not surprisingly, receive weekly benefits based on a more generous calculation formula than those whose disability is "partial." Compare and contrast MCL 418.351(1) with MCL 418.361(1). Those whose disability is both "total and permanent" receive additional advantages, such as an additional layer of weekly benefits and a conclusive presumption on ongoing disability for 800 weeks. See, MCL 418.521(2) and MCL 418.351, respectively.[6]

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[6] There is also a special definition of disability for retirees discussed in subsection H., *infra*. There is also a type of scheduled benefit called "specific loss" benefits payable for the anatomical loss of certain body members, such as a thumb or leg, as the result of a work injury. MCL 418.361(2). These benefits, as well as all but one form of "total and permanent" disability, are designed to compensate the employee for one's non-vocational loss as well.

Most garden-variety workers' compensation cases engage the definition of disability engaged in this case, 301(4).[7] Section 301(4) says two things:

> As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss. MCL 418.301(4).

Only if the employee satisfies 301(4) can the analysis proceed to the next provision because the next provision begins with the following condition precedent to its operation:

> If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows: . . . . MCL 418.301(5).[8]

Section 301(5) then describes various scenarios involving potential offers of "reasonable employment"[9] arranged by the injury-employer to mitigate its weekly liability to persons whose "disability is established pursuant to section (4)." Section 301(9) later defines "reasonable employment" in 301(5) as work within the employee's ability to perform which poses no threat to health and is within a reasonable distance of the employee's residence. MCL 418.301(9). "Reasonable employment" is not limited to jobs suitable to the employee's qualifications and training. *Id.* A disabled employee cannot refuse "reasonable employment" without good and reasonable cause else the employee is considered to have voluntarily removed

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[7] The same definition is repeated *verbatim* in § 401(1). Section 401(1) is the opening provision in Chapter 4 of the Act. Chapter 4 addresses occupational diseases, a chapter infrequently used these days given modern work environments.

[8] Section 301(5)'s parallel provisions in the occupational disease chapter are found, with certain differences, at 401(3) through (8). Since the instant case involves only Chapter 3 and since that is the more prevalent chapter in workers' compensation practice, defendant will refer only to Chapter 3's disability citations in this brief.

[9] "Reasonable employment" is the statutory term for what had historically been called under common law "favored work," *i.e.*, post-injury work given a disabled employee which favors his or her limitations, as mentioned in n 1.

himself from the workforce and "no longer entitled to any wage loss benefits under this act" while in a period of such refusal. MCL 418.301(5)(a).

The Court recently decided a trilogy of cases within the confines of Section 301(5) involving: a disabled employee who lost her "reasonable employment" during the first 100 weeks; an employee who changed his mind with regard to an offer of reasonable employment; and, an employee not protected by 301(5) after he had recovered from his work injury. *Russell v Whirlpool Financial Corp*, 461 Mich 579; 608 NW2d 52 (2000); *McJunkin v Cellasto Plastic Corp*, 461 Mich 590; 608 NW2d 57 (2000); *Perez v Keeler Brass Co*, 461 Mich 602; 608 NW2d 45 (2000), respectively.

For present purposes, the trilogy is important for two reasons. First, "to the extent that the common law is inconsistent with the statute, the common law has been changed, and pre-subsection (5) case law is no longer relevant." *Perez, supra* at 609, and also at pp 606, 611, 615 n 11, and particularly 607 n 5; *McJunkin, supra* at 598. This answers the Court's question in this case relating to *Powell*, as will be amplified below. Second, an employee must still be "disabled" as defined in § 301(4) to obtain the protection afforded in § 301(5).[10] *Perez, supra* at 615 and the serial operation of the act recounted in *Russell, supra* at 584. Focus on this point answers the problem of reconciling 301(4), (5), and (9), as will also be amplified below.

B. <u>What Is It That Presently Appears Irreconcilable?</u>

The above statutory schemes appear straightforward and coherent. Yet, the workers' compensation system today finds case law irreconcilable and statutory provisions, given case law interpretation, on a collision course.

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[10] The employees in *Russell* and *McJunkin* were "disabled" under 301(4), thus raising 301(5) issues. *Russell, supra* at 581, 588; *McJunkin, supra* at 601. When the employee in *Perez* ceased to be disabled under 301(4), the 301(5) analysis ended. *Perez, supra* at 615, 608.

What appears to be irreconcilable within case law is this. *Haske* offered an interpretation of 301(4) which borrowed from the lead opinion in *Sobotka* v *Chrysler Corp, (After Remand)*,[11] a pre-301(4) case. *Haske* said in a footnote:

> An employer may refute the causal connection between the partial disability and the employee's unemployment with evidence that other factors are the cause of the unemployment, e.g., an employee's ailments that are unrelated to his previous employment or malingering. [*Sobotka*] at 22, and 26, n 26 (BOYLE, J., lead opinion)(relying on 1C Larson, § 57.12(e), p 10-56), 53 (BRICKLEY, J., dissenting). *Haske*, *supra* at 662 n 38 (bracketed word added).

Haske's reference to *Sobotka* is reference to the following quotation from *Sobotka*'s lead opinion:

> According to Professor Larson:
>
> > Of course, if the claimant's continued unemployment is the result, not of his employment-related impairment, but of personal ailments unrelated to his employment, there is no possible ground for continuing temporary benefits. *Sobotka*, *supra* at 26 n 26 (BOYLE, J., lead opinion).[12]

This statement contradicts *Powell*, another pre-301(4) case. In *Powell*, an injured employee returned to "favored work" until she became stricken with non-work-related cancer which precluded all subsequent employment. *Powell* said:

> A supervening event, not chargeable to the worker, which makes it impossible for the worker to continue his or her previous favored work does not preclude the payment of compensation for a prior injury. We, therefore, hold that there is no legal basis on which to preclude payment of the plaintiff's compensation in this case. *Powell*, *supra* at 339.

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[11] 447 Mich 1; 523 NW2d 454 (1994).

[12] The numbering in the present edition of Larson's treatise has changed from that quoted in *Sobotka* and *Haske*. The quotation relied upon by *Haske* and *Sobotka* is now found in 4 *Larson's Workers' Compensation Law*, § 80.03[5], p 80-9 (2001). The quote remains the same today as it had read at the time of *Haske* and *Sobotka*, except the present edition includes the feminine pronoun.

Thus, on the one hand, *Haske* says that an employee's ailment unrelated to his previous employment refutes the causal connection between a work-related partial disability and continued unemployment and, therefore, provides no ground for ongoing weekly workers' compensation benefits. *Powell* says otherwise.

Besides this conflict in case law, the Court has also asked whether either *Haske* or *Powell* can be reconciled with "disability determinations under MCL 418.301(4)" and weekly benefit determinations "in light of subsequent reasonable employment" under § 301(5) and (9). (36a).

The Court should recognize that both of the questions it asks on reconcilability stem from *Haske*. *Haske* therefore requires examination.

C. *Haske* Misinterpreted The First Sentence of Section 301(4) And That Is The Source Of The Confusion In The Law Today.

Haske says that "disability" in the first sentence of 301(4) is determined by inquiring whether there is any job - even a single job - within the employee's qualifications and training that is now foreclosed by a work injury.[13] This method of determining "disability" counts the number of jobs which were suitable to a person's pre-injury qualifications and training and compares that count with the number of jobs the person can do post-injury. Thus, *Haske* reads the first sentence of § 301(4) as if it says:

> As used in this chapter, "disability" means a limitation in the number of jobs suitable to the employee's qualifications and training.

The first sentence of Section 301(4) does not read that way. The following italicized words are in the statute but were read out of it by *Haske*:

> As used in this chapter, "disability" means a limitation *of an employee's wage earning capacity* in work suitable to his or her

[13] *Haske, supra* at 634.

> qualifications and training *resulting from a personal injury or work related disease.*

The omissions of these two italicized phrases are enormously significant. The Legislature did not provide that disability means a limitation in the number of jobs suitable to one's qualifications and training. The Legislature said that disability means a limitation of "wage earning capacity" in work suitable to one's qualifications and training. "Wage earning capacity" has a specific broad meaning known to the Legislature and historic in Michigan workers' compensation law.[14] The Legislature is presumed to be aware of such preexisting, longstanding case law interpretation of words and phrases.[15]

Wage earning capacity is a measurement of one's "ability" or "capacity" to earn. *Id.* It is not dependent on counting jobs, but instead on a broad factual assessment of the capacity to earn. "Wage earning capacity" is, thus, a multi-factor inquiry:

> Thus, the method of determining the employee's earning capacity, as that term is used in the act, is a complex of fact issues which are concerned with the nature of the work performed and the continuing availability of work of that kind, and the nature and extent of the disability and the wages earned. This determination by legislative enactment is reposed in workmen's compensation department. *Pulley v Detroit Engineering & Machine Co*, 378 Mich 418, 423; 145 NW2d 40 (1966).[16]

Whenever one partisan side in the workers' compensation debate has sought to elevate any one factor as the *sine qua non* of disability, the Court has historically rejected it. Thus, wage earning capacity does not mean only wages actually earned because whether wages are actually earned is not, standing alone, dispositive of one's capacity to earn. *Hood v Wyandotte Oil & Fat Co*, 272

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[14] See *Sobotka*'s discussion of this history. *Sobotka, supra* at 21-25.

[15] *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994); *Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989).

[16] See also, *Leizerman v First Flight Freight Service*, 424 Mich 463, 473; 381 NW2d 386 (1985); *Markey v S.S. Peter & Paul's Parish*, 281 Mich 292, 298-299; 274 NW2d 797 (1937).

Mich 190, 192; 261 NW 259 (1935). One may have the capacity to earn and elect not to exercise that capacity. *Pulley, supra*; *Babcock v General Motors Corp*, 340 Mich 58, 65; 64 NW2d 917 (1954); *Barrett v Bohn Aluminum & Brass Co*, 69 Mich App 636, 640-641; 245 NW2d 147 (1976). Such a person is nevertheless charged with such capacity to earn even though it remains unexercised. *Barnot v Ford Motor Co*, 282 Mich 37, 39; 275 NW 758 (1937). Conversely, a person may earn yet have no real ability to earn if the wages earned are a gratuity from the injury-employer reflective only of "make work"/"nondescript"/"odd lot work" and not reflective of a real wage earning capacity. *Pulley, supra* at 423; *Hood, supra* at 192-193. And, important here, evidence that an employee left his job for reasons unrelated to the injury tends to establish no loss of wage earning capacity related to the work injury. *Mitchell v General Motors Corp*, 89 Mich App 552, 555-556; 280 NW2d 594 (1979).[17]

Armed with this longstanding understanding of "wage earning capacity," the Legislature in enacting the first sentence of 301(4) decided that henceforth the "disability" inquiry is: whether there is a limitation in the claimant's "wage earning capacity" in work suitable to her qualifications and training. Restated using the Michigan's historic understanding of "wage earning capacity" the inquiry is: is there a limitation in the ability to earn after considering the nature of the work performed, the continuing availability of that kind of work,

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[17] *Mitchell* contains a good compilation of what "wage earning capacity" does and does not mean in Michigan: "Whether a worker has a compensable disability depends upon whether his injury resulted in a loss in wage earning capacity. See, *e.g.*, *Sims v R D Brooks, Inc*, 389 Mich 91, 93; 204 NW2d 139, 140-141 (1973), *Pulley v Detroit Engineering & Machine Co, supra*, *Medacco v Campbell, Wyant & Cannon Foundry Co*, 48 Mich App 217; 210 NW2d 360 (1973). Loss of wage earning capacity is a complex fact issue dependent upon the nature of work performed, continuing availability of work of that kind, the nature and extent of the disability, and the wages earned subsequent to injury. See *Pulley v Detroit Engineering & Machine Co, supra*, at 423; 145 NW2d at 43, *Frammolino v Richmond Products Co*, 79 Mich App 18, 27; 260 NW2d 908, 913 (1977). Evidence that an employee was still able to perform his job after injury is probative of the issue of whether the employee suffered a loss of wage earning capacity, but need not be decisive; it is only one of a complex of factors to be considered. See *Pulley, supra*, *Medacco v Campbell, Wyant & Cannon Foundry, Co, supra*, *Ward v Detroit Board of Education*, 72 Mich App 568, 575-579; 250 NW2d 130, 133-134 (1976) (BRONSON, J., dissenting). Similarly, evidence that an employee left his job for reasons unrelated to his injury tends to establish that he was still able to do the work, and had not suffered a loss in wage earning capacity." *Mitchell, supra* at 555-556.

the nature and extent of the work-related disability, and the wages earned post-injury? *Haske* was therefore wrong in understanding "wage earning capacity" to be a singular inquiry into whether one (or more) jobs is foreclosed by a work injury.

Besides *Haske*'s error on the meaning of "wage earning capacity," equally egregious was *Haske* ignoring 301(4)'s requirement that the limitation be one "resulting from a personal injury[18] or work related disease." The Legislature did not intend to compensate limitations of wage earning capacity *unless* the limitation is one "resulting from a personal injury or work related disease." Put differently, a person who may be physically or mentally unable to work is not suffering from a "disability" in a workers' compensation sense unless such condition is one "resulting from" a work injury.

These two concepts read out of 301(4) by *Haske* were the Legislature's mandate in 301(4).[19]

Haske is remarkable because the *Haske* majority, after reading out of the statute the two phrases described above, re-introduces to some extent the ideas of "*wage capacity*" and "*resulting from* a work injury" in interpreting the second sentence of *301(4)* where the phrases do *not* appear.

That is, the *Haske* majority reads the second sentence of 301(4) which says, "The establishment of disability does not create a presumption of wage loss," as meaning that "the

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[18] "Personal injury" is defined earlier in § 301(1) as an injury "arising out of and in the course of employment." MCL 418.301(1).

[19] The present Section 301(4) became effective May 14, 1987 via 1987 PA 28. The 1987 definition was a modification of the original legislative definition of disability in the prior Section 301(4) [1981 PA 200]. 1981 PA 200 had defined disability as "a limitation of an employee's wage earning capacity in the employee's general field of employment resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss." Prior to 1981 PA 200, the Worker's Disability Compensation Act remarkably did not have a specific statutory provision explicitly defining "disability." Instead, prior to 1981 PA 200, "disability" was defined by case law with the only statutory touchstone being the present Section 371(1)'s remark that weekly wage loss should "fairly represent the proportionate extent of impairment of the employee's earning capacity."

employee must establish *a reduction in earning capacity*." *Haske*, *supra* at 654 (emphasis in original). And, *Haske* says 301(4)'s second sentence requires the employee to prove a "causal link" between the work injury and subsequent unemployment. *Id.* at 658, 660-661. Such "causal link" between the two creates a "*compensable* disability," a new term coined by *Haske*. *Id.* at 635 (emphasis added); see also *Id.* at 665.

It is as if the *Haske* majority in construing the first sentence of 301(4) in a manner favorable to the most extreme position advocated by plaintiffs sensed that some balance must be introduced via interpretation of the second sentence. Therefore, *Haske* re-introduced both the "wage earning capacity" and "causal link" concepts in construing 301(4)'s second sentence, albeit in a minimalist, de-emphasized fashion by remarking on the concepts primarily only in footnotes.[20] Yet, 301(4)'s second sentence appears to be a simple statement that disability (under the first sentence) does not necessarily mean that the employee has lost wages. (*E.g.*, a disabled schoolteacher is not entitled to wage loss benefits if earning equal wages at other employment).[21] There was no reason to read the concepts of "wage earning capacity" and "causal link" out of the first sentence by characterizing the sentence as "ambigu[ous]" and then interpreting the second sentence - where the words do not appear at all - as re-introducing both concepts. *Id.* at 653.

Defendant welcomes *Haske*'s infusion of the "wage earning capacity" analysis and the "causal link" requirement into the overall mix, but the irony is that the first sentence of

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[20] The de-emphasis of employer-friendly concepts was also accomplished in the text of *Haske* by introducing them with conjunctions like "although" and "while." *Haske* at 658, 659, 660.

[21] Justice Weaver in her concurring in part and dissenting in part *Haske* opinion correctly said: "... I believe that the second sentence states the basic premise that Michigan's workers' compensation system is a wage-loss system. Wage loss establishes *entitlement* to benefits. However, the question of wage loss is reached only after the threshold question of *eligibility* for benefits under subsection 301(4) has been proven." *Haske* at 667 (WEAVER, J., concurring/dissenting opinion).

Regarding the first sentence, Justice Weaver also correctly recognized that "it would be inconsistent with the plain language of subsection 301(4) to conclude that the Legislature intended 'a limitation' to mean nothing more than a physical limitation because the words 'a limitation' cannot be considered separately from their restrictive clause 'of an employee's wage earning capacity in work suitable to his qualifications and training." *Id.* at 667.

301(4) contains those very words "wage earning capacity" and "resulting from a personal injury or work related disease," yet the words were there ignored.[22] As the Court will see in the subsection following, *Haske*'s re-introduction of the two concepts in interpreting the second section does *not* solve the problem, but has instead created the present problem.

Before turning to that point, however, the Court should appreciate that the *Haske* majority arrived at its curious point of view after this Court had previously read 301(4)'s first sentence differently. In fact, of the three cases from this Court addressing the present § 301(4), *Haske* is the exception.

Haske specifically abandoned the Court's original interpretation of 301(4), an interpretation that reflected the statute's words. In *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201; 536 NW2d 542 (1995), the Court in its first broad announcement on what the present § 301(4) definition of disability means said in an order:

> A majority of the Court is of the opinion that the 1987 definition of disability in the workers' disability compensation act requires a claimant to demonstrate how a physical limitation affects wage earning capacity in work suitable to the claimant's qualifications and training. It is not enough for the claimant claiming partial disability to show to an inability to return to the same or similar work. If the claimant's physical limitation does not affect the ability to earn wages in work in which the claimant is qualified and trained, the claimant is not disabled. *Rea*, *supra*.

[22] *Haske*'s inversion of the text's meaning in 301(4)'s two sentences reaches fruition in this reasoning: "With this conclusion, the definition of disability in subsection 301(4) cannot then be logically interpreted as a reduction of wage-earning capacity as long as wage loss is also measured by a reduction in wage-earning capacity. See *Lawrence v Toys R Us*, 453 Mich 112, 121; 551 NW2d 155 (1996) (LEVIN, J., plurality opinion). Subsection 301(4)'s second sentence eliminates the possibility that disability and wage loss are defined the same way when it provides that proof of a 'disability does not create [a] presumption of wage loss.' As a consequence, the Legislature must have instead intended a different meaning for disability. The only other meaning that the ordinary words of the statute may sustain is the definition urged by plaintiffs: an employee is disabled whenever he can no longer perform a job suitable to his qualifications and training as a result of his injury. This conclusion is consistent with our analysis in *Michales*." *Haske*, *supra* at 654-655 (footnotes omitted).

Rea then offered guidelines for fact finding on remand that reflected the recognized inquiry into "wage earning capacity."[23] *Haske*, in effect, adopted the Court of Appeals' *Rea* analysis at 204 Mich App 516; 517 NW2d 25 (1994).

Michales v Morton Salt Co, 450 Mich 479; 538 NW2d 11 (1995), was released the same day as *Rea*. Not surprisingly it reflects *Rea*'s reading of 301(4). The *Michales* Court also gave 301(4)'s first sentence its plain meaning. *Michales* is particularly important because it is strikingly similar to the instant case.

Mr. Michales had suffered a work-related hearing loss but continued working. He continued working at his usual job because the employer had improved the noise level in its plant for all who worked there and also provided earplugs.[24] So protected, Michales was able to perform his job. He did so until stricken with a non-work-related illness that precluded all further work.

This Court in *Michales* held that, on these facts, the employee did not satisfy 301(4)'s first sentence. The existence of a preventive or prophylactic restriction (working in an insulated environment with earplugs) was not determinative of disability under 301(4). If *Michales* had determined disability by comparing the number of jobs that might be performed pre- and post-injury, as *Haske* requires, Michales would have prevailed because he could no longer work in a noisy environment without protection, whereas pre-injury he could and did.

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[23] *Rea* had a curious history. The Court's original *Rea* order mailed to the parties implied a slip opinion had been prepared. Specifically, Justice Riley's statement in *Rea* referenced "Slip op at 40-41," but the Court Clerk's Office advised counsel of record the next day that this was a typographical error (Mr. Davis' letter of August 29, 1995). After the fact finding on remand was completed in *Rea*, the case returned to this Court because it had retained jurisdiction. The Court refused consolidation of *Rea* with *Haske* and held *Rea* in abeyance. 554 NW2d 320 (1996). The Court then dismissed *Rea* citing *Haske* over the dissent of Justices Weaver and Taylor "for the reasons stated by Justice Weaver in dissent in *Haske*." 456 Mich 894; 572 NW2d 7 (1997).

[24] Thus, Michales was accommodated - as was everyone else - by this modification which occurred before the employer knew of his work injury. *Michales* in this way is somewhat different from the instant case insofar as the instant plaintiff was not assigned certain tasks within his department given his restriction.

Michales' dispositive focus was the employee's *capacity* to earn after his work injury at work suitable to his qualifications and training. Since Michales retained the capacity to earn equal wages post-injury at work in his regular department, he was not disabled. Yet, *Haske* cites *Michales* as authority for its interpretation of 301(4)'s first sentence.[25]

The *Michales* Court read 301(4) the way defendant contends and the way *Rea* authorized. *Michales* said:

> Second, even assuming the inability to work in a noisy environment, a person is not compensably disabled within the meaning of the current definition if the employee remains able to perform work suitable to the employee's qualifications and training without limitation of wage-earning capacity. *Michales*, *supra* at 493-494.

Michales described the dispositive question under § 301(4)'s first sentence as being:

> Instead, the question is whether the employee's wage-earning capacity, i.e., ability to earn wages, has been limited, considering the employee's qualifications and training. *Id.* at 493 n 19.

Mr. Michales did not prevail because:

> . . . he has not met his burden of establishing that his wage-earning capacity has been limited by his hearing loss. *Id.* at 494.

Michales summarized its reading of § 301(4)'s first sentence as:

> The current definition of disability narrows the scope of an employee's eligibility for worker's compensation benefits. Pursuant to this definition of disability, plaintiff remains able to perform work suitable to his qualifications and training. *Id.* at 495.

Mr. Michales was not even "partially disabled because he had *no* limitation of wage earning capacity when his noncompensable manic depression rendered him totally disabled." *Id.* at 494 (emphasis added).

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[25] Justice Weaver in *Haske* correctly characterizes the *Haske* majority's reading of *Michales* as "this strained re-interpretation of *Michales*." *Haske*, p 669 (WEAVER, J., concurring/dissenting opinion).

Therefore, even though the number of jobs Michales could perform was more limited than pre-injury, he was not disabled because his capacity to earn was unaffected by reference to the suitable post-injury work he performed and the amount he earned post-injury.

Rectification then of the *Haske* majority's reading of the first sentence of § 301(4) will not represent an undoing of firmly rooted case law interpretation. To the contrary, the Court had read Section 301(4) correctly originally. *Haske* made the error. The Court should restore reliance on the statute and that will end the mischief that presently plagues the system.[26]

D. Is *Haske*'s Interpretation Of 301(4)'s First Sentence Harmless In Light Of *Haske*'s Interpretation Of 301(4)'s Second Sentence?

A legitimate question is: is *Haske*'s misreading of the first sentence harmless since *Haske* re-introduced to some extent the concepts of "wage earning capacity" and the necessity that wage loss be "resulting from" a work injury (*i.e.*, a causal link) in construing the second sentence? *Haske*'s misreading is not harmless because 301(5)'s opening clause conditions 301(5)'s applicability on satisfaction of "disability" in 301(4). "Disability" in 301(4) is defined explicitly only in the first sentence. Due to *Haske*'s interpretation of the first sentence, an employee can enjoy the protections afforded in 301(5), although he or she cannot satisfy *Haske*'s interpretation of 301(4)'s second sentence. As a result, confusion has ensued because employees who cannot meet 301(4)'s second sentence criteria can, nevertheless, prevail if the decision maker skips 301(4)'s second sentence and drops down to a 301(5) analysis. The same set of facts are, therefore, yielding different results depending on which statutory provision - 301(4)'s second sentence or 301(5) - the decision maker chooses to apply.

[26] Compare, *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000); *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000); *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998).

This Court must correct this problem by overruling *Haske*'s interpretation of the first sentence. So long as "disability" in the first sentence of 301(4) continues to be defined the way *Haske* defines it, *i.e.*, the inability to do a single job within one's qualifications and training, 301(4) and 301(5) are in conflict. Claimants satisfy 301(5)'s opening condition precedent by simply saying, "there is one job I cannot do, therefore, I'm disabled." Thereafter, claimants are cloaked by 301(5)'s protections *even though* they cannot meet *Haske*'s interpretation of the second sentence of 301(4), *e.g.*, he or she cannot prove a "causal link" between work injury and wage loss.

Using this case as an example,[27] Mr. Sington satisfies, per the Court of Appeals in reliance upon *Haske*, the "disability" requirement in 301(4)'s first sentence. Thus, per the Court of Appeals, the only remaining analysis is under 301(5). And, since Mr. Sington under 301(5) either lost his job "for whatever reason" (if he labored 100 or less weeks) or lost his job "through no fault of his own" (if he labored more than 100 weeks), he receives benefits. MCL 418.301(5)(e) and (d), respectively. The conflict arises because under *Haske*'s interpretation of the *second* sentence of 301(4) Mr. Sington cannot prevail. Mr. Sington's "ailments that are unrelated to his previous employment" refute "the causal connection between the partial disability and the employee's unemployment." *Haske, supra* at 662 n 38. That is why the Magistrate and Worker's Compensation Appellate Commission denied Mr. Sington's claim, *i.e.*, plaintiff does not satisfy 301(4)'s second sentence as interpreted by *Haske*.

We now have a situation where employees who cannot satisfy the second sentence of 301(4) receive benefits under 301(5) because, per the Court of Appeals, in such cases

[27] There are many others like it. *E.g.*, *Wagner v General Motors Corp*, 2000 ACO #429; *Ridley v International Paper Co*, 2000 ACO #440; *Burgtorf v Federal Mogul*, 2000 ACO #395; *Woodhams v Federal-Mogul Corp*, 2000 ACO #341; *Davis v G & L Industries*, 2000 ACO #10; *Brogdon v Chrysler Corp*, 2000 ACO #22; *Stroggin v Wal-Mart*, 2000 ACO #617.

Haske's second sentence analysis is irrelevant: "Injured employees engaged in 'reasonable employment' who subsequently lose their jobs are not required to prove that the job loss was causally connected to the work-related injury," per the Court of Appeals (34a). We now have a situation in workers' compensation law where, if 301(4)'s second sentence as interpreted by *Haske* is applied to a set of facts, the claim fails. If 301(5) is applied to the same set of facts, the claim succeeds. The result depends on whether the decision maker chooses to apply 301(4)'s second sentence as interpreted by *Haske* or 301(5).

Please consider, by contrast, how everything falls into place if 301(4) is applied as it reads. If 301(4)'s first sentence inquiry is an inquiry into the effect of the work injury on the claimant's "wage earning capacity" and an inquiry into whether any such limitation "result[s] from" the work injury, then the conflict between § 301(4) and (5) goes away. Mr. Sington, while unable to work at all of the jobs suitable to his qualifications and training post-injury as compared to pre-injury, did not suffer a limitation in his "wage earning capacity." He worked with a precautionary restriction in the same department doing jobs (but avoiding some) which he had performed pre-injury. His post-injury work paid as much as he earned pre-injury. The work was never withdrawn by defendant. Plaintiff simply could not continue working because of a non-work-related problem. These are all factors relevant for determining "wage earning capacity." *Pulley* and *Mitchell*, both *supra*. When the focus is *not* placed solely on the number of jobs plaintiff could perform post-injury but on Mr. Sington's "wage earning capacity" post-injury, then Mr. Sington does not satisfy the first part of § 301(4)'s first sentence.

Additionally, Mr. Sington does not satisfy the concluding phrase of § 301(4)'s first sentence as it reads. Mr. Sington is not experiencing a loss of wages today "resulting from a

personal injury or work related disease." He is experiencing an absence of wages "resulting from" a non-work-related stroke.

In sum on this point, *Haske*'s interpretation of 301(4)'s first sentence draws 301(4)'s second sentence into conflict with § 301(5) whereas the two do not conflict when correctly read. If 301(4)'s first sentence is given its plain meaning, *i.e.*, the meaning given it in *Rea* and *Michales*, there is no conflict between 301(4) and (5). Mr. Sington does not satisfy the first sentence of 301(4) by its terms. He only satisfies it because of *Haske*'s misconstruction of the sentence. The Court should fix that misconstruction. The result will be Mr. Sington is not disabled under 301(4)'s first sentence. As such, he cannot progress to § 301(5). There will no longer be no conflict between the second sentence of 301(4) as interpreted by *Haske* and 301(5). And, there will no longer be the problem of decision makers having the option of referring to one section to award benefits or another to deny benefits on the same facts.

E. Fixing *Haske* By Applying The Statute As It Reads Renders *Powell* Irrelevant.

The Court should recognize that correction of *Haske*'s reading of the first sentence also solves the Court's concern about reconciling *Haske* and *Powell*. There is no need to attempt to reconcile the two cases because it was not *Haske* but the Legislature in enacting 301(4) who overruled *Powell* on the question of whether non-work-related ailments causing unemployment yield compensation. The Legislature required that a limitation in wage earning capacity be "resulting from" a work injury and not something else. *Powell* says otherwise, but it was decided under the common law before enactment of 301(4), (5) and (9). That makes all the difference. As this Court has said:

> Now, however, the quoted statutory provision established the law in this area. The Legislature chose the words of the statute, and we are bound by them. Any cases decided under the common law before subsection (5) was enacted are essentially irrelevant. To the

> extent that the common-law favored work doctrine is inconsistent with the plain language of the statute, the Legislature has changed the common law. This is a proper exercise of legislative authority. Const 1963, art 3, §7. *Perez*, *supra* at 606.

See also, *Perez* at 609 ["As noted above, to the extent that the common law is inconsistent with the statute, the common law has changed, and pre-subsection (5) case law is no longer relevant."] *Perez*, *supra* at 609; see also *Id.* at 611, 615 n 11 and *McJunkin*, *supra* at 598. The Court of Appeals in this case recognized that *Perez* had implied that pre-statutory common law cases, and specifically *Powell*, had no further vitality. But, the Court of Appeals said that this Court has not specifically overruled *Powell*.[28]

The Court "must examine the statute alone for guidance" on this point and, in so doing, recognize that the Court of Appeals "erred in applying the common law to the facts of this case." *Perez*, *supra* at 611. Since *Powell* is "inconsistent with the plain language of the statute," *Powell* "is no longer relevant." *Perez*, *supra* at 609. The Court should overrule *Powell* here explicitly, given that the Court of Appeals believes it has continuing vitality.

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[28] *Powell* also was the impetus for other legislative changes. For example, *Powell* defined disability as an inability to do the job one was performing at the time of injury. *Powell*, *supra* at 350. *Powell*'s view of disability did not comport with other common law pronouncements by this Court on what disability means. Since there was no specific statute directly addressing disability, one could consider the common law on this subject in a state of flux. In any event, 301(4) defined "disability" differently than *Powell* with the reference now on limitation in wage earning capacity. *Haske*, p 666 (WEAVER, J., concurring/dissenting opinion). Also, Section 301(9) was an antidote to *Powell*'s loose description of what constitutes "favored work." *Powell* characterized "favored work" as any job less demanding than the job performed at the time of injury. That characterization was coupled with the stark pronouncement that performance of "favored work does not establish a wage-earning capacity." *Powell* at 349. The net result of *Powell* was that if a person returned to anything but their last job the person was performing favored work and, by doing so, proved that she has no wage earning capacity. *Powell*, *supra* at 350-352. The Legislature reacted by recasting favored work as "reasonable employment" and by providing that performance of any reasonable employment for particular durations can establish a new wage earning capacity. MCL 418.301(5). Finally, *Powell* implied that a new wage earning capacity could only be established if one returned to a job within one's qualifications and training, whereas the Legislature in 301(9) specifically says that "reasonable employment" is not so limited and can be any post-injury work. Compare *Powell* at 352-355 with 301(9).

F. What Does 301(5) Apply To?

If 301(4) means what defendant contends it plainly says, a legitimate question is: when *does* § 301(5) apply? Section 301(5) applies when an employee is offered post-injury work unsuitable to his qualifications and training. This is why 301(9) defines reasonable employment as work not limited to jobs suitable to one's qualifications and training. Section 301(5) also applies to offered work that is suitable to one's qualifications and training but at a diminished earning level.

To illustrate both scenarios, a skilled electrician sustains a work injury which renders him incapable of continuing work as an electrician. His employer offers him a menial desk job in the employer's office at equal pay. Such a job is not suitable to an electrician's qualifications and training. Therefore, the electrician satisfies the opening clause of § 301(4) because he has a limitation in his capacity to earn wages in work suitable to his qualifications and training. He is thus within 301(5)'s protections. If and when he stops laboring at the office work, one or the other of the various provisions in § 301(5) is engaged depending upon the duration of his post-injury office work.

Since "reasonable employment" also encompasses work within one's qualifications and training, another 301(5) example is where the electrician's doctor restricts the electrician to working 40 hours per week at electrician work, rather than his usual 60 hours per week. Such an electrician continues to labor at work suitable to his qualifications and training. But, he has suffered a limitation in "wage earning capacity," *i.e.*, his ability to earn as much post-injury at such work is diminished. Consequently, he is within § 301(5) and receives partial benefits reflecting "a", *i.e.*, any, limitation in her wage earning capacity while working. MCL

418.301(5)(c). When he stops working one or the other of § 301(5)'s provisions are engaged depending again upon the specific circumstances of when she terminates work.

This is how § 301(4) and (5), and (9) were designed to work together to make a coherent statute. This coherence is dependent, however, upon the Court giving the first sentence of § 301(4) its plain meaning, the meaning the Court gave it in *Rea* and *Michales* and abandoned in *Haske*.

G. The Legislative Purpose of § 301(4).

There is another reason why the Court should restore 301(4)'s plain meaning. The Legislature had a particular purpose in mind when enacting Section 301(4). *Haske*'s reading of the first sentence defeats that purpose, while *Michales* and *Rea* gives it fruition. A review of some of the history of 301(4) is worthwhile to appreciate this point.

The Court of Appeals remarked that the passage of 301(4)'s 1987 definition of disability "works a substantial change in substantive law because it increases a claimant's burden of proving loss of wage-earning capacity." *Turrentine v General Motors Corp*, 198 Mich App 572, 576; 499 NW2d 411 (1993). This observation is accurate for the following reason.

The 1987 definition of disability was a modification of the original legislative definition of disability enacted in the early 1980s via 1981 PA 200. The *quid pro quo* of those 1980s reforms was: the amount of people deemed eligible for workers' compensation was to be reduced in exchange for the "dollar amount of benefits payable to workers eligible for compensation [being] increased." *Dean v Chrysler Corp*, 434 Mich 655, 667; 455 NW2d 699 (1990); *Farrington v Total Petroleum, Inc*, 442 Mich 201, 216 n 16; 501 NW2d 76 (1993); *Michales*, *supra* at 490; VanderLaan & Studley, *Workers' Compensation Reform: A Case Study of the Legislative Process in Michigan*, 14 U Mich J L Ref 451, 459-460 (1981); Booms &

Salter, *Workers' Disability Compensation*, 27 Wayne L R 1035, 1053-1054 (1981); (46a *et. seq.*); (56a-57a *et. seq.*); 1980 Journal of the Senate 821-822 (statement of Senator Welborn).

In keeping with that rationale, this Court recognized early on that the Legislature intended "to narrow and restrict eligibility qualification" for workers' compensation benefits. *Dean, supra* at 667; *Farrington, supra* at 216 n 16. This Court bluntly noted that the Legislature's purpose was "to overturn or modify expansive interpretations placed upon the Act by this Court." *Dean, supra* at 666. The purpose of 301(4) was to bring Michigan into the mainstream view in the United States. (73a; 75a; see also 59a *et. seq.*; 66a *et. seq.*). This was necessary because:

> In the early 1980's, the Legislature, after a good deal of public discussion, came to the view that the costs of Michigan's worker's compensation system were excessive and therefore a deterrent to the state's nascent economic recovery from the recession of the 1970's. See Senate Analysis Section, SB 573, January 7, 1982. To sense the tenor of the argument of the reformers, it is helpful to recall, as this Court did in *Franks v White Pine Copper Div*, 422 Mich 636, 655; 375 NW2d 715 (1985), the words of the then Governor William Milliken, who described the system as the "'biggest single liability to Michigan's job climate today.'" *Tyler v Livonia Schools*, 459 Mich 382, 388; 590 NW2d 560 (1999).

Interpreting the first sentence of § 301(4) to mean that a person is "disabled" so long as there is one job within the person's qualifications and training foreclosed by a work injury does not give effect to this legislative intent. Even Professor Larson did not think that

such a reading was correct. (58a).[29] By contrast, reading the statute to require inquiry into the effect of the work injury on one's wage earning capacity and to require that the limitation result from the work injury does give effect to legislative intent.

H. How Does 301(4)'s Description Of Disability Differ From The Retiree Definition Of Disability in 373?

An argument raised previously against reading 301(4) according to its text and in accord with *Rea* and *Michales*, is: doesn't that make 301(4)'s definition of disability the equivalent of the retiree definition of disability in 373(1)? It does not. The retiree definition of disability provides:

> An employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the social security act, 42 U.S.C. 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this act are sought shall be presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under either this chapter or chapter 4. This presumption may be rebutted only by a preponderance of the evidence that the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience. This standard of disability supercedes other applicable standards used to determine disability under either this chapter or chapter 4. MCL 418.373(1).

[29] Professor Larson's speech to the Michigan Self-Insurers' Association was recounted in its newsletter as follows: "'It is being argued in some quarters,' said the Duke University law school professor, 'that this (definition of disability) language means that if the claimant as a result of the injury is under any limitation as to any kind of work for which he is qualified, he is disabled even though he is doing perhaps the very job that he was doing when he was injured or could do a number of jobs.

'I suppose you could squeeze that meaning out of the words if you tried hard enough,' Larson said, 'but I think they've been trying to get away from this original freakish Michigan situation and this was just one more step in the right direction.

'You try to avoid constructions which produce preposterous results' Larson continued, 'and if you carry this interpretation to an extreme, you can get some pretty preposterous one. Just hypothesize for example that I'm injured. I'm trained and qualified to do 50 different jobs, but because of my injury there is one of them that I can't do. I can do the other 49. Am I disabled? I don't think so.'" (58a).

Besides the presumption contained in this statute, a retiree must prove that he or she is unable to perform any work suitable to his or her qualifications, including training or experience. The employee must therefore prove an inability to perform each and every job so suitable. And, "suitability" of jobs is not limited to those within one's qualifications and training because 373(1) requires reference to one's "experience" as well. [*E.g.*, an electrician who had "experience" previously at menial office work must prove he cannot perform that too.]

The lead case describing what an employee must do to satisfy the retiree standard says:

> Relevant inquiries under §373(1) are: What is the retired employee's residual physical capacity after his work-related injury? What skills and knowledge has he acquired through training or experience? Are these skills transferable to other types of occupations? Are there other jobs to which his skills and knowledge can be transferred within his physical capacity to perform? Under this analytical framework, the retired claimant's burden of rebutting the presumption is twofold: (1) he must establish that he has physical restrictions resulting from a work-related injury or disease, and (2) that these restrictions render him unable to perform work, within or without his field of skill, that is otherwise 'suitable to his qualifications.' In other words, a retired worker must demonstrate by a preponderance of the evidence that the work-related impairment precludes him from performing any other work, either within or without his field of skill, for which he is qualified by virtue of his prior training or experience and to which he can transfer, adapt or utilize job skills and such knowledge previously acquired. *Peck v General Motors Corp,* 164 Mich App 580, 592-593; 417 NW2d 547 (1987).[30]

Therefore, there is difference between 301(4) and 373(1). Under the latter, the retiree must be unable to do virtually anything.

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[30] *Peck*'s companion case, *Pankow v General Motors Corp*, 432 Mich 892; 438 NW2d 80 (1989), was reversed on a different ground. *Peck*'s description of how the retiree standard operates is accepted as the controlling law. *E.g.*, *Miles v Russell Memorial Hospital*, 202 Mich App 6, 11; 507 NW2d 784 (1983); *Mason v Chrysler Corp*, 201 Mich App 17, 21-22; 506 NW2d 240 (1993); *Warnsley v K-Mart*, 1999 ACO #577; *Grady v Michigan Employment Security Comm*, 1998 ACO #482; *Larson v Clinton Valley Center*, 1998 ACO #255.

I. How The Rate Provisions Of The Act Apply.

For completeness sake, one remaining consideration is: how do the weekly rate provisions - 371(1), 351(1), and 361(1) - play out under the statutory scheme?

The rate provisions presume eligibility and entitlement to weekly workers' compensation benefits and address the amount of weekly benefits payable. Section 371(1) describes the starting point for rate calculations as the employee's average weekly wage at the time of injury. It then directs consideration into the proportionate extent of the impairment left by the work injury.

Section 351(1) says that those totally disabled, *i.e.*, where the proportionate impairment is 100%, are entitled to this rate of compensation: 80% of the employee's after tax average weekly wage, subject to a maximum weekly rate set by Section 355 annually.

Remember that 301(4) defines disability as "a" limitation, *e.g.*, any limitation. The reason why 301(4) says "a" limitation is because any limitation of wage earning capacity is actionable in Michigan, *i.e.*, even a partially limiting work injury can yield weekly compensation. The Legislature's use of the "a" is a recognition that Michigan recognizes partial disability under 361(1), as well as total disability under 351(1).

Under 361(1)'s partial disability provision, the weekly rate is calculated differently than for total disability. The partial rate's formula is less generous, *i.e.*, 80% *of the difference* between the injured employee's after tax weekly before the injury as compared with the after tax average weekly wage which the employee is able to earn post-injury, again subject to the same maximum recited in Section 355.

How do non-work-related ailments affect persons already receiving weekly workers' compensation benefits? That is, what is the effect of a non-work-related stroke on one

already *totally* disabled by a work injury? There is no effect. Such an employee continues to receive full weekly workers' compensation benefits because she is already totally disabled by a work injury. Superimposition of another ailment atop the totally disabling work injury does not work a cessation of her weekly benefits.

What happens if a *partially* disabled employee later suffers a non-work-related stroke precluding all employment, *i.e.*, rendering her totally disabled? Such an employee does not begin receiving full benefits as if she were totally disabled *resulting from a work injury*. Nor does the subsequent non-work-related ailment superimposed upon her work-related partial disability extinguish her right to continuing partial disability benefits because the work-related partial disability remains. Such an employee continues to receive the partial disability benefits, although now further disabled by a non-work-related ailment.

This is how the statute was designed to work. An employee is to be compensated on the basis of the degree of impairment in his or her wage earning capacity resulting from the work injury. MCL 418.371(1).[31] Non-work-related contributions toward unemployment do not matter.[32] This was Justice Brickley's opinion in the concurring in part dissenting in part decision in *Sobotka*, *supra*. There, he said:

> Should a finder of fact determine that a partial disability is only partially impaired earning capacity, and that there are other reasons for total post injury unemployment, compensation should be limited to the extent the injury has caused unemployment. *Sobotka*, *supra* at 44-45 (BRICKLEY, J., concurring/dissenting opinion).

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[31] *Simpson v Lee & Cady*, 294 Mich 460, 463; 293 NW 718 (1940); *Barnot*, *supra*.

[32] *E.g.*, *Fawley v Doehler-Jarvis Division of National Lead Co*, 342 Mich 100, 104; 68 NW2d 768 (1955); *Benefield v W R Grace Co*, 34 Mich App 442, 445; 191 NW2d 567 (1971).

J. Resolution Of The Instant Case

Were there physical limitations left by Mr. Sington's work injury? Yes. Are there some jobs precluded within work suitable to his qualifications and training as the result of the work injury? Yes. Did the work injury limit Mr. Sington's ability to earn at jobs suitable to his qualifications and training? No. Mr. Sington had no limitation in his wage earning capacity within work suitable to his qualifications and training resulting from a work injury. Much like Mr. Michales, Mr. Sington was able to continue work in his same department with a precautionary restriction performing - not "make work" or "non-descript" work - but jobs he had done before his work injury. Those jobs did not end. Plaintiff's ability to continue at them did. Mr. Sington's ability to continue work ended not as a "result [] of a personal injury or work related disease", but rather - like Mr. Michales - as a result of a non-work-related ailment.

For this reason, Mr. Sington does not receive benefits because he does satisfy the first sentence of 301(4). That is, his wage earning capacity was not limited by his work injury but by a problem that did not result from the workplace.

Since Mr. Sington does not satisfy the first sentence of § 301(4), the Court of Appeals' progression to 301(5) is inappropriate. Section 301(5)'s opening clause requires Mr. Sington to establish disability under § 301(4) and Mr. Sington does not meet that criterion.

Haske conflicts with *Michales* and *Rea* and, most importantly, with the words of 301(4). The Court must overrule *Haske*'s reading of the first sentence of § 301(4). Overruling *Haske*'s interpretation of the first sentence places the law back on its proper track. The provisions which follow 301(4) fall into place and make a coherent whole. Placing the law back on track with the statute eliminates the present conflicts in the law and the potential for arbitrary decision making.

ARGUMENT II

WAGE LOSS MUST BE CONNECTED TO A WORK INJURY. WHERE THERE IS NO CONNECTION, THERE IS NO WORKERS' COMPENSATION LIABILITY FOR WAGE LOSS, EVEN UNDER *HASKE*. IF THE COURT DOES NOT OVERRULE *HASKE*'S INTERPRETATION OF THE FIRST SENTENCE OF § 301(4), THEN THE COURT SHOULD APPLY *HASKE*'S INTERPRETATION OF 301(4)'S SECOND SENTENCE AND HOLD THAT THE INTRODUCTORY CLAUSE TO § 301(5) REQUIRES THE PLAINTIFF TO SATISFY BOTH SENTENCES IN § 301(4) AS INTERPRETED IN *HASKE*. PLAINTIFF DOES NOT SATISFY *HASKE*'S INTERPRETATION OF 301(4)'S SECOND SENTENCE.

Among the most elemental principles in workers' compensation law is the principle that wage loss must be connected to a work injury for there to be workers' compensation liability.[33] Workers' compensation was created to compensate employees for wages lost due to a work injury, not as a general insurance policy against all ailments precluding work.[34] The instant plaintiff's absence of wages due to his non-work-related stroke is not a loss attributable to any work injury. *The stroke took him out of the labor force, not his work injury.* Absence from work due to a non-work-related reason, even though the claimant has not recovered from the work injury, cannot be the employer's responsibility under the workers' compensation act.[35] *Haske* recognized this, but only reached this point by interpreting the second sentence of § 301(4), primarily in footnotes.

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[33] *Lauder v Paul M. Wiener Foundry*, 343 Mich 159, 167; 72 NW2d 159 (1955); *Levanen v Seneca Corp*, 227 Mich 592, 601; 199 NW 652 (1924); *Simpson, supra*.

[34] *Id.*

[35] *E.g., Fawley v Doehler-Jarvis Division of National Lead Co*, 342 Mich 100, 68 NW2d 768 (1955). *Wieland v Dow Chemical Co*, 334 Mich 427; 54 NW2d 708 (1952).

The Court of Appeals, on the other hand, rejected this fundamental principle in this case. It held that plaintiff's wage loss due to the stroke was the employer's responsibility. The Court of Appeals' reasoning was bluntly stated as:

> Injured employees engaged in "reasonable employment" [under § 301(5)] who subsequently lose their jobs are not required to prove that the job loss was causally connected to the work-related injury. (35a; bracketed material added).
>
> * * *
>
> An injured worker engaged in "reasonable employment" need not prove that he lost his job for reasons directly related to his injury. Therefore, once an employee accepts and begins to perform "reasonable employment," the specific provisions found in § 301(5)(e) take precedence over *Haske*'s general requirement that the wage loss must be causally linked to the work-related injury. (34a).

To arrive at this conclusion, the Court of Appeals *sub silento* reasons that the opening clause of the "reasonable employment" provision in 301(5) does *not* require the claimant to satisfy all of 301(4) as interpreted by *Haske*. Yet, if *Haske* is to withstand the Court's scrutiny in this case, the Court should hold that the opening clause of 301(5) requires the claimant satisfy *all* of 301(4) as interpreted by *Haske* for the following reasons.

First, the Legislature in the progressive arrangement of the statute requires as a condition precedent to engagement of the "reasonable employment" provision of 301(5) that "disability [be] established pursuant to subsection (4)." MCL 418.301(5). As indicated, *Haske* understands §301(4)'s two sentences to mean that "disability" in the first sentence is the inability to do one or more jobs with the second sentence qualifying only certain first-sentence disabilities as "compensable" disabilities. The term "compensable disability" does not appear anywhere in § 301(4).

Since the term "*compensable*" disability is an invention of *Haske*, the Legislature in conditioning operation of 301(5) on 301(4)'s disability determination could not have said that 301(5) is only engaged, "If *compensable* disability is established pursuant to subsection (4) . . . ." Put differently, the Legislature could not have anticipated this Court coining the term "compensable disability" so that the Legislature could condition 301(5) on establishment of "compensable" disability. Yet, there can be little doubt that the Legislature did not mean that a claimant can satisfy one-half of 301(4) in order to proceed to 301(5). It is unreasonable to assume that the Legislature envisioned a claimant: satisfying the first sentence of 301(4), skipping over the second sentence of 301(4), and proceeding directly to 301(5). It is unreasonable to assume that an employee can be granted benefits under 301(5) when he cannot satisfy *all* of the preceding provision. It is unreasonable to assume that the linchpin provision on disability is to take a backseat to the provision which follows it, a provision conditioned its satisfaction.

Therefore, if the error of *Haske* is to persist with respect to the first sentence, then the Court should hold that the opening clause of § 301(5) requires satisfaction of *Haske*'s "causal link" and "wage earning capacity" concepts read into the second sentence of 301(4) by the *Haske* majority.

Applying such understanding of the condition precedent to 301(5) here, Mr. Sington does not prevail. There is no "direct link" between his work-related injury and his subsequent wage loss under the second sentence of 301(4). *Haske*, *supra* at 661 and 660. The quote from *Haske*, drawing from *Sobotka* and Professor Larson, recounted in the preceding Argument to the effect that a non-work-related ailment breaks the causal link "between the

partial disability and the employee's unemployment" applies here to defeat plaintiff's claim. *Haske*, *supra* at 662 n 38.

The Court should also consider the following consequences flowing from the Court of Appeals' reasoning, again stemming from the problem created by *Haske*. Defendant under the Court of Appeals' reasoning would have been better off had it never returned Mr. Sington to work within his restrictions. Under that circumstance, plaintiff would have filed his workers' compensation claim and - since plaintiff had not been returned to "reasonable employment" - the claim would have been litigated only under § 301(4) and *Haske*. Plaintiff would not have prevailed under *Haske* because he would not have satisfied the second sentence of 301(4) as interpreted by *Haske*. He has thus only obtained benefits via the Court of Appeals' reasoning *because* defendant returned plaintiff to work.

Do we want a workers' compensation system which discourages employers from returning employees with restrictions to their workplace? The answer is obvious since one of the central themes of workers' compensation is encouragement of returns to work. *Bower v Whitehall Leather Co,* 412 Mich 172, 178; 312 NW2d 640 (1981).

Consider also the following absurdity which flows from the Court of Appeals understanding of the statute and *Haske*. Suppose that an employee following a work injury which limits her is returned to "reasonable employment." Within the first 100 weeks of such employment, assume that the employee recovers from the work injury but the employer has not yet reassigned the employee outside of the modified work within the department. In other words, although the employee recovered from the work injury, she was still laboring at the modified job, perhaps because the employer wanted a particular project finished or time for reassignment was not ripe. Under the Court of Appeals reasoning, if such employee loses her

modified work within the first 100 weeks "for whatever reason," then she is entitled to workers' compensation benefits under 301(5)(c) because she is still within 301(5)'s protections. She is still "[a]n injured worker engaged in 'reasonable employment'" and need no longer satisfy 301(4) again. (34a).

Surely, the Legislature did not arrange the statutes so that employees are entitled to weekly workers' compensation disability benefits even though they are no longer disabled. An employer must be able to challenge employees on whether they satisfy 301(4), both sentences as interpreted by *Haske*, at any time. Working at "reasonable employment" cannot immunize the employee from such challenge. Yet, under the Court of Appeals' decision in the instant case, that is the result. A "worker engaged in 'reasonable employment' need not prove that he lost his job for reasons directly related to his injury." (34a). This is not a coherent, rational reading of the statute. It also appears to contradict *Perez*, *supra*.

In sum, with reference to an elemental principle of workers' compensation and *Haske*'s interpretation of the second sentence of § 301(4), plaintiff cannot prevail. Plaintiff must satisfy all of § 301(4) as interpreted by *Haske*. He does not satisfy the second sentence as read by *Haske*. He does not have a "compensable disability" because his wage loss is not directly linked to his work injury. *Haske* at 661, 660. The Court of Appeals is wrong in saying that 301(4), the general requirement for disability in workers' compensation, is irrelevant simply because an employer did what the workers' compensation system desires, *i.e.*, returned the employee to work.

RELIEF

WHEREFORE, defendant-appellant, Chrysler Corporation, a/k/a DaimlerChrysler Corporation, respectfully requests that the Supreme Court reverse the Court of Appeals and reinstate the order of the Worker's Compensation Appellate Commission.

Respectfully submitted,

LACEY & JONES

BY:_____

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