

STATE BAR OF MICHIGAN

Workers' Compensation Section Newsletter

Spring 2008



Annual Spring Meeting ■ June 19-21, 2008
Shanty Creek Resorts, Bellaire, MI

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STATE BAR OF MICHIGAN—WORKERS COMP SECTION
June 19-22, 2008

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From the Chair

Dear Section Members,

Your council has been very busy these last couple of months. This is because there are changes afoot at the bureau.

The first notable proposal is a change in the 104, Petition for Hearing. This new form includes jurisdictional questions and a lengthy section outlining employment in the last 15 years. Please see your council member for a copy of the proposed changes, and let your council member or Jack Nolish know how you feel about this new petition. Constructive criticism is the best way to achieve a good result.

The second notable change is a proposal to amend the current pamphlet concerning vocational rehabilitation hearings. The pamphlet, as proposed, sets forth an appeal procedure and standard of review for mediation hearings. Again, I urge you to contact your council member for a copy of the proposed changes. I will be frank and tell you that I believe this procedure violates the Administrative Procedures Act, as well as the Workers' Compensation Act. My opinion is that the pamphlet, as proposed, sets forth rules and procedures without going through the rulemaking process. Please let us know of your opinion regarding this matter. It affects both plaintiffs and defendants, so it bears close scrutiny.

Lastly, I hope to see many of you at the June section meeting in Shanty Creek. We have an interesting agenda, and the meeting is always good fun. See you there. ✂

—Paula

Editor's Comment

We have much information to share in this edition, with notices of the Section meeting in June and new contributors. I want to echo Paula's desire to have more attendance at the Spring meeting—it's a great opportunity for us all to come together and renew our Section's spirit. It will also be a chance to catch up on the recent developments regarding the ongoing struggle with CMS issues - besides that, it's just fun. With limited space in this edition, I offer you some quotable quotes. See if you can identify the people who are supposed to have said the following:

- 1) "I have nothing to offer but blood, toil, tears, and sweat."
- 2) "We shape our buildings and, afterward, our buildings shape us."
- 3) "We are the captain of our souls."
- 4) "Never, Never, Never, give up (in)."
- 5) "This is the kind of tedious nonsense up with which I will not put!" ✂

Notes from the Director

By Jack A. Nolish, Director, Workers' Compensation Agency

As I write this while sitting at the Detroit hearings office, the sky is grey and it seems to be getting colder. The calendar indicates it is spring. Although in the past week I have managed to play the first round of golf of the season and have taken the first motorcycle ride, with the weather forecast describing rain and even snow in some parts of the state, it certainly looks like the second one of either will be some time away. The grey sky does not clear when I think about the continuing problems with CMS. As of 2/29/08, we have over a thousand cases listed as "AWAIT CMS," and we continue to be confronted by the delays and problems on a daily basis. At the request of the Workers' Compensation Section, we have compiled some data that may help us understand the scope of the problem.

First, I would be remiss if I did not thank our claims division administrator, Kathy Rademacher, and our claims division analyst, Ken Smith, for helping me with this project. Together, with the assistance of other staff, they were able to manually analyze the CMS impact in all 9,012 redemptions that were approved in 2007. Here are their preliminary findings:

- Of the **9,012** redemptions, **598** involved WCMSA and/or conditional payment reimbursement, representing 6.64 percent of the total number of redemptions in 2007.
- The total gross amount of the 598 redemptions comes to **\$62,315,831.92**, with the average being \$104,207.08. The average gross for all 2007 redemptions was \$55,386.49 (including *present value* of annuities).
- **\$11,473,856.33** was placed in WCMSAs, or 18.41 percent, with the average being \$19,251.44 (both figures include the *gross value* of annuity payments to a WCMSA).
- **\$366,559.42** was reimbursed to CMS for conditional payments, or .59 percent, with the average payment being \$2,364.90, or 2.27 percent.
- The total of WCMSA and conditional payments comes to **\$11,840,415.75**. (This combining of figures is the approach used by CMS in their reporting.)
- In 2006, **430** Chicago region WCMSA submissions were deemed to "not meet CMS review criteria," or

18.24 percent of the 2,358 total submitted nationwide.

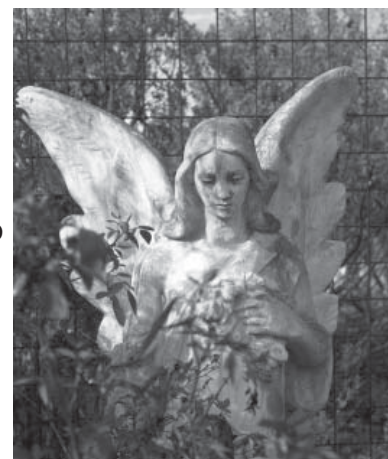
In a report that CMS staff recently sent to Congress, they claimed that for the entire nation in 2007, the combined total of WCMSAs established and conditional payments recovered came to **\$877,192,185**. Assuming that number is correct, Michigan's \$11,840,415 comes to **1.35 percent** of the total.

CMS claims that as of 2/28/08, there are only **875** cases pending WCMSA approval over **60 days** for the *entire country*. Of those, 366 are delayed pending prescription drug pricing information, 175 are delayed waiting for information from the submitter for over 30 days, and 250 are delayed waiting for information from the submitter less than 30 days. Although we do not have the exact data categories described by CMS, we do know that as of 2/29/08 (we are aware of Leap Year), our docket shows **1,061** cases in "AWAIT CMS" status of which **831** have been on the docket in that category more than 60 days.

The "intuitively obvious" conclusion here is that there is both a lot of time and money involved. Other conclusions are for discussion at upcoming meetings. ✖

In Memoriam

As we approach the celebration that is our annual summer meeting, let's all take a moment to reflect on the losses of Gerald Keller, Tom Chuhran, and Larry Kevelghen in recent months. We recall each of them personally with fondness and their contributions to our profession as a whole. They will all be missed.



Workers' Compensation Appellate Commission

By Martha M. Glaser, Chairperson

In September of last year, our appellate rules were amended once again. We want to remind everyone to refer to our website or contact our office when questions arise regarding appellate procedures. The "little blue book" published in 2004 is very helpful for questions regarding the statute and executive order, but not necessarily for the procedural rules, as many have changed since 2004.

One of our recent rule changes has caused some confusion.

R 418.2(3) states: *One attorney recipient will be designated by the commission for each party, for the purpose of receiving correspondence from the commission. The attorney whose name appears on the claim for review will be designated as the attorney recipient for that party. An attorney representing an appellee shall file an appearance designating the attorney as attorney recipient. If no such appearance is filed, the attorney last appearing at the hearing before the magistrate, as reflected in the magistrate's order or opinion, will be designated as the attorney recipient for that party. A party may change the attorney recipient by filing a written stipulation with the commission and serving notice of the change on all parties, or by order of the commission on motion for such change.*

Very simply, if you are the trial attorney and you file a claim

for review, all correspondence from the commission will be directed to you. If you then have another attorney handle the appeal for you, all correspondence will continue to be directed to you, unless and until a stipulation is filed, indicating that the latter attorney is now the attorney recipient.

If we do not receive an appearance from an attorney for the appellee(s), specifying that said attorney is to be the attorney recipient, all correspondence from the commission will be directed to the attorney representing that appellee at trial.

There will no longer be multiple mailings for individual parties. All orders, however, will continue to be served on each party and the designated attorney recipient for that party.

Another rule change that we would like to remind everyone of is the ability to fax any filing document up until the last minute of the day it is due. The facsimile transmission preserves the filing deadline; however, we must still be provided with the original document.

We are once again looking forward to seeing many of you at the Annual Meeting and Seminar in Bellaire. There is always an abundance of great camaraderie, and no one walks away without having learned something new. You don't want to miss it! ✂

Redemptions By Affidavit

By Murray A. Gorchow, Chair of the Board of Magistrates

"The times they are a-changin'."
(With apologies to Bob Dylan)

For as long as any of us involved in the workers' disability compensation system in Michigan can remember, magistrates have exercised their discretion, when appropriate, to permit redemption hearings to be conducted utilizing an Affidavit in Lieu of the Plaintiff's Personal Appearance. The typical circumstance allowed is where there is a hardship involved, such as when the distance to the hearing is great; plaintiff is physically unable to attend; or plaintiff has become employed, and cannot get an excuse or cannot afford to miss work.

Over the years, the plaintiffs' bar has created boilerplate affidavits, which served quite well as a substitute for plaintiff's appearance. The Affidavit in Lieu of Plaintiff's Personal Appearance should include, of course, the reason why plaintiff

cannot attend; plaintiff's agreement that his attorney may accept personal service of the Redemption Order for Plaintiff in lieu of mailing, and all of the other matters that plaintiff would typically be asked by all counsel and the magistrate. However, *"the times, they are a-changin'."* The new issues we now face are not being adequately dealt with in the Affidavits in Lieu of Plaintiff's Personal Appearance.

First and foremost among the new matters to be covered in the affidavit are Medicare, Medicaid, Friend of the Court, and other liens. More often than not, the magistrate will be presented with a form, signed by plaintiff, covering these three matters, even when plaintiff is present for the hearing. That it is signed by plaintiff is sufficient when plaintiff is present, is

under oath, and testifies to its contents. However, when plaintiff is not present, such a form should also be notarized.

I recommend that counsel update their affidavit to include the Medicare, Medicaid, Friend of the Court, and any other applicable lien information.

A few recommendations about Affidavits and dealing with **Medicare (CMS)**: The Center for Medicare and Medicaid Services has made it clear that it is plaintiff's "**eligibility**" for Medicare that triggers Medicare's interest—not simply whether plaintiff has a Medicare card, or whether plaintiff has ever used his Medicare card. A plaintiff may be eligible for Medicare, but may have declined coverage. Plaintiff simply may not yet have received his Medicare card in the mail. Plaintiff may have recently received a letter awarding Social Security disability benefits with a disability entitlement date early enough to become immediately eligible for Medicare. Indeed, the award letter often will state that the letter itself may be used as a Medicare card until the card is provided to plaintiff. If plaintiff is not present at the redemption hearing, and the affidavit or signed form simply states that plaintiff does not have a Medicare card, the critical question about plaintiff's Medicare eligibility has not been answered. If plaintiff is Medicare "**eligible**," then CMS must be dealt with before the case may be redeemed.

The same is true with **Medicaid**. The fact that plaintiff's affidavit or testimony states that plaintiff "does not have Medicaid" does not answer the critical question of whether plaintiff ever had Medicaid insurance on and after the alleged date of injury. People go on and off the means-tested Medicaid insurance program depending on their financial circumstances, such that it is not unusual for plaintiff to have used Medicaid for the alleged injury, but no longer have Medicaid coverage at the time of the redemption hearing. This question must be dealt with in the affidavit. It is also insufficient for plaintiffs to testify live or by affidavit that they have Medicaid (or Medicare) coverage, but that they have never used it for the alleged injury. Plaintiffs simply do not know who or how their medical providers are billing for the care being provided. It has been proven time and again, notwithstanding plaintiff's honest but mistaken testimony, that Medicaid or Medicare have been billed, and have paid, for something related to the case without plaintiff's knowledge. Of course, a letter showing no Medicaid coverage or payment from the Michigan Department of Community Health can also serve the same purpose, just as such a letter does for Medicare.

The bottom line is that the Board of Magistrates understands and appreciates the need to hear a redemption request by affidavit, but the affidavit must be updated to anticipate and cover the new issues that may come up at a redemption hearing. A thorough and complete Affidavit in Lieu of Plaintiff's Personal Appearance is the sure way to avoid unnecessary delay in obtaining approval of redemptions by affidavit. So, please heed, with my apologies, the modified

words of the now Pulitzer Prize®-winning Bob Dylan:

*"Come gather round lawyers
Wherever you roam
And admit that redemptions
Around you have flown
And accept it that soon
You'll be stretched to the bone.
If your time to you
Is worth savin'
Then best change affidavitin'
Or you'll sink like a stone
For the times they are a-changin'." ✕*

Changes on the Board of Magistrates

By Murray A. Gorchow, Chair of the Board of Magistrates

I am pleased to welcome Lisa Klaeren to the Board of Magistrates. Recently appointed by Governor Granholm, she fills the unexpired term of former Magistrate Bill Baillargeon for the term ending January 26, 2011. Klaeren, an experienced workers' compensation practitioner, was assigned to the Kalamazoo hearing office, effective March 9, 2008. With her extensive experience, she has been able to hit the ground running. I know she will prove to be a great addition in Kalamazoo as a magistrate and a facilitator to help move the docket for everyone. Her assignment will take some of the pressure off Magistrate David Merwin, who has been performing yeoman service on his own in Kalamazoo. Welcome, Lisa!

In January, Magistrate Richard Zettel (Mt. Clemens) became a supervisory ALJ for Medicare in Irvine, CA. In April, Magistrate John Rabaut (Detroit) became a Social Security ALJ in Flint. At the end of June, Magistrate Andy Sloss (Mt. Clemens) will become a Social Security ALJ in Nashville, TN. Congratulations to Rick, John, and Andy! My thanks go to all three for their service to the state of Michigan. I know we all wish them well with their new responsibilities.

To deal with the departure of Rick Zettel, Magistrate Rosemary Wolock agreed to return to Mt. Clemens to take over the Zettel docket, and Magistrate Victor McCoy is again full time in Pontiac. In Detroit, the Rabaut docket will be posted and rotated each day among the other Detroit magistrates, who will treat the docket as their own, and keep those cases thereafter on their docket. Please be ready to proceed. Please do not assume there will be any automatic adjournments. ✕

Workers' Comp Hall of Fame Update

By Murray Feldman

Congratulations to William (Bill) Listman, the late Mike Barney, the late Roger Rapaport, and the late Jim Ryan, all of whom have been approved for induction into the Workers' Compensation Hall of Fame.

We will be honoring Bill and representatives of the other inductees at dinner on Thursday, June 19, 2008; in conjunction with our summer meeting scheduled at Shanty Creek Resort for June 19-21, 2008.

Your section has extended an invitation to Bill and representatives of the other three inductees to join us on June 19 for our cocktail party, dinner, and a very special awards ceremony acknowledging our new inductees. As of the preparation of this article, Shirley Barney and Jane Rapaport have accepted our invitation.

Elsewhere in this newsletter you will find more information on our summer meeting and a reservation form to use to reserve your spot for our summer meeting and for what promises to be a very special evening on June 19.

For those of you who are not aware, the Workers' Compensation Section has now taken over the Workers' Comp Hall of Fame project, and we will be inducting individuals for the first time since 2002.

I'd also like to take the opportunity to specially acknowledge our Workers' Comp Hall of Fame Committee, co-chaired by Rick Warsh and Jim Geroux and including members Don Ducey, Nort Cohen, Agency Director Jack Nolish, Steve Pollok, and Len Hickey for their efforts in indentifying and bringing to the section's attention our inductees. The committee will be re-forming after our summer meeting, and if you are interested in becoming a member of the committee and/or making any nominations, please contact either Don Ducey or Nort Cohen.

We encourage you to join us at our summer meeting to honor our inductees and their representatives. ✖

Historical Note

Steve Pollok sent me a copy of a letter that was handwritten by Theodore (Ted) P. Ryan (1904-1999), who was a former administrative law judge here in the Lansing area and worked with Rapaport, Pollok before he died. In his handwritten note, he makes reference to Ray Rapaport (1913-1975) and his son, Roger Rapaport (1951-2003). The handwritten note stated, "Way back when, about 1970 or maybe a few years before or a little later, we needed a coat rack for our hearing room on Michigan Street across from Alex's Restaurant next to the river. There was no likelihood that the State would provide any such accommodation, and Raymond Rapaport and Peter Munroe, two of our more prosperous members of the workers' compensation bar, saw a way to make some extra money. They purchased a coat rack and placed it in our hearing room, and everyone was grateful. However, they then started collecting \$2 each from everyone who hung a coat there. The charge seemed fair, and everyone was grateful. However, there are some who say that the collections never stopped until Roger, Ray's boy, had finished law school and Pete had completed the building of his new home. The coat rack has become a permanent fixture, still in excellent condition, a monument to the free enterprise system, and never cost the State a single penny." I took Pete to lunch on February 8, and he confirmed most of the story. However, he professed that he and Ray never quite recouped the \$10 to \$12 that the coat rack cost. It should be noted that the coat rack can still be found in the attorney's lounge of the Diamondale bureau. Hope you find this historical note and information useful. ✖



Regards,
Bill Housefield

CMS Conditional Payments— There is a Time Limit on Recovery by CMS

By Chuck Palmer

Last fall I had an unpleasant experience with CMS that caused me to actually read the Medicare Secondary Payer Act, 42 USC 1395y(2). After waiting for nine months for the conditional payment letter, we finally received one, stating that the conditional payments owed back to Medicare totaled \$1,198.31. We redeemed the case in the next two weeks, and I mailed Medicare their check. Less than a month later, I received a new conditional payment letter, claiming that the amount owed was \$14,878.68. Outraged, I figured I'd better find out whether they could collect this new amount.

Anyone who's redeemed a case in the last several years for a Medicare recipient knows that Medicare has very sweeping powers pursuant to the Medicare Secondary Payer Act. Under this federal law, Medicare may make a payment for medical care that may be someone else's responsibility, such as a health or auto insurance company or a workers' compensation insurance carrier. 42 USC 1395y(2)(A). However, this "conditional payment" by Medicare creates an obligation to repay the conditional payments made by Medicare. 42 USC 1395y(2)(B). If payment is not made within 60 days of the date notice is given to the primary plan, the secretary is entitled to charge interest, and the United States can bring a court action seeking double damages against any and all entities that were responsible to pay. 42 USC 1395y(2)(B)(ii-iii). The United States is also subrogated (to the extent of the conditional payments) to any individual or any other entity that may have a right to seek payment of the payments. 42 USC 1395y(2)(B)(iv). Sounds pretty scary, right?

However, reading on, I discovered that **MEDICARE CONDITIONAL PAYMENT RECOVERIES HAVE A LIMITATION PERIOD**. I was chagrined when I read this section, since I had argued and given up in a small redemption a year prior, where Medicare had sought recovery of conditional payments going back to 1992! But reading the statute, there it was: **42 USC 1395y(2)(B)(vi) Claims-Filing period**.

Notwithstanding any other time limits that may exist for filing a claim under an employer group health plan, *the United States may seek to recover conditional payments* in accordance with this subparagraph where the request for payment is submitted to the entity required or responsible under this subsection to pay with respect to the item or service (or any portion thereof) under a primary plan within *the three-year period beginning on the date on which the item or service was furnished*.

Wow, there you have it. Medicare can only recover conditional payments made within three years of the date the medical treatment was **provided**. Given the two-year-back rule and a year or so of litigation, that could significantly limit Medicare's ability to recover conditional payments in many Michigan workers' compensation cases. Similarly, if the United States is subrogated to plaintiff's rights to recover, and we have a two-year-back rule, then we can also argue that Medicare is not entitled to any conditional payment that we could not recover in our own claim against the employer.

Citing this section, I wrote back to CMS and told them they couldn't recover payments for services that were rendered more than three years earlier. I also told them it was fundamentally unfair for them to take nine months to issue a conditional payment and then issue a greatly increased one after we've already redeemed. It's been only two months since I sent the letter, so I can't be sure I'm out of the woods yet. But if I'm reading this statute correctly, we at least have some limits to what CMS can seek to recover by way of conditional payments. If I hear otherwise, I'll write an update. But for now, anyone who receives a conditional payment letter for services more than three years old should dispute it by promptly responding to the letter and citing the above section. . ✖



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<http://www.michbar.org/workerscomp/newsletter.cfm>

Agree is Not a Four-Letter Word

By John Cooper

Mediation is both simple and complicated at the same time. Process, preparation, communication, perceptions, patience, persuasion, balancing principle and compromise while making progress, all come into play. A summary of good qualities a mediator needs would include the following: educator, good communicator, empathy, good active listener, sincerity, creative problem solver, ability to relate to people of diverse educations and backgrounds, efficient time use, unquestioned fairness, and a love for the profession.

Mediation in workers' compensation has evolved over several years. It has gone from 14 mediators statewide to four. Additionally, the advent of telephone mediations came into use, allowing participants to participate conveniently without the need for extensive costs, travel, and time. The agency also has provided a guideline for mediators to conclude consideration of mediations and vocational rehabilitation within a 90-day period in all but the most unusual of circumstances. As a result, participants in the process must work together in a reasonable relationship that effectively meets the mission of mediation.

The informality of mediation is a key to achieving resolution over conflict. Resolution requires an open exchange of information, honesty about the issues to be addressed, a feeling of trust between the parties, and participants who truly are able to make decisions. The mediator must get to the "guts" of the conflict. This may require posing very direct questions, maybe even investigating issues that in the formal process might be considered "irrelevant," possibly addressing prejudices and biases that may exist, and in general, cutting through to the chase. As I like to refer to it, this process is more about "just us" in a room, than simply justice. Additionally, mediators are fully aware that cases before magistrates take priority most days and time is, therefore, of the essence. Consequently, preparation and candidness of the parties is absolutely essential.

Certainly, mediation may not be the best way to resolve every case, yet it should be given the opportunity in many. Alternative dispute resolution (ADR) is here to stay and expanding in all areas of legal conflict. In the global society, there is no reason why a mediator in North America cannot resolve a dispute (with the proper background) between a party in Europe and Asia. Modern technology cannot

overcome each nuance of cultural differences, but it sure can provide a working mechanism for change, compromise and understanding.

So, where do we stand with mediation in workers' compensation in Michigan? Are we doing our best to realize its true advantages? In such an open process are we exploring fully its many opportunities? Does it work effectively for attorneys, insurance representatives, claimants and employers alike? How does it rate as a means in resolving the cases? How does the general public feel about the effectiveness of our justice systems? All questions worthy of thought.

I have many years of experience now. I like interaction with hosts of different types of people. It is such a rewarding journey. I find the process of mediation to allow for great creativity and, yes, most of all, fun. Yet, it is clear to me that some fairly simple practice tips and reminders deserve our attention if mediation is to reach its full potential.

Some of the areas to think about include:

- Decisions are made by the parties, not the mediator. To make mediation effective, parties must come to the table or phone with this capability and authority. Too many times these decisions are kept from us by delayed decisions of faceless people elsewhere. These people should know a mediation is scheduled. Why not call them to update them and for further direction before the mediation date?
- Procurement of records, information, etc. can be an overly cumbersome task. Fax transmissions, emails, paperless society, and other advances must be utilized to their maximum. Medical records must be obtained with all due speed, and the cavern between the legal and medical communities must be reduced. If records are unduly delayed, phone calls by mediators to have them faxed the same day can be requested.
- There is a fertile area for resolution between the 90-day limit and final trial dates. Pre-trials and initial trial dates rarely bring agreement. Yet, some 92 percent-95 percent of cases are settled before trial. Should cases be brought back for mediation before trial (after all evidence/information is available) as a means of taking advantage of this often long fertile period for possible resolution? To me, it makes sense to assign both a trial date and an-

other mediation date sometime before trial in some, but certainly not all, cases.

- In this same vein, redemption negotiations can be addressed in mediation more often. As it is, parties choose to simply request a trial date when most cases are headed for a full settlement. Mediators are prepared to, want to, and enjoy the actual negotiation of cases with real numbers. If demands and offers can be supplied in this format more frequently, more cases can be resolved even more expeditiously through that mechanism.
- Parties should pay attention to notices differentiating between “mediations” (in person) and “telephone mediations.” In some cases, one party will assume he or she can participate by telephone for an in-person mediation with no notice to the other affected party. This assumption creates harsh feelings and significant problems to parties who may have traveled extensive distances to a site, losing both time and money in the process. Reasonable accommodation can only be made if timely request and notice is presented to otherwise unsuspecting parties and the mediator.
- One parting thought: When dealing with pro pers, the lawyers should leave their “lawyer hats” at the door. Lawyers need to be participating as “people,” not simply as lawyers, to be more effective in an informal process. Talk to the parties, not me, and empathize with their situa-

tion. Counsel certainly does not have to accept a claim/allegation. This is mediation, not a trial. Sometimes lawyers call me “Your Honor.” I am a mediator, not a judge. I am smart enough to know this is habit, not a showing of deference. Relate. Acclimate. Understand. Give the party a sense that you truly appreciate what they are going through. All of this will work wonders toward what we may be able to accomplish, and improve perceptions participants may have of the process.

We are lucky to have a fine group of people working in the area of workers’ compensation. Most all of the time, they are working together, showing respect for one another in a most cooperative spirit. I have always felt that my job in the process is to carry forth my mission and keep in mind the stresses and strains those I serve may face from day to day. Additionally over the years, I have strived to work closely with the magistrates I team with to make their jobs more productive and satisfying. It is my belief that mediation is a tremendous tool all of us can truly benefit from as we face the difficult task of providing people and entities justice. It is my nature to always look for improvement. This endeavor has been an attempt on my part to highlight some of the many ways we might accomplish that. ✖

Newly Redesigned SBM *e-Journal* Allows Readers to Directly Access Practice Area Summaries

The State Bar of Michigan free daily online publication, *e-Journal*, has been newly redesigned with enhanced features. Readers can now directly access the opinions and practice area summaries they are interested in without sorting through the entire edition.

This new customization feature will make reading faster and easier. Current subscribers should choose the “Manage Your Subscription” link in the upper right-hand corner of the *e-Journal* to make their practice area selections.

The *e-Journal*, sent daily to more than 16,000 subscribers, is one of the most popular services provided by the State

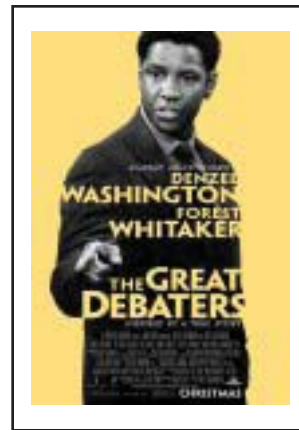
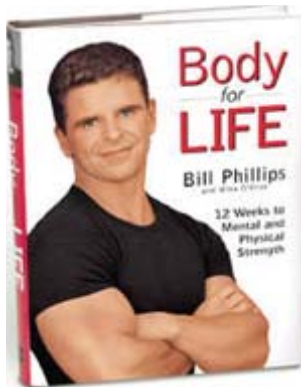
Bar. It summarizes all opinions as they are released from the Michigan Supreme Court, Michigan Court of Appeals (published and unpublished), the U.S. Sixth Circuit Court of Appeals (published), and selected U.S. District Courts.

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Magistrate Recommendations

If books and movies are your things, check out what some of our magistrates recommend:

Mike Harris recommends *Champions Body for Life*, published by Harper Collins and to be released June 3, 2008. Why? Because it is a rewrite of the original and it not only changed Mike's life, but he is a contributor.



Ken Birch recommends the recent movie *The Great Debaters*, as he indicates that it is actually fairly action packed.

Chris Ambrose recommends you watch *And Justice for All*, on a rainy day with a cup of tea. He believes it demonstrates the stress that all jurists face.

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Recent Cases

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

The Supreme Court has not issued any new decisions since our last newsletter. As of this writing, the Supreme Court still has pending before it *Stokes v Chrysler LLC, f/k/a DaimlerChrysler Corp* (SC Docket No. 132648). The case was orally argued on October 4, 2007. The point orally argued in *Stokes* was the parties' burdens of proof in *Sington* disability cases. Recall that the Court of Appeals had largely dismantled the Workers' Compensation Appellate Commission's *en banc* decision in *Stokes*, but the Court of Appeals affirmed the result in the case – an open award of benefits at the maximum rate. *Stokes v DaimlerChrysler Corp*, 272 Mich App 571; 727 NW2d 637 (2006). For the time being, the Court of Appeals' *Stokes* decision is the controlling rule of law.

Another case that had been orally argued before the Supreme Court and remains pending as of this writing is *Gee v Arthur B. Myr Industries, Inc* (SC Docket No. 133762). *Gee* was argued in January 2008. It is a factually complex case involving *res judicata* in an attendant care context.

More specifically, Mr. Gee had litigated a total and permanent disability claim in 2001. At the conclusion of the hearing, he requested attendant care benefits for his family providers. The magistrate failed to address the nursing or attendant care portion of the claim. On appeal, the Workers' Compensation Appellate Commission denied the attendant care claim on the basis that plaintiff had failed to introduce any evidence on the reasonable value of services performed. That appeal became final.

Plaintiff then filed a new application, again requesting attendant care services. The defendant moved for dismissal on the basis of *res judicata*. The magistrate denied the motion to dismiss and went on to determine that plaintiff was entitled to 56 hours of attendant care services each week. Defendant appealed to the Appellate Commission and Court of Appeals without success. The Supreme Court's oral argument related to whether the defendant is entitled to relief on the basis of *res judicata*.

Most recently, the Supreme Court has granted an oral argument on an application for leave to appeal in *Brckett v Focus Hope* (SC Docket No. 135375). The oral argument is scheduled for May 7, 2008.

The issue in the case is whether plaintiff's claim is barred by the intentional and wilful misconduct provision, MCL 418.305. The facts are that plaintiff at the time of hire was

advised that she had to attend Focus Hope's annual Martin Luther King Day celebrations. After hire, plaintiff decided not to attend the celebration. Her supervisors confronted her about her decision and she claimed a psychiatric injury as a result. The question for oral argument is whether her psychiatric injury is by reason of her own intentional and wilful misconduct.

Finally, two other cases pending before the Supreme Court bear noting if for no other reason than the length of time they have been pending before the Supreme Court. One is *Bessinger v Our Lady of Good Counsel* (SC Docket No. 128870). The other is *Diot v Department of Corrections* (SC Docket No. 130702).

Bessinger presents the question of whether the claimant is entitled to only partial disability benefits after he ceased working at a post-injury lesser paying job. The Supreme Court had remanded the case while retaining jurisdiction on January 31, 2006. The Workers' Compensation Appellate Commission issued its opinion on remand on October 25, 2006. The case then automatically returned to the Supreme Court where it still pends.

In *Diot*, the employer applied for leave to appeal on March 14, 2006, over two years ago. That application still pends, which is highly unusual. Mr. Diot was granted an open award of benefits upon being found disabled as a result of an inability to return to work at one place of employment for his employer, although he acknowledged the ability to do that type of work elsewhere.

It is conceivable that *Bessinger* and *Diot* are either being held in abeyance while the Supreme Court continues to consider *Stokes*. Or, perhaps they are being considered in conjunction with *Stokes*. We will, of course, keep everyone apprised of the developments.

Court of Appeals

While the Court of Appeals has not issued any published decisions (as of this writing) since our last newsletter, it has been busy with respect to workers' compensation. The Court of Appeals has recently released seven workers' compensation decisions, all unpublished.

Applying *Sington*

In *Miller v Grand Haven Stamped Products Co* (CA Docket No. 278235, rel'd April 1, 2008), the Court of Appeals re-

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versed the Workers' Compensation Appellate Commission's and magistrate's open award of benefits on the basis that they had misapplied *Sington*.

The plaintiff in this case works for an automobile components manufacturer. She suffered a work-related right knee injury. At the time of her injury, she was working up to 60 hours a week. Following arthroscopic surgery, she returned to work with restrictions requiring a sit/stand option. Post-injury, she performed different jobs within these restrictions, some of which ended when they were outsourced to other countries and some of which paid less than she earned at the time of injury. After her benefits were terminated, plaintiff filed her application seeking a reinstatement of partial disability benefits.

The magistrate and Appellate Commission found that plaintiff was disabled under *Sington* and granted her an open award of benefits.

The Court of Appeals reversed saying "[p]laintiff is not disabled under *Sington*." After reviewing *Sington's* discussion of both the first and second sentences of MCL 418.301(4), the Court of Appeals in discussing the definition of disability in the first sentence says plaintiff did not prove "disability" because:

One of the factual matters to consider when making a disability determination is whether there continues to be a substantial job market for the work for which the employee is both trained at qualified. [*Sington, supra*] at 157. Here, the record establishes that the piecework job that plaintiff held in the 1980s, at which she earned \$15 to \$17 an hour, has not existed since the 1980s. There is no evidence in the record that there is any market, let alone a substantial job market, for such work at present. Accordingly, the piecework job has no relevance for purposes of establishing plaintiff's maximum wage earning capacity. Furthermore, although the evidence demonstrated a link between plaintiff's injury and her loss of the opportunity to work in other cells within defendant's plant, there was no showing that plaintiff would earn a greater hourly wage if she worked in any other cell.

With respect to the second sentence of § 301(4) and its obligation to link wage loss to a disability, the Court of Appeals added:

Moreover, although plaintiff demonstrated that she had lost significant earning capacity, as reflected by her loss

of overtime work, the evidence demonstrates that this loss of earning capacity is not attributable to her injury, but to the changing fortunes and efficiencies of the automotive industry and the terms of her union contract.

The Court of Appeals then added that, given pay raises, plaintiff now "realizes her maximum wage earning capacity" and her work injury "has had no adverse impact on her maximum wage earning capacity."

Applying *Rakestraw*

In *Bousquette v Meeder Dimension & Lumber Co* (CA Docket No. 274373, rel'd April 8, 2008), the Workers' Compensation Appellate Commission had reversed the magistrate's open award of benefits on the basis that the magistrate erred in failing to apply *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003). Plaintiff appealed. The Court of Appeals affirmed the Appellate Commission.

Plaintiff suffered a pre-existing back condition as a result of an L4-5 fusion. He claimed that a specific event at work, lifting bags, compensably aggravated that condition. His co-workers confirmed at trial that plaintiff had experienced pain attributable to the lifting at work. The magistrate found compensable aggravation, but had not explicitly chosen between the competing medical opinions. On appeal, the Appellate Commission reversed on the basis "the magistrate legally erred in failing to apply *Rakestraw's* 'medically distinguishable' standard." The Appellate Commission said the testimony of plaintiff's co-workers that he injured his back while lifting bags was binding but was insufficient to establish that plaintiff had suffered an injury medically distinguishable from his pre-existing disc abnormalities.

In affirming the Appellate Commission, the Court of Appeals said the co-workers' testimony did not shed light on the medical question presented. The Court of Appeals said that the medical record "contains testimony both in support of and against the conclusion that plaintiff suffered a work injury, as distinguished from an exacerbation of symptoms consistent with the progression of his pre-existing back condition." The Court of Appeals then held that the Appellate Commission could legitimately choose to accept one doctor's testimony to the effect that lifting the bags at work "may have resulted in exacerbation of plaintiff's back pain, [but] did not result in any new condition."

Losing Reasonable Employment Where the Employee is at Fault

In *Johnson v General Motors Corp* (CA Docket No.

275909, rel'd January 29, 2008), the Court of Appeals addressed the "reasonable employment" (f/k/a favored work) provisions of MCL 418.301(5)-(9).

Plaintiff suffered a work-related knee condition and then returned to work with restrictions. She claimed a new injury while working at such "reasonable employment" and filed a petition on that basis. Plaintiff had a confrontation at the trial on that petition with a representative of the defendant. Defendant said plaintiff "attacked" the representative at the agency and, as a result, plaintiff's employment was terminated. Defendant then filed its own petition claiming that, since plaintiff lost her post-injury reasonable employment as a result of her own fault, she was no longer entitled to benefits under MCL 418.301(5)(d). This provision says: "If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job through no fault of the employee, the employee shall receive compensation under this act pursuant to the following:"

The Workers' Compensation Appellate Commission found this provision inapplicable and ruled plaintiff was entitled to ongoing benefits. The Appellate Commission said nothing within the reasonable employment provisions exactly fit this case and, therefore, its provisions were not the criteria by which to judge whether plaintiff was entitled to benefits.

The Court of Appeals disagreed. The Court of Appeals said that "the WCAC's decision, which advocates an interpretation of MCL 418.301 requiring looking outside the statute to determine plaintiff's entitlement to benefits, is improper." The Court of Appeals vacated the Appellate Commission's order and remanded for a determination of "whether a termination of employment, through the fault of the employee here, results in the permanent forfeiture of benefits pursuant to MCL 418.301(5)(d)."

Majority Decision of the WCAC

In *Smith v Exemplar Manufacturing Co* (CA Docket No. 272749, rel'd January 31, 2008), the Court of Appeals addressed the question of whether a splintered Workers' Compensation Appellate Commission decision constituted a "true majority" opinion.

The Appellate Commission had issued a decision that consisted of three different opinions: a lead opinion, a concurring opinion, and a dissenting opinion. The employer argued that this was improper because the act and case law require a true majority opinion under MCL 418.274(8) ["The decision reached by a majority of the assigned 3 members of a panel shall be the final decision of the commission."] and *Aquilina v General Motors Corp*, 403 Mich 206; 267 NW2d 923 (1978).

The Court of Appeals disagreed with defendant saying there was a "true majority" because the only purpose of the concurring opinion was to address the dissenting Commissioner's points and "in all other respects" the concurring Commissioner agreed with the lead opinion.

Bailey and Retroactivity

In *Pieser v Sara Lee Bakery and Second Injury Fund (Vocationally Handicapped Provision)* (CA Docket Nos. 275608 and 277884, rel'd March 20, 2008), the Court of Appeals addressed whether the employer was entitled to reimbursement as a result of a change in the law precipitated by the Supreme Court's decision in *Bailey v Oakwood Hospital & Medical Center*, 472 Mich 685; 698 NW2d 374 (2005). Recall that *Bailey* held that the Second Injury Fund is obliged to reimburse employers under the vocationally handicapped provision even if the employer failed to provide notice to the fund within the time limits described in MCL 418.925(1).

After release of *Bailey*, the employer and its carrier sought reimbursement in *Pieser* on an old claim. The Workers' Compensation Appellate Commission agreed with defendant and gave *Bailey* retroactive effect, ordering the fund to reimburse the employer for all benefits paid after the date of *Bailey's* release on June 29, 2005.

The Court of Appeals reversed the Appellate Commission. The Court of Appeals said it saw no reason to stray from "the 'usual' rule of limited retroactivity. Therefore, because this case was no longer pending at the time *Bailey* was released, that case is inapplicable to the instant matter and the fund is correct in its assertions that the WCAC erred in granting defendants any reimbursement at all."

WCAC's Administrative Role

Two of the unpublished decisions from the Court of Appeals address the Workers' Compensation Appellate Commission's authority in reversing magistrate's decisions.

In *Krastes v Haseley Construction Co, Inc* (CA Docket No. 276545, rel'd April 10, 2008), the Court of Appeals reversed the Appellate Commission and reinstated the magistrate's order granting the defendant's petition to stop.

Ms. Krastes had originally been granted an open award after which the employer filed a petition to stop. The employer's petition was based on a medical examination by Dr. Drouillard and on the videotapes of plaintiff taken by a private investigator. On the basis of that evidence, the Magistrate concluded plaintiff was no longer disabled and granted the petition to stop. On appeal, the Appellate Commission reversed. The Appellate Commission said Dr. Drouillard had

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not examined plaintiff at the time she was originally found to be disabled and, as a consequence, had no understanding of how her condition may have changed since then. And the Appellate Commission said the magistrate misinterpreted the private investigator's videotapes.

In response to the employer's appeal, the Court of Appeals reversed the Appellate Commission, saying it "overstepped its authority." The Court of Appeals said that, although the Appellate Commission "carefully reviewed the record, it afforded little or no ... deference to the magistrate's decision and did not conduct the limited review provided by" statute. The Court of Appeals characterized the Appellate Commission's discussion of Dr. Drouillard's testimony as "entirely specious." And the Court of Appeals found the Appellate Commission merely "chose to substitute its interpretation of the videotape evidence for the magistrate's interpretation." The Court of Appeals therefore concluded the Appellate Commission "misapprehended or grossly misapplied its standard of review when it reversed the magistrate's order stopping disability benefits."

A different result ensued in *Stone v R.W. Lapine, Inc* (CA Docket No. 275684, rel'd April 3, 2008).

Here, the magistrate granted plaintiff a closed award and, on plaintiff's appeal, the Workers' Compensation Appellate Commission reversed and granted him an open award.

On appeal to the Court of Appeals, the defendant argued, among other things, that the Appellate Commission had misapprehended its administrative appellate role, particularly by disagreeing with the magistrate's application of the "special circumstances" provision of the average weekly wage provision, MCL 418.371(6).

The Court of Appeals disagreed with defendant and affirmed the Appellate Commission. The Court of Appeals said the Appellate Commission "preserved the integrity of the administrative process by vacating the magistrate's personal medical opinions and crafting an opinion based on the evidence in the record." The Court of Appeals agreed with the Commission that the magistrate should have applied subsection (3) of the average weekly wage provision because plaintiff had worked less than 39 weeks and the "special circumstances" provision of subsection (6) did not apply.

Workers' Compensation Appellate Commission

Due to the volume of Court of Appeals' decisions reviewed, space limitations only allow for addressing a couple of the

more recent decisions from the Workers' Compensation Appellate Commission.

Medical Benefits Under a Prior Open Award

The Workers' Compensation Appellate Commission has addressed the defendant's obligation to pay medical benefits under a prior open award of benefits, as well as related procedural issues. In *Kerrigan v Suds Mobile Cleaning Systems*, 2007 ACO #187, the magistrate had previously entered an open award of benefits that included an obligation to pay reasonable and necessary ongoing medical benefits "including, but not limited to, treatment recommended by" a particular doctor. After that award had become final, the employer filed an application to, among other things, challenge whether plaintiff's ongoing medical treatment was reasonable and necessary. To prove its point, the employer scheduled two medical depositions. Those medical depositions were quashed by the magistrate, however, on the basis that the employer was refusing to authorize medical treatment as required by the terms of the prior open award. The employer challenged that quashing of depositions before the Appellate Commission. An oral argument was held.

Oddly, before the Appellate Commission resolved the case, the propriety of the magistrate's ruling quashing the depositions became moot because the employer agreed to pay the medical bills in question, but the defendant pursued the appeal nonetheless. The Appellate Commission said, "Having now fulfilled their obligation to provide ongoing medical, defendants will now receive the relief they sought here at the Commission," namely the ability to take the depositions quashed by the magistrate. However, the Appellate Commission then proceeded to address the procedural question presented. The Appellate Commission majority said the magistrate did not err in quashing the depositions due to the defendant's failure to provide ongoing medical treatment. The concurring Commissioner, Commissioner Grit, agreed with the majority and said "[b]ecause of the importance of the issues raised, I believe we should address these cases." Commissioner Grit then explained:

The defendants are looking for a ruling that says they need not pay for medical benefits under an open award whenever they dispute the work-related nature, reasonableness or necessity of the medical treatment. The defendants believe that if they decide the medical treatment is not compensable, they can refuse pay-

ment, even under an open award, until a magistrate rules otherwise. The defendants are wrong.

The defendants ask us if they have to pay for medical treatment that might be grossly inappropriate, unrelated to the work injury, unnecessary and/or unreasonable. The answer is yes. The reason the answer is yes is because there is an order (in this case final) requiring the defendants to do so. That order remains effective until or unless a different order is entered. And until a different order is entered, the defendants may have to pay bills that they should not have to pay. The logic behind that reasoning is provided by the Supreme Court in *Garcia*.

See also, *Schultz v Pontiac Osteopathic Hospital*, 2007 ACO #82, which contains a historical review of MCL 418.315(1) in the context of a prior open award granting unspecified ongoing medical benefits.

Applying the Court of Appeals' *Stokes* Decision

In *Welch v Means Industrial, Inc*, 2007 ACO #121, the Workers' Compensation Appellate Commission addressed application of the *Sington* definition of disability under the current state of the law, i.e., under the Court of Appeals' decision in *Stokes v DaimlerChrysler Corp*, 272 Mich App 571; 727 NW2d 637 (2006). In remanding the case to the magistrate for additional analysis, the Appellate Commission explained "how a plaintiff proves a prima facie case on disability." Commissioner Grit, with Commissioners Ries and Will concurring, said:

While not repudiating the numerous factors suggested by the *Sington* Court, the Court of Appeals decision in *Stokes v DaimlerChrysler*, 272 Mich App 571 (2006), offers up a straightforward discussion of how a plaintiff proves a prima facie case on disability:

. . . as a practical matter, an employee's proofs will generally consist of the equivalent of the employee's resume, i.e., a listing and description of the jobs the employee held up until the time of the injury, the pay for those jobs, and a description of the employee's training and education; and testimony that the employee cannot perform any of the jobs within his qualifications and training paying the maximum wage . . . By producing such evidence, in addition to evidence of a work-related injury causing the disability, an employee makes a prima facie case of disability—a limitation in the employee's

maximum wage earning capacity in all jobs suitable to the employee's qualifications and training. [*Hovey v Hancock Enterprises, Inc*, 2007 ACO #51, pp 4-6.]

We remand this matter to the magistrate for a complete analysis on the disability issues. His analysis should take into account the *Sington* decision and the Court of Appeals decision in *Stokes*. The magistrate should address whether the plaintiff's work injuries have resulted in a limitation in his maximum wage earning capacity in work suitable to his qualifications and training. The decision should include findings on the plaintiff's pre-injury qualifications and training, the exact extent of the plaintiff's work-caused physical limitations, what work is suitable to his qualifications and training and within Mr. Welch's work caused limitations, whether that work is reasonably available and whether the current pay for that type of work is equivalent to Mr. Welch's maximum wage earning capacity. ✕



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