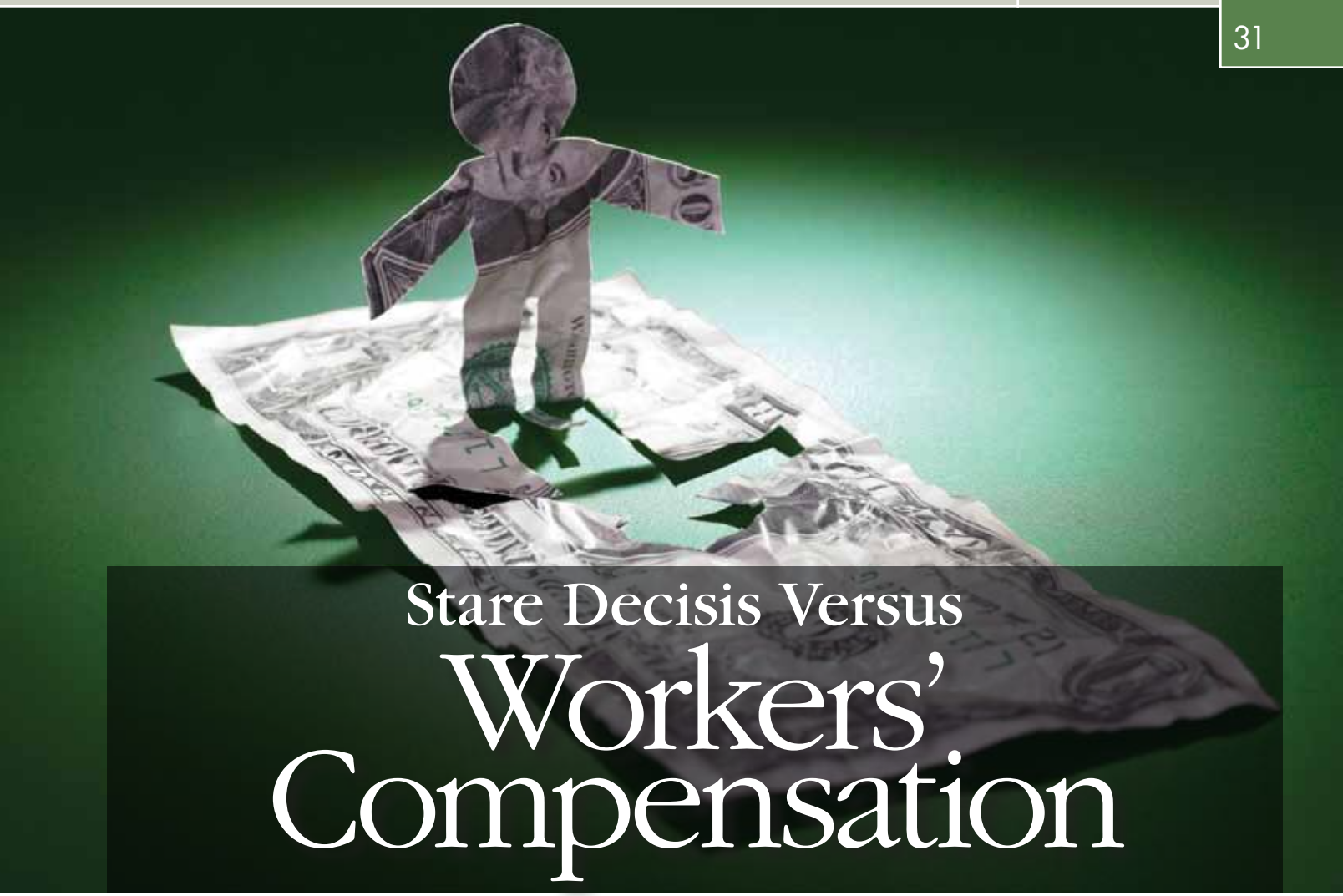

Stare Decisis Versus Workers' Compensation

BY JOHN A. BRADEN

Being called on to decide perhaps one workers' compensation case a year, most judges do not understand that area of law. Suffering from specialist tunnel vision, most workers' compensation practitioners do not understand any other area of law. When these trends collide, the results can be messy. Nowhere is this more evident than in the requirement that, to be compensable, a worker's wage loss must have been caused by his or her on-the-job injury.

Pre-*Haske*

The courts held early on that, although an on-the-job injury must cause lost *earning capacity,* it need not cause *unemployment* nor *lost wages. Foley v Detroit United Railway*[1] rejected the employer's argument that the worker's wage loss should not be recoverable because it was caused by a termination rather than the injury. *Roxbury v Weidman Lumber Co*[2] held that wage-loss benefits were available even though the drop in the worker's post-injury wages was caused by the Depression rather than the injury.

Fast Facts:

An on-the-job injury need not be the cause of wage loss for the worker to be eligible for benefits under the workers' compensation statutes, say controlling workers' compensation cases.

Cases requiring that the injury have caused the wage loss violate the rules of stare decisis.

Recent amendments of the Worker's Disability Compensation Act impose an injury-causing-wage-loss requirement.

Haske

In *Haske v Transp Leasing Inc, Indiana,*[3] the issue was how one defines "disability" under the 1982 amendments of the Worker's Disability Compensation Act (WDCA).[4] The Court held that inability to do even one job is "a limitation" in wage-earning capacity and hence a disability.[5]

However, the defendants who had lost in *Rea v Regency Olds/Mazda/Volvo*[6] on a similar issue filed an amicus curiae brief in *Haske,* arguing that no wage-loss benefits should be available when the wage loss was caused by work avoidance rather than the injury. The *Haske* Court responded to this argument by making numerous comments to the effect that a worker's injury must cause the wage loss.[7] This is where the rules of stare decisis come in:

1. A court's statement of a proposition that is not outcome-determinative is not authoritative.[8]

This is based on human nature: Judges are not going to be as careful about getting a point of law right if getting it wrong does not hurt either party before the court. Similarly, the parties have no incentive to fully present the issue if resolution of the issue makes no difference in the outcome.

In *Haske* and its companion case, no one had raised a work-avoidance defense, making the issue irrelevant. The Court felt free to expound on an injury-causing-wage-loss requirement (ICWLR), knowing that its comments would not hurt the injured workers before it. The Court might have viewed the issue with a more critical eye if a consequence of its comments would have been to have thrown an injured worker out of court.

In addition, when both parties simply assume the law to be thus-and-so, there is no reason to suppose that the court has been presented with all the pros and cons, and consequently no reason to suppose that the court's statements on the conceded issue are well informed. To avoid imposing such half-baked statements on other litigants, it has been held that:

2. A court's statement of a proposition is not authoritative if the court simply assumed it to be true because no one challenged it.[9]

In *Haske,* the plaintiffs did not challenge the *Rea* defendants' proposed ICWLR (arguing only that they had satisfied the requirement). Even the amicus curiae brief filed in *Haske* by the Michigan Trial Lawyers' Association conceded that there was an ICWLR. Consequently, the ICWLR in *Haske* was a point assumed, not decided.

Finally, *Haske* failed to mention (let alone purport to overrule or distinguish) the *Roxbury* line of cases, which runs afoul of another stare decisis rule:

3. If a court fails to mention prior controlling authority, it must be presumed that the resulting decision is erroneous and not authoritative.[10]

Kurz Gets Short Shrift

Consistently with these stare decisis rules, the first Court of Appeals' decision published after November 1, 1990, *Kurz v Mich Wheel Corp,*[11] ignored the *Haske* dictum, held that *Roxbury* remained good law under the 1982 amendments of the WDCA, and rejected the employer's argument that wage loss was not compensable when it was caused not by the injury, but by an amendment of a collective-bargaining agreement.

Now workers' compensation practitioners' ignorance of non-workers'-compensation law began to rear its ugly head. Ignoring *Roxbury, Kurz,* and the stare decisis rules we've mentioned, the Workers' Compensation Appellate Commission (WCAC) began treating *Haske*'s dictum about an ICWLR as if it were law in *Bednar v Grand Rapids Griffins.*[12] In so doing, the WCAC violated another rule of stare decisis:

The Court held that inability to do even one job is "a limitation" in wage-earning capacity and hence a disability.

4. Published holdings of superior courts (*Kurz* and *Roxbury* in this case) are binding on inferior tribunals.[13]

But the ignorance was not confined to the WCAC. In a pair of decisions that contradicted *Kurz,* the Court of Appeals applied an ICWLR. In *Rangel v Ralston-Purina Co,*[14] it held that injured workers who went off work due to early retirement were not entitled to wage-loss benefits because the wage loss was not caused by the injury. *George v Burlington Coat Factory* held the same.[15] These decisions violated another rule of stare decisis:

5. Under MCR 7.215(J)(1),[16] a rule of law established by the first decision of the Court of Appeals published on or after November 1, 1990, is binding on all other panels of the Court of Appeals unless reversed or modified by the Supreme Court or a special panel of the Court of Appeals.

MCR 7.215(J)(1) was designed to end conflicts among panels of the Court of Appeals, yet here we had one. How to resolve the conflict? On the theory that the later decisions were in the wrong (by failing to follow the first decision), it has been held that:

6. Decisions that violate MCR 7.215(J)(1) are not binding authority.[17]

In other words, *Kurz* controls, while *Rangel* and *George* are not binding. Consistently with all the stare decisis rules we've discussed so far, the WCAC did an about face and denied that any ICWLR exists. *Ristau v Presque Isle Corp*[18] ruled that a post-injury layoff that contributed to a wage loss had no effect on the right to benefits, calling *Bednar* obsolete. *Ristau* also considered *Haske*'s ICWLR language inoperative, since *Haske* had been overruled by *Sington v Chrysler Corp;*[19] thus invoking another rule of stare decisis:

7. Overruled decisions are not authoritative.[20]

Raybon

Nevertheless, the Court of Appeals continued to elevate *Haske*'s dictum over binding holdings to the contrary. In *Raybon v D P Fox Football Holdings,*[21] an unpublished decision, the panel remanded to the WCAC for it to apply an ICWLR. In addition to citing *Haske,* the panel cited a statement in a Supreme Court case, *Sweatt v Dep't of Corrections,*[22] setting forth an ICWLR. However, the cited statement was subscribed to by only three of the seven justices participating in the case, with a fourth justice concurring only in the result. *Raybon*'s giving weight to the statement in *Sweatt* thus violated the following rule:

8. A concurrence in the result only does not give authoritative status to statements in the lead opinion.[23]

The *Raybon* panel also cited an example (mentioned in a footnote in *Sington*) of a worker who took a scheduled retirement the day after being injured. However:

9. What is said in an opinion by way of illustration only is not binding authority.[24]

Note also that Sington concededly went off work for non-injury-related reasons. Consequently, if there were an ICWLR, Sington's wage-loss claim should have been denied outright. Instead of doing that, the Supreme Court remanded *Sington* for the WCAC to apply its new definition of disability. If the outcome of a case must depend on a proposition to make the proposition authoritative, then perforce:

10. An outcome that *contradicts* a stated proposition renders the proposition nonauthoritative.[25]

In the wake of *Raybon,* the WCAC generally refused to follow it.[26] Those WCAC cases are consistent with the following rule:

11. Unpublished decisions are not binding under the rule of stare decisis.[27]

Romero

In *Romero v Burt Moeke Hardwoods Inc,*[28] the defendant employer argued that Romero's post-injury unemployment was due to losing his work visa, not the injury. The Court of Appeals disagreed and allowed wage-loss benefits. Since this was the same result that would have ensued had there been no ICWLR, the Court's additional statement of the existence of an ICWLR was unnecessary to the outcome, hence dictum (see Rule No. 1). Nevertheless, again displaying ignorance of stare decisis, the WCAC followed *Romero,* ignored *Roxbury* and *Kurz,* and resumed applying an ICWLR in *Epson v Event Staffing.*[29]

Epson was an en banc decision,[30] which has led subsequent WCAC panels to follow *Epson* on the basis of the following rule:

12. En banc decisions are binding on all subsequent panels of the WCAC under MCL 418.274(9).

However, since the courts are still superior to the WCAC, MCL 418.274(9) does not authorize workers' compensation appellate commissioners (or even magistrates) to use *Epson* as an excuse to ignore *Roxbury* and *Kurz* (see Rule No. 4).

Recent Court Cases

In *Harvey v Gen Motors Corp,*[31] while denying leave, the Supreme Court expressed its disagreement with the WCAC's rejection of an ICWLR. Its being a denial of leave brings into play the following rule:

13. Denials of leave have no precedential effect.[32]

In addition, the *Harvey* order contains no statement of the facts, which means that it was not a "decision" under the Constitution.[33] Thus, the following rule applies:

14. An order not satisfying the constitutional requirements for a "decision" is not controlling under stare decisis.[34]

Finally, *Harvey*'s denial of leave left the award of wage-loss benefits for the worker standing. Since that is the same result that would have ensued absent any ICWLR, the statement supporting an ICWLR was not outcome-determinative and, hence, was dictum (see Rule No. 1).

Nevertheless, the Court of Appeals continued to violate Rules 1 through 6 by recognizing an ICWLR in unpublished decisions.[35]

Most recently, the Supreme Court remanded several cases for application of an ICWLR.[36] However, because these orders contained no statement of facts, they were again not "decisions" as defined in the Constitution and hence not binding authority (see Rule No. 14).

The Legislature Weighs In

As of 2011, the ICWLR was an emperor without clothes: There was nothing in the statute authorizing the requirement,[37] nor any binding judicial authority recognizing it. Nevertheless, judges were applying the requirement.

Faced with this absurd situation, the legislature voted not to expose this naked emperor, but to clothe him: Amendments of the WDCA applicable to workers injured after December 18, 2011, now require that the injury itself have caused wage loss to entitle the worker to benefits.[38] These amendments underscore the previous illegitimacy of any ICWLR since, if the act had already authorized such a requirement, no amendment would have been needed. At any rate, the legislative fix doesn't undo the fact that, for 14 years, both rules of stare decisis and the plain language of the Worker's Disability Compensation Act were ignored and injured workers denied wage-loss benefits based on a nonexistent requirement. ■

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FOOTNOTES

1. *Foley v Detroit United Railway,* 190 Mich 507; 157 NW 45 (1916).
2. *Roxbury v Weidman Lumber Co,* 268 Mich 596, 599; 256 NW 560 (1934); see also *Medacco v Campbell, Wyant & Cannon Foundry,* 48 Mich App 217, 221; 210 NW2d 360 (1973) (concluding that the wage loss was caused by a nonoccupational heart attack and did not affect the right to wage-loss benefits); *Oliver v Ajax Paving Industries,* 1994 Mich ACO 2772, 2776 (concluding that the end of the working season did not end the right to wage-loss benefits).
3. *Haske v Transp Leasing Inc, Indiana,* 455 Mich 628; 566 NW2d 896 (1997).
4. MCL 418.301 *et seq.*
5. *Haske,* 455 Mich at 665.
6. *Rea v Regency Olds/Mazda/Volvo,* 204 Mich App 516; 517 NW2d 251 (1994).
7. The Court used terms and phrases such as "a causal link," *Haske,* 455 Mich at 634, "attributable to," *id.* at 635, "resulted in," *id.* at 643, "caused by," *id.* at 654 n 24, "caused," *id.* at 662, "causally linked," *id.* at 668, and "direct link," *id.* at 661. The use of such variant phrases underscores that the statute contains no causal language with respect to wage loss, requiring the Court to act as a judicial legislator to insert some.
8. *Whitehead & Kales Co v Taan,* 233 Mich 597, 601; 208 NW 148 (1926).
9. *Allen v Duffie,* 43 Mich 1, 11; 4 NW 427 (1880) (stating that a court's assumed legality of a contract made on a Sunday was not authoritative when the issue was not contested); *Chapman v Buder,* 14 Mich App 13, 19–20; 165 NW2d 436 (1968) (stating that a court's assumption that the guest-passenger statute applied to negligent entrustment was not binding when the plaintiff never contended otherwise).
10. *Andrews v Booth,* 148 Mich 333, 335; 111 NW 1059 (1907); *Foster v Watson,* 153 Mich 400, 406–407; 117 NW 197 (1908).
11. *Kurz v Mich Wheel Corp,* 236 Mich App 508, 513–514; 601 NW2d 130 (1999).
12. *Bednar v Grand Rapids Griffins,* 2001 Mich ACO 241.
13. *Catalina Marketing Sales v Dep't of Treasury,* 470 Mich 13, 23; 678 NW2d 619 (2004).
14. *Rangel v Ralston-Purina Co,* 248 Mich App 128, 141; 638 NW2d 187 (2001).
15. *George v Burlington Coat Factory,* 250 Mich App 83; 645 NW2d 722 (2002).
16. This rule of stare decisis began its life as Administrative Order No. 1990-6 and eventually was promulgated as MCR 7.215(J)(1).
17. *Romain v Frankenmuth Mut Ins Co,* 483 Mich 18; 762 NW2d 911 (2009); *People v Carlin,* 225 Mich App 480, 485–486; 571 NW2d 742 (1997).
18. *Ristau v Presque Isle Corp,* 2004 Mich ACO 291.
19. *Sington v Chrysler Corp,* 467 Mich 144; 648 NW2d 624 (2002).
20. *Landon Holdings Inc v Grattan Twp,* 257 Mich App 154, 174; 667 NW2d 93 (2003).
21. *Raybon v D P Fox Football Holdings,* unpublished opinion of the Court of Appeals, issued July 17, 2007 (Docket No. 268634).
22. *Sweatt v Dep't of Corrections,* 468 Mich 172, 187–188 n 11; 661 NW2d 201 (2003).
23. *Huron Land Co v Davison,* 131 Mich 86, 88; 90 NW 1034 (1902).
24. *McNally v Bd of Canvassers,* 316 Mich 551, 557; 25 NW2d 613 (1947).
25. *Goulder v Gen Motors Corp,* 2006 Mich ACO 124 (noting that the result of *Sington* belies any ICWLR).
26. *Reece v Event Staffing,* 2008 Mich ACO 40 (concluding that the plaintiff's wage-loss claim was compensable even though the end of the football season contributed to his lost wages); *McConnelee v Consumers Energy,* 2008 Mich ACO 50 (concluding that the plaintiff's wage-loss claim was compensable even though his unemployment and subsequent wage loss was caused by a non-injury-related loss of license); *Brock v Gen Motors Corp,* 2008 Mich ACO 54; *Jones v SDW Holdings,* 2008 Mich ACO 2 (holding that the magistrate erred by basing compensability on whether the injury contributed to wage loss).
27. MCR 7.215(C)(1).
28. *Romero v Burt Moeke Hardwoods Inc,* 280 Mich App 1; 760 NW2d 586 (2008).
29. *Epson v Event Staffing,* 2009 Mich ACO 152; see also *Pueblo v Gen Motors Corp,* 2008 Mich ACO 255; *Curtiss v Curtiss Reporting,* 2009 Mich ACO 9; *Davis v Event Staffing,* 2009 Mich ACO 17; *Miller v City of Flint,* 2009 Mich ACO 35; *Kuikstra v Challenge Mfg Co,* 2009 Mich ACO 56; *Campbell v Denso Mfg,* 2009 Mich ACO 57; *Petersen v Consumers Energy,* 2009 Mich ACO 70; *Redman v P Jax,* 2009 Mich ACO 86; *Childress v Gen Motors Corp,* 2009 Mich ACO 131; *Wilson v Eaton Corp,* 2009 Mich ACO 142.
30. Just barely: because of a shrunken WCAC, the panel consisted of four commissioners—just one more than an ordinary WCAC panel. The last time this situation occurred (in 2004), subsequent WCAC panels refused to treat decisions of the shrunken commission as binding en banc decisions.
31. *Harvey v Gen Motors Corp,* 482 Mich 1044; 769 NW2d 598 (2008).
32. *Tebo v Havlik,* 418 Mich 350, 363 n 2; 343 NW2d 181 (1984).
33. Const 1963, art 6, § 6 (stating that "[d]ecisions of the supreme court…shall contain a concise statement of the facts").
34. *People v Osteen,* 46 Mich App 409, 417; 208 NW2d 196 (1973).
35. *Coleman v Mich Paving & Materials Co,* unpublished opinion per curiam of the Court of Appeals, issued December 14, 2010 (Docket No. 294737); *Harris v Gen Motors Corp,* unpublished opinion per curiam of the Court of Appeals, issued December 2, 2010 (Docket No. 291779); *Finley v Sam's Club,* unpublished opinion per curiam of the Court of Appeals, issued May 18, 2010 (Docket No. 289437); *Stiven v Gen Motors Corp,* unpublished opinion per curiam of the Court of Appeals, issued December 16, 2010 (Docket No. 294579).
36. *McMurtrie v Eaton Corp,* 490 Mich 976; 806 NW2d 530 (2011); *Kirby v Gen Motors Corp,* 490 Mich 915; 805 NW2d 440 (2011).
37. While the second sentence of MCL 418.301(4) recognizes that wage loss must be suffered before wage-loss benefits are payable, it cannot, as a matter of logic or grammar, create an ICWLR since it omits two of the three elements necessary to such a requirement: the second sentence does not mention the causative factor (the injury) and contains no causal language either.
38. MCL 418.301(7) and (8) and MCL 418.401(5) and (6), all as amended by 2011 PA 266.