No. 20-7484

IN THE

UNITED STATES SUPREME COURT



JOSEPH F. OLIVARES – PETITIONER

vs.

MARK LONG, ET AL – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES 6TH CIRCUIT COURT

PETITION FOR WRIT OF CERTIORARI

JOSEPH F. OLIVARES

2581 INTERNATIONAL DRIVE 1220C

YPSILANTI, MI. 48197

734-21-8305

A

## QUESTIONS PRESENTED FOR REVIEW

DID THE COURT ERR;

1. IN NOT ALLOWING PETITIONER TO DEVELOP THE RECORD FOR APPEAL, BY ALLOWING AT LEAST ONE HEARING?

2. IN FINDING THAT LIMITATIONS CONTROLS THIS ACTION UNDER 42 U.S.C. 1983, AS A THREE YEAR STATUTE FOR INJURY UNDER MICHIGAN LAW?

3. IN IGNORING MICHIGAN LAW AS TO STATUTE PETIONER IS CURRENTLY UNDER, AS OF 2000, TO WHICH THE 2005 ORDER IS VOID AB INITIO, IN NOT COMPLYING WITH SAID STATUTE?

4. IN VIOLATING PETITIONER'S DUE PROCESS OF KNOWING WHAT HE WAS TO DEFEND, IN 2005, IN THE MAGISTRATE HAVING AN INDEPENDENT MEDICAL EXAMINER REVIEW PREVIOUSLY LITIGATED MEDICAL EVIDENCE, ABSENT THE 2000 X RAY, TO ADAPT THE FINDING THAT PETITIONER'S INJURY IN 1998 WAS A TORN SHOULDER. TO WHICH THE MAGISTRATE IN 2000 CONSIDERING THE 2000 X RAY ORDERED PETITIONER TO RECEIVE REASONABLE AND NECESSARY MEDICAL CARE FOR HIS ROTATOR CUFF SURGERY AND FOLLOW UP TREATMENT?

5. IN IGNORING THE 2018 ORDER BY THE COMMISSIONER'S IN ASSERTING THE DOCTRINE OF RES JUDICATA CONTROLS THE 2005 VOID AB INITIO ORDER, TO THEN CALCULATE WHEN LIMITATION STARTS?

B

## PARTIES TO THE PROCEEDINGS

All parties do not appear in the caption of the case. The names of the parties are listed below

Joseph F. Olivares, Petitioner, Appellant, and Plaintiff below

Mark Long individually as Director for the Michigan Worker's Compensation Agency. Respondent, Appellee, Defendant below

The Board of Magistrates individually for the Michigan Worker's Compensation System. Respondent, Appellee, Defendant below

The Commissioners for the Michigan Worker's Compensation System

Respondent, Appellee, Defendant below

Performance Contracting Group (PCG)

Respondent, Appellee, Defendant below

Court dismissed this action prior to service

B(iii)

Filed in U.S. District Court, Honorable Paul D. Borman, 2:20-cv-11763 Eastern District of Michigan. Styled Olivares v. Long et al. Date Judgement/Order entered 07/08/2020

Appeal filed in 6th U.S. Circuit Court on 8/13/2020 under 20-1774, Court then splits same case under 20-1795, order entered on 1/08/21, motion for reconsideration denied on 2/4/2021.

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## CONCISE STATEMENT OF JURISDICTION

Appeal filed in 6th U.S. Circuit Court on 8/13/2020 under 20-1774, Court then splits same case under 20-1795, order entered on 1/08/21. Motion for reconsideration denied on 2/4/2021. No writ for Certiorari filed in lower Court.

iv. 42 U.S.C. 1983, Judiciary act of 1914, 38 Stat 790. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

F

## LAW CONTROLLING CONSTITUTIONAL PROVISIONS AND STATUTE

Petitioner filed his claim under 42 U.S.C. 1983, as a due process violation of the United States Constitution, under Amendment 14, as Petitioner has been placed under the provisions of MCL 418.301(5), now MCL 418.301(9) as of December

2000. Appellants App. Pgs 94-95. The law controlling is *McJunkin v Cellastro Plastics Co.* 461 Mich. 590; 608 N.W.2d 57 (2000). Appellants App. 47-51. Petitioner has not been provided hearing on this matter, by the United States District Court Eastern District of Michigan.

United States Constitution Amendment 14 Sec 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

G

CONCSISE STATEMENT OF FACTS STATEMENT OF CASE

The case is that a final order entered in 2000, by a Michigan Magistrate for the Michigan Worker's Compensation Agency. The Magistrate in 2000, reviewed the medical evidence, and heard the testimony of Petitioner's Employer's Independent Medical Examiner, as to a 1998 MRI and surgical report, as well as 2000 X ray and MRI, revealing "abnormal signaling deep within the humeral head, as well as glenoid appears thinned. At no time has Petitioner received diagnosis. At the time of June 22nd 1998 surgery, Petitioner believed was to obtain diagnosis for "narrowing of the subacromial space," by 1998 MRI, and not a rotator cuff repair. After said 2000 hearing the Magistrate did not find or order that Petitioner had a rotator cuff repair.

The evidence for that was by the 1998 Surgical Report that did not reveal that Petitioner's sub deltoid bursa had been resected. And the 2000 X ray did not reveal that the #2 Mersilene sutures used in surgery were used to repair the rotator cuff. The Magistrate then ordered that "Petitioner shall receive reasonable and necessary medical care for his rotator cuff surgery, in 2000.

The Magistrate committed multiple due process violations in 2005 in issuing a void ab initio order, closing award.

The first being it is ministerial to open award in the absence of a showing of work performed for a minimum of 250 weeks or that the Employer continues to hold out work that Petitioner is refusing.

In 2005, the Magistrate did not find either of these statutory conditions to exist, and then proceeded, under an equitable theory, that Petitioner's medical condition had changed to close award.

The 2005 order makes two findings, not based upon medical diagnosis, in 2000, to which is an unchanged medical condition, and they are;

1. Petitioner had his rotator cuff repaired.

2. Petitioner suffers a natural medical condition of life as a degenerative shoulder.

Both these issues were fully litigated in 2000, and Petitioner never has been diagnosed with a degenerative shoulder.

The lower Court, in 2020, upon reconsideration then asserted that the Magistrate had subject matter jurisdiction based upon a dispute under MCL 418.847.

MCL 418.847 governs procedure and not jurisdiction.

There was no tenable dispute present after 2000, in Petitioner making application for re instatement of wage loss benefits, as of May 5th 1998.

To which in 2018 the former MCAC, and it's Commissioners' asserted Petitioner's rights to wage loss benefits are barred by a void ab initio order as res judicata.

Petitioner has yet to receive diagnosis for his 1998 MRI revealing "narrowing of the subacromial space, has not been provided the 2000 X ray, and has not been provided diagnosis for the 2000 MRI, with the impression of "abnormal signaling deep within the humeral head, as well glenoid appears thinned."

The void ab initio 2005 order is further void on the due process violation that the Magistrate had reviewed the 2000 medical evidence, by the Employer's Independent

Medical Examiner, Dr. James Wessinger, and asserts the same medical evidence was reviewed by a second opinion physician Dr. Kathleen Buran. Absent from said review is the 2000 X Ray.

The reason the 2000 X ray is absent is because said X ray is the basis for the Magistrate not finding that Petitioner had undergone a rotator cuff repair. Said X ray not seen by Petitioner at any time probably reveals the location of the #2 Mersilene sutures, at the coracoid. To which Plaintiff does have 2014 X ray, but no impression or diagnosis of coracoid fixation, resulting in coracoid impingement. Lastly Petitioner has the right to stipulation as to a proposed diagnosis after June 22nd 1998 surgery, to which bone and ligament were destroyed and video not made, as to a diagnosis withheld in surgery, in order to effectuate settlement, in this matter.

ii) Review by the U.S. District Court was sought in the first instance by entry of order, and denial of reconsideration, by the Honorable Borman in 2020, as to the 2018 entry of Commissioner's order in this action, asserting the doctrine of res judicata bars Petitioner's right to re instatement of wage loss benefits.

h) DIRECT AND CONCISE STATEMENT BY RULE 10(a) AMPLIFIED REASONS

Now Comes Joseph Olivares, Petitioner and says;

Petitioner is seeking review under Supreme Court Rule 10(a), as the 6th Circuit Court of Appeals has decided an action contrary to the Michigan Supreme Court, in asserting that limitations controls Petitioners right to have a void ab initio order set aside, based upon multiple 14thAmendment Due Process right violations.

The latest assertion from the lower Court is that a dispute arose, thus providing subject matter jurisdiction to the Magistrate in 2005, under MCL 418.847.

MCL 418.847 is a procedural statute and not a subject matter jurisdiction Statute.

MCL 418.301(5), now MCL 418.301(9), is the only legal template allowed for Petitioner to then file an application for re instatement of wage loss benefits in 2005.

Said statue by it's own terms does not allow for any dispute whatsoever as to "ongoing injury," as opined by the Magistrate in 2005.

The Michigan Supreme Court in 1958 issued an order in *Fritz vs Krugh* 92 N.W.2d 604. (1958), which allows for void ab initio orders to be set aside as tolling the Statute of Limitations.

The Michigan Supreme Court in 2000, issued an order governing MCL 418.301(5), now MCL 418.301(9), and did not interpret said statute as allowing for equitable relief in the form of dispute as to injury whatsoever. The only dispute allowed after 2000 order was did the Employer hold out work at the time of the 2005 hearing, or did the Petitioner work for the Employer or any other Employer for a minimum of 250 weeks prior to the Employer contesting the injury as not ongoing. Said dispute was not raised by the Employer in 2005, in the first place, as being in possession of Petitioner's diagnosis as to "narrowing of the subacromial space" by 1998 MRI. "Glenoid appears thinned, and abnormal signaling deep within the humeral head by 2000 MRI."

Clearly the Magistrate was advocating for the Employer, in re litigating the 2000 medical without re litigating the 2000 X ray. It was the 2000 X ray that failed to reveal the location of the #2 Mersilene Sutures used in 1998 Surgery, as to the rotator cuff. By 2014 X ray, Petitioner believes absent an impression that the X ray shows a coracoid fixation. To which the withheld diagnosis would be a coracoid impingement. And a coracoid impingement can only be diagnosed by surgery as to protocols.

After 2000 order, parties only right to diagnosis, in order to settle this matter, was by a proposed diagnosis, as the Doctrine of Res Judicata does not allow the Surgeon to testify as to diagnosis after 2000 hearing. The Magistrate in 2005, knew or should have known that Petitioner was not aware of the results of the 2000 X ray, and had Petitioner been provided said X ray would have allowed Petitioner to state that Petitioner actually had a coracoid fixation, as the Mersilene sutures are around the coroaid, by 2014 X ray in appendix volume 2.

The Employer literally got a second bite at the apple, illegally, in 2005 hearing after fully litigating their right to have Petitioner's benefits controlled by MCL 418.301(5), now MCL 418.301(9), to which the Doctrine of Collateral Estoppel as well as the Doctrine of Res Judicata bar. *Sunshine Anthracite Coal Co. v. Adkins* 310 U.S. 381 (1940). *United States v. Utah Constr. & Mining Co.* 382 U.S. 900 (1965)

The 2018 Order from the Appellate Commission clearly demonstrates that of 2005, Petitioner was pursuing this action, in the proper forum, and had to exhaust State

remedies, prior to seeking relief before the U.S. District Court. The prior complaints were before the 2018 order. Clearly Petitioner has not been allowed to develop the record in this matter, after exhausting administrative remedies as of 2018, to set aside a void ab initio order entered in 2005.

As clear legal error by the lower Court and the Court of Appeals goes to both limitations as well as dispute.

The 2018 order by the Michigan Compensation Appellate Commission is the correct point to apply limitations under Michigan's three year statute.

Petitioner was required to exhaust administrative remedies prior to filing complaint before the lower Court under 42 U.S.C. 1983, and did so as of 2018.

The issue of dispute is clearly stated by Michigan Compensation law.

The only dispute that can be raised by an Employer is whether the injury arose out of and in the course of employments. And whether the Employer is offering reasonable employments to bar Petitioner from receiving wage loss benefits.

The first was answered in the positive in 2000.

The second was answered in the negative in 2005.

As a result it is now ministerial to re instate wage loss benefits as of May 5th 1998. To which Petitioner has been denied due process in not receiving reinstatement of wage loss benefits in 2005, and declared res judicata in 2018, by the Michigan Compensation Appellate Commission.

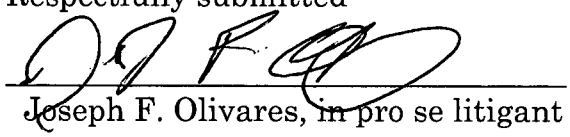
"Generally, where a statute creates a right or duty not found in the common law, the remedies provided in the statute are exclusive. *Int'l Brotherhood of Electrical Workers, Local 58 v. McNulty,* 214 Mich.App. 437, 445, 543 N.W.2d 25 (1995). This

Court will infer additional remedies only if those in the statute are "plainly inadequate," id., or where "the act provides no adequate means of enforcement of its provisions." *Forster v. Delton School Dist.*, 176 Mich.App. 582, 585, 440 N.W.2d 421 (1989).

## CONCLUSION

CERTIORARI should be granted.

Respectfully submitted



Joseph F. Olivares, in pro se litigant

March 10th 2021
Dated