The Old Order Changes, Yielding to the New

By James R. Rinck

Back in the Orwellian year of 1984 (not to be confused with the Orwellian year of 2020), my then mentor handed me a stack of federal court transcripts for several Social Security cases and said, essentially, "Figure it out." Later that year, I acquired my first workers' compensation client and eventually settled her psychiatric case, something that now really does not exist. To settle that case, I relied on her successful application for Social Security disability benefits because I knew she would have a steady income after her settlement. Early on, I became aware of the interplay between the two areas of practice. What seems apparent after all these years is that, in many ways, the two areas are becoming quite alike, if not merging.

To truly appreciate where we are and where we may be going, I must reference the thrilling days of yesteryear in workers' compensation. The contrast between now and then is like comparing the movie *Seven Brides for Seven Brothers* to the current dating scene. Workers' compensation lawyers were swashbuckling types who traveled across the country to depose nationally known physicians and bankrupted entire industries. One only needs to peruse the Michigan appellate decision volumes of the 1970s to note the numerous cases against foundries in Muskegon, many of which ceased operations after leaders of the comp bar proved those work environments were killing their employees.[1] Of course, comp lawyers across Michigan collectively converted carpal tunnel syndrome from being presumed to be exclusively caused by trauma to being a repetitive trauma disease. Being a comp lawyer meant being a potential pioneer by finding new ways to connect conditions and diseases to work.

Part of what made all of this possible was the concept of favored work in lieu of paying workers' compensation benefits, a longstanding rule which eventually was renamed "reasonable employment" as codified in Section 301(5) of the Workers' Compensation Disability Act and carried forward in the amendments to that act in 2011.[2] If an employer lacked the ability to offer so-called reasonable employment in a case, that was a factor that tended to encourage settlements. However, and as discussed below, once the Michigan Supreme Court construed the language in Section 361(1)[3] of the act about an injured worker's ability to earn as including virtual wages an employer did not have to provide but could simply refer to other jobs a worker could theoretically perform, the way cases proceeded before the Workers' Compensation Bureau changed greatly.

Before the concept of virtual jobs became the standard in Michigan workers' compensation, taking three or more depositions per week was the norm for most practitioners. The sheer joy of catching an independent medical examiner in a contradiction could lift one's spirit for days. Appeals went to the old Workers' Compensation Board of Appeals, which was backlogged for years due to the bulk of cases awaiting decision. Now, while the Appellate Commissioner no longer reviews unemployment agency appeals after Executive Reorganization Order 2019-3 was implemented, its docket is quite reduced from what it was years ago. Many workers' compensation firms no longer have an appellate department, and those who made a living writing those appeals have been outsourced.

Currently, workers' compensation practitioners might conduct fewer than five depositions a year, with some of them devoted to complying with *Stokes v DaimlerChrysler Corporation*.[4] Those of us who practice in both workers' compensation and Social Security could not help but note that *Stokes* essentially grafted a Social Security disability standard onto the Workers' Compensation Act; that is, just as the plaintiff in a Social Security case must usually prove that he or she cannot perform a significant number of jobs in the national economy, a workers' compensation plaintiff must show the same thing.[5] Indeed, the dissent in *Stokes* accused the majority of a high degree of creativity by determining that a plaintiff had to provide a transferable-skills analysis in order to prevail at trial.[6] The practical effect of *Stokes* for both parties means hiring a vocational expert (VE) to interview the plaintiff, write a report, and then give a deposition, greatly increasing the cost and time necessary to prepare a case for trial and truly eliminating any possibility that a 60-day case could be tried in anywhere near that length of time.

At a Glance

In many ways, the practice areas of workers' compensation and Social Security are becoming quite alike, if not merging. Those who practice in both areas could not help but note that Stokes essentially grafted a Social Security disability standard onto the Workers' Compensation Act.

Vocational experts, workers' comp, and Social Security

Post *Stokes*, the workers' compensation attorney must deal with the bane of every Social Security attorney: the VE present at virtually every Social Security hearing. The VE will almost invariably recite a number of truly hypothetical jobs that your disabled client allegedly can perform. Trying to show those jobs are unsuitable can be quite difficult, especially since there rarely is a preview of the expert's testimony. While the *Stokes* setting is different, the same issues arise. If your client can breathe, there usually is some obscure title in the Dictionary of Occupational Titles (DOT) that he or she can perform, although I have yet to hear that one of my clients is

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capable of being a chick sexer—yes, determining whether newly hatched chickens are male or female is a real job.[7]

Part of the problem with the DOT is that it is universally known to be obsolete. While the Social Security Administration (SSA) has promised a replacement, those promises have developed a distinct patina. In the meantime, the hypothetical jobs which will be enumerated by a VE almost inevitably limit the value of comp cases, bringing Michigan closer to the employer's paradise envisioned by some of our past political leaders.

Even with an affirmative finding of disability by the SSA—in the case of clients over 50, be aware that a finding of disability does not necessarily mean that person cannot perform any job in the national economy—virtually any vocational expert hired by the defense will opine that any non-paralyzed person could still work as an inspector with a sit/stand option, as retail greeter, or a surveillance systems monitor (even though the last job is obsolete).[8] Subtracting even just the minimum wage from a plaintiff's wage-loss benefits comp rate reduces settlements in an era of increased litigation expenses, which means fewer cases filed, fewer trials, and fewer awards.

Similar trends have emerged in the Social Security realm. Approval rates have significantly declined over the years.[9] Preparing for hearings has been greatly transformed. With the recent enactment of the five-day rule [20 CFR 404.935(a) and 20 CFR 416.1435(a)] requiring that all evidence be submitted by five days before a hearing unless there is a reasonable explanation provided to the administrative law judge, there is a clear imperative to brief every case before a hearing to deal at least with that issue, not to mention other case issues. Also, due to changes in the workers' compensation system, I usually take more pre-hearing medical statements for Social Security hearings than workers' compensation depositions in a typical year, a far cry from the way things used to be. While these efforts may seem insignificant compared to the extensive pretrial preparation required in other areas of practice, they are emblematic of how the once-casual nature of Social Security hearings has become adversarial. The worsening environment for Social Security claimants and the increasing unlikelihood that any workers' compensation settlement they might get will be enough to tide them over financially for any significant length of time raises the stakes for clients in both realms.

So, how to deal with vocational expert issues? In a Social Security hearing, impeaching the VE is problematic; a competent practitioner is under the gun during vocational expert testimony, especially now that experts are no longer drawn from a local pool, but can participate from anywhere in the country. An attorney may not know much about them. Investing in programs like Skilltran, Job Sleuth, or Occucollect allow you to check jobs as the expert discusses them during a hearing. In the Social Security arena, nothing prevents you from filing a post-hearing brief so such issues can be preserved for review. In fact, if you don't contest questionable vocational numbers after a hearing, you may have waived that issue.[10] In a workers' compensation case, you have a report to review first, so you can prepare with more leisure by using the above programs or searching resources such as the

Charles Martin listserv[11] or Larry Rohlfing's californiasocial securityattorney.blogspot.com.[12] In both workers' compensation and Social Security cases, the more jobs that can be eliminated, the better for the plaintiff.

Medicare set-aside

This article would be incomplete without referencing another bane of injury attorneys, the Medicare set-aside, which is required whenever an injury claim involving future benefits is settled.[13] Michigan's workers' compensation magistrates have produced a form which accompanies all settlements to deal with the poorly conceived federal efforts in this area.[14] Explaining to a client why they need to keep records and a separate account for the amount taken out of their settlement check is a fool's errand in many ways. There is no practical way to invest really small amounts of money, and that money disappears quickly in a time when avoiding eviction is a full-time job for many plaintiffs. Medicare is spectacularly erratic in timeliness of responses to proposals, and even then, the responses sometimes lack rationality. Consultants can be hired to deal with this issue, but it is another possible expense and an almost certain delay which hits plaintiffs harder.

Aside from the set-aside, attorneys obtaining workers' compensation settlements need to know that a client's future Social Security benefits will be reduced if earnings during the previous five years exceed a certain amount. This is known as the 80 percent rule.[15] It's calculated by taking your client's highest-earning year on his Social Security record in the last five years—let's say it was $20,000. Divide that number by 12 ($1,667.67), then multiply it by 80 percent ($1.333.34). That number is the maximum amount that person can receive from combined Social Security and workers' compensation benefits each month before the SSA reduces them. Usually, the lifetime offset language on the workers' compensation redemption form avoids that scenario, but you don't want to be the attorney with a surprised and upset client because you failed to account for that possibility.

Conclusion

Certainly, the changes in Michigan's economic climate mean the practice of workers' compensation will never return to its heyday. However, the principle of awarding benefits to injured workers on a fair basis in a reasonable period could (and should) return without the assumption that injured workers can easily obtain Social Security disability benefits, because obtaining such benefits has become increasingly difficult. The SSA seems to operate under the assumption that it pays out billions in bogus benefits, perhaps based upon the longtime crusade of late Sen. Tom Coburn (R-Okla.), who argued that point for years without much more than anecdotal evidence, which may sound familiar today. My experience of nearly four decades of work in this field tells me the opposite: that is, persons who truly cannot function in a proverbial real job are often denied benefits without good reason and many denials that should be appealed are not, sometimes due to a lack of attorney initiative.

Now more than ever, our society needs the workers' compensation and Social Security threads in the safety net to remain intact to avoid the consequences of too many people thinking they have no hope. Making the *Stokes* precedent less onerous for workers or eliminating it entirely—and while we're at it, how about eliminating the wage-loss ruling in *Sanchez v Eagle Alloy*[16]—might make workers' compensation actually amount to real workers' compensation again. ■

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ENDNOTES

1. *Felcoskie v Lakey Foundry Corp*, 382 Mich 438 (1969).
2. MCL 418.301–MCL 418.941.
3. MCL 418.361.
4. *Stokes v DaimlerChrysler Corp*, 481 Mich 266; 750 NW2d 129 (2008).
5. *Id.* at 281–283.
6. *Id.* at 298.
7. DOT No 411.687-014. For this and other occupational titles, go to *Dictionary of Occupational Titles (DOT) Job Descriptions*, GovtUSA <http://www.govtusa.com/dot/> [https://perma.cc/SC2R-MPAG]. All websites cited in this article were accessed January 11, 2021.
8. Wolstein, *Surveillance-system Monitors in the Work Force Kincaid Vocational and Rehabilitation Services*, 16 J of Forensic Vocational Analysis 49, 52 (2016).
9. Ssa.gov, Annual Statistical Reports.
10. *Shaibi v Berryhill*, 870 F3d 874 (CA 9, 2017).
11. In order to access the Charles Martin listserv, an attorney must be nominated for inclusion.
12. Mr. Rohlfing will be presenting at the SBM Social Security Section's Summer Seminar on June 13–15. See the SBM Social Security Lawyers Section at <https://connect.michbar.org/socsecurity/home> for more details about his presentation.
13. 42 USC 1395y(b) and 42 CFR. Part 411.
14. *Forms*, Workers' Disability Compensation Agency, Mich Labor and Economic Opportunity, available at <https://www.michigan.gov/leo/0,5863,7-336-94422_95508_26917---,00.html> [https://perma.cc/BT82-6BNA].
15. 42 CFR 404.408.
16. *Sanchez v Eagle Alloy*, 254 Mich App 651; 658 NW2d 510 (2003).