

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

GARY A. HENRY,
PLAINTIFF,

V

DOCKET #03-0334

CITY OF MIDLAND,
SELF INSURED,
J.E. JOHNSON CONTRACTING INCORPORATED AND
CITIZENS INSURANCE COMPANY,
DEFENDANTS.

ON REMAND FROM MAGISTRATE SLOSS.

EDWARD J GALLAGHER, II FOR PLAINTIFF,
BRUCE L. DALRYMPLE FOR CITY OF MIDLAND,
JUDITH F. VARGA FOR J E JOHNSON CONTRACTING, INCORPORATED AND
CITIZENS INSURANCE COMPANY,

OPINION

PRZYBYLO, COMMISSIONER

This matter returns to the Commission following a remand to Magistrate Andrew Sloss requiring the magistrate to provide more analysis of plaintiff's post-injury wage-earning capacity. Because we retained jurisdiction, the matter returned without either party filing a Claim for Review. As such, neither the Worker's Disability Compensation Act nor our prior order required the parties to file a brief to identify any errors in the magistrate's supplemental decision.

However, defendant did file a "post remand memorandum on appeal". That document contained only defendant's reiteration of its arguments from its original brief. Defendant's original brief raised three arguments, the magistrate's failure to allocate the burden of proof to plaintiff and to address evidence, the magistrate's failure to analyze plaintiff's post-injury wage earning capacity, and the magistrate's failure to apply the one-year-back rule under MCL 418.833.

The magistrate's supplemental decision follows the remand order and directly addresses the failures defendant identified in its original brief, excepting the one-year-back argument. The magistrate properly allocated the burden of proof to plaintiff and addressed all of the post-injury jobs. The magistrate's analysis used the factors the Commission instructed him to use. The magistrate concluded that none of plaintiff's post-injury work represented wage earning capacity. Because defendant does not identify any specific error in the magistrate's supplemental

decision and the magistrate clearly provided the analysis missing from his first decision, we affirm his supplemental decision.

However, defendant properly raised the one-year-back rule in its original brief. Neither the Commission nor the magistrate has addressed this argument. We now accept defendant's argument and hold that it may apply the protection of the one-year-back rule. Under that rule, defendant may limit its obligation to pay benefits to the period one year prior to plaintiff filing his latest application, May 1, 2000 and continuing.

Therefore, we affirm the magistrate's supplemental decision with the modification allowing application of the one-year-back rule.

Acting Chairperson Glaser and Commissioner Will concur.

Gregory A. Przybylo Commissioner

Martha M. Glaser Chairperson

Rodger G. Will Commissioner

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This matter returns on remand from Magistrate Andrew G. Sloss' decision, mailed March 22, 2005. The Commission has considered the record and believes that the magistrate's supplemental decision should be affirmed with modification. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed with modification in accordance with the attached opinion.

Gregory A. Przybylo Commissioner

Martha M. Glaser Chairperson

Rodger G. Will Commissioner