State Bar of Michigan

Workers' Compensation Section Newsletter

Spring/Summer 2007

Section Members Meet with Senator Stabenow in Washington, D.C.

By Joel Alpert

Contents

On May 24, 2007, a delegation met with United States Senator Debbie Stabenow and her staff members Sander Lurie, chief of staff; Oliver Kim, senior legislative counsel; and Paul Lyons, legislative fellow, to discuss the Medicare Secondary Payer and Workers' Compensation Settlement Agreements Act of 2007. The delegation consisted of Joel Alpert, treasurer, State Bar Workers' Compensation Section; Denice LeVasseur, Delphi Corporation; Tanya Lamnin, Jules Olsman, Robert June, and Troy Haney, representing the Michigan Association for Justice (formerly Michigan Trial Lawyers Association); Douglas Holmes, president of UWC-Strategic Services on Unemployment and Workers' Compensation (a national association exclusively devoted to representing the interest of the business community on national unemployment insurance/employment services and workers' compensation public policy issues); Bob DeRose, president-elect, and Randall Scott, executive director of WILG (Workers Injury Law & Advocacy Group—the national non-profit membership organization dedicated to representing the interest of workers who suffer the consequences of work-related injuries and occupational illnesses); and Sue Steinman, director of policy for public affairs of the American Association for Justice (formerly the American Trial Lawyers Association). Senator Stabenow and her staff were most gracious and afforded over two hours of their time to discuss this pressing subject.

The Medicare Secondary Payer and Workers' Compensation Settlement Agreements Act of 2007 was introduced on May 24, 2007, as H.R. 2549 by Rep. John Tanner (D-TN) and Rep. Phil English (R-PA). We are hoping that Senator Stabenow, as well as other senators, will agree to sponsor the Senate version of the bill. It is unlikely that it will be a freestanding bill and will most likely be attached to and packaged with other legislation. Senator Stabenow and her staff were impressed by the fact that this proposed legislation is supported by the improbable consortium of business, insurance, and injured worker interests.

Continued on page 4

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Tom Ruth, Newsletter Editor

Opinions expressed herein are those of the authors or the editor and do not necessarily reflect the opinions of the section council or the membership.

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From the Chair

Dear Colleagues,

Thank you for giving me the opportunity to serve this next year as the section chair. I hope I am up to the task of representing this section's diverse population in the course of my term.

I have great examples of past chairs to emulate. Len Hickey has been a wonderful chairman. His professionalism and level-headedness have been great assets to the section. Richard Warsh strove to unite East side and West side while chairperson. Alan Helmore was so fiscally responsible the section is happily very solvent once more.

Luckily, additional talented people have been appointed to the committee. We welcome Dave DeGraw as treasurer this year. Dave has long served as the golf committee chairperson at the Spring meeting. On a personal note, please remember Dave in your prayers this summer as he undergoes heart surgery. We hope for a safe and quick recovery.

Also joining the committee is Bill Housefield. Bill practices defense work in the Lansing area. He had the fortunate experience of practicing workers' compensation with the legendary Pete Monroe. His experience will be a wonderful addition to the committee.

Ella Parker is the chairperson of next year's Spring meeting. Should you have any suggestions for her, please contact her as soon as possible. A decision for our location will be made shortly.

Murray Feldman is the chairperson for the Fall meeting, which is traditionally held in Detroit. Should you have ideas for the program, please let Murray know.

Fred Bleakley is chairperson of the Winter meeting. He is scouting locations in Costa Rica and Hawaii.

Lastly, we have added the position of "Minister of Misrule." This person is responsible for promoting comradery and fun within our practice. Robert Kluczyuski is out first minister and he has a number of activities planned for section members just for the fun of it

Lest this seem too frivolous, let me remind everyone that I am well aware of the atmosphere in the workers' compensation arena. I have seen this field of practice shrink to a quarter of its size since I first began in law. I have seen able attorneys leave this practice for other fields or lose their jobs because of downsizing. We in workers' compensation have also experienced the deaths of some colleagues, which have placed a huge hole in our hearts, particularly because these people were so instrumental in making workers' compensation fun.

So let's go forward this year and remember that we have survived through some of the worst of times. We are stronger for the experience. We can work together in this field and preserve the atmosphere of collegiality and comradery that has set us apart from the practitioners of law in the past. It is this quality that makes us special.

Thank you again for the opportunity to serve as chair. It's going to be a great year.

Sincerely,

Paula S. Olivarez

From the Outgoing Chair

Dear Friends and Colleagues:

By the time you read this, our annual spring meeting will have occurred, our section will have a new leadership team, and our section's agenda for the coming year will be in the process of being implemented. My term as your chairperson ended on June 15. Your new chairperson is Paula S. Olivarez. I look forward to being available to assist Paula, as needed, as she assumes the responsibilities of the chairperson of our section.

If you do not know her, Paula is with the law firm of McCroskey, Feldman, Cochrane & Brock, and is located in their Kalamazoo office. She currently represents employees. Previously, she served on the Appeal Board and on the Board of Magistrates. For the last three years, she has served as an officer on the executive committee of the section. Paula is knowledgeable and has the benefit of the perspective gained from having worked in different roles in our workers' compensation system. We look forward to her leadership.

Our section is active, vibrant, collegial, strong, and on solid financial footing. It is well positioned to serve its members and advance the practice of workers' disability compensation law in our state.

Many people have given of their time and have been very helpful to the section, and to me, during my term as chair of the section. I thank all of them. I also especially thank my partner, John Combs, my assistants, Julie Lutz and Marah Schultz, the executive committee, Paula Olivarez, Murray Feldman, and Joel Alpert, the council, Director Jack Nolish, Board of Magistrates Chairperson Murray Gorchow, Appellate Commission Chairperson Martha Glaser, Fred Bleakley, and Barry Schroder.

Finally, thank you to my colleagues, fellow practitioners, and skilled advocates. I am proud to know you, to work with you, and to have served as your chairperson.

Sincerely,

Len Hickey

Newsletter gets New Editor

Due to a variety of other time commitments, it is with great regret that I informed Len Hickey and Paula Olivarez that this edition would be my last as newsletter editor. I am most pleased to announce that this newsletter is in GREAT HANDS with new editor Tom Ruth of Saginaw. I want to personally thank Tom for agreeing to take over the duties of newsletter editor on behalf of our section. I know Tom will do a great job.

I'd like to take this opportunity to thank all of those who have contributed to the success of this newsletter in my time as editor. Those individuals include all of our regular columnists, Jack Nolish, Murray Gorchow, Martha Glaser of the administration, and Jerry Marcinkoski and his law notes. On behalf of the entire section, I wish to acknowledge the contributions made by these individuals, whose actions enrich our entire section with their contributions to the newsletter.

I also want to take the opportunity to thank the semi-regular columnists who have submitted articles, crossword puzzles, Sudoku, and other such columns for the newsletter. I'd also like to take this opportunity to acknowledge our friend, of blessed memory, Mike Barney, for his contributions of poetry.

Finally, but certainly not least, I'd like to publicly acknowledge Ms. Sue DeLong and Ms. Theresa Pinch for their assistance in the preparation of this newsletter. I've often said that the two of them are the "brains" behind this newsletter, and I continue in my public confession regarding their activities.

I'd also like to give one more thank you to Ms. Sue Oudsema of the State Bar of Michigan who does our desktop publishing. Sue, on behalf of our entire section—THANKS.

Thank you for the opportunity of serving as your newsletter editor.

Murray R. Feldman

Section Members Meet . . .
Continued from page 1

The proposed bill would amend the Medicare Secondary Payer Act (MSP Act). Highlights include exempting workers' compensation settlements of $250,000 or less from the Medicare set-aside procedures; defining and establishing that a "qualified" set-aside satisfies all obligations under the MSP Act; creating a "safe harbor set-aside" that is deemed approved if its amount is 10 percent of the total settlement; establishing a means for appeal; allowing for optional direct payment of set-aside funds to CMS; requiring CMS to notify the parties of any conditional payments within 60 days after a request for information is made; and allowing for the reduction or termination of the set-aside upon the death of the claimant and satisfaction of the outstanding payment obligations, or if after five years the claimant's medical condition has improved to an extent justifying a 25 percent or greater reduction.

Nationally, labor interests are in agreement with the bill if it is "revenue neutral," that is, if it does not shift the cost of medical care from business and insurance interests to employees or the federal government. This proposed legislation can easily be modified to make it revenue neutral. The proposed bill is currently being "scored" by the appropriate government agency. ("Scoring" determines if the proposed legislation will create an inflow or outflow of funds for the government.)

(L-R) Troy Haney, Joel Alpert, Tanya Lamnin, Robert June, Jules Olsman, and Denice LeVasseur (*photo digitally altered*)

All of the members of the delegation who met with Senator Stabenow and her staff were encouraged by the attention and response received. Your section will continue to pursue this meaningful legislation and will keep you advised of all further developments.

Notes from the Director

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

I am sorry that I was unable to attend the section meeting. My family went to Europe to attend the wedding of one of the exchange students that lived with us during our kids' high school years. It should be a great event.

There are some things going on worthy of note:

1) We have signed a new lease on space in Oakland Town Center, which is where the present Pontiac hearings office is located. We will be moving to the third floor, and renovations will begin when the new floor plan is finalized. Few things are more challenging than moving plumbing around in a very old building, and once the architect figures out how to deal with a couple of sound issues, we will be able to proceed. Since the project involves the renovation of the entire third floor, I suspect it will be well after the first of the year before we actually get to move in. The general plan calls for interior courtrooms with perimeter offices and conference rooms. The magistrates will have a secure hallway, much like the ones in Detroit and Mt. Clemens. There will be improved and direct sightlines so it will be much easier to locate people. There will be a large waiting area with windows on the southwest corner of the floor with some auxiliary area on the southeast corner. Although there may be popular demand for it, the director dunk tank will not be installed.

2) Speaking of moving, I assume that you did not notice that we moved the administrative operation from the General Office Building (GOB) in Delta Township down to the Hollister building, one block from the Capitol,

Notes from the Director. . .
Continued from page 4

as part of the GOB renovation. My office in the building overlooks an alley restoration project that seems to be taking forever. As the alley work is finally finishing, the renovation of the exterior of the Hollister Building now involves ripping the façade off around my windows. We are on track to move back to GOB in the fall and soon thereafter the WCAC and the Lansing hearings office will be consolidated into that space in GOB. This will produce a significant cost savings. The fact that you did not notice a significant interruption in service is attributable to the hard-working GOB staff that toils out of the public eye.

3) This year's self-insurer funds assessment was below the statutory maximum and done in light of the continued predictions of more troubled businesses filing for protection under the bankruptcy code. Industrial downsizing is not likely over.

a. There are heightened concerns on the general health of the auto supply industry. Analysts predict a shake-out of employers over the next few years as the auto supply industry adapts itself to the reduced level of car production in the U.S. There are approximately 540 self-insured employers, and approximately 110 of these employers are directly related to the auto supply industry. With the difficulties in the auto supply industry and the belief that these employers will have to weather tough times over an extended period, I determined that it is in the best interest of the trust funds to recommend a SISF assessment of .02774 for this year. This is required to both maintain sufficient funds to handle likely claims and to maintain funds at their present levels.

b. Within two weeks of the assessment, we received word of an unexpected bankruptcy from two self-insured employers.

4) It is no secret that the budget issues continue to be a problem. Within that discussion, there continues to be the need to reduce the size of state government. WCA is ahead of the curve on that one:

a. Executive Order 2003-18 reduced the number of magistrates from 30 to 26, saving about $513,658 per year.

b The closure of four full-time hearings offices in Ann Arbor, Jackson, Battle Creek, and Muskegon saves $108,560 per year. Traverse City was changed to a part-time space-share operation.

c. The consolidation of the Appellate Commission and Lansing Hearings Office from Ottawa into the renovated space at GOB will save $148,406 per year.

d. Combined total rental savings for those two changes produces a 17% reduction in annual rental.

e. The early-out retirement program in 2003 resulted in 28% staff reduction of 42 employees from 147 to 105.

5) The number of contested cases filed continues to decline. Extrapolating the rest of the year from the first four months of 2007, we will have only 9,114 new contested cases filed. This compares to 1997 when 21,900 were filed (highest number between 1993 and 2006). As a predictor, multiplying the first four months by three, has an average error factor of fewer than 3% over a 12-year period. If this means that fewer workers are getting injured, it is very good news. It may, however, be a reflection of the nature of work today and the decline in the number of jobs.

6) Lastly, the new subpoena rule has gone into effect. There were a few rough spots and there is a learning curve to every change. Agency customers have adjusted. Staff is hard at work removing and distributing medical records that are not admitted as exhibits. I am pleased to say that we have had relatively few complaints. There have been some questions raised about making the electronic version of the form more user friendly. To do this, we need a software upgrade, and I am working on that, but I will have to go through the regular budget process. We have had calls from health care providers regarding the need for HIPAA releases. Please check the article on our website that links to HIPAA and indicates that workers' compensation litigation is not subject to HIPAA.

As always, the door is open. Please feel free to stop by. Due to travel restrictions, I will be spending more time in the Detroit office. 🛠

The Workers' Compensation "Community:"

What Does the Public See?

By Murray A. Gorchow, Chairperson, Workers' Compensation Board of Magistrates

One of the aspects of the workers' compensation practice that most attorneys and magistrates appreciate is the professional good will that exists between attorneys from both sides of contested cases—plaintiff and defendant. That good will is an everyday part of the workers' compensation community. Attorneys have largely been able to advocate passionately on behalf of their clients and not get into personal warfare. With only rare exceptions, we have all managed to "disagree without being disagreeable." It has become natural for us to talk about our families, our health, sports, politics, vacations, etc. The reality is that we see each other every day in court. Attorneys cover for each other in court when there are schedule conflicts. We attend holiday parties together. We attend seminars together. We even attend funerals with each other and for each other. We have become professional friends and family. It makes the day-to-day practice of law far more enjoyable than the alternative that we know exists in other areas of legal practice. Indeed, this is one of the reasons why the Workers' Compensation Section is one of the largest sections of the State Bar of Michigan. This is all to the good.

Now for the reason for this article. Plaintiffs and defendants—the parties—the real people that attorneys represent and whose cases are heard by the magistrates—are not part of the attorney workers' compensation community. They have their cases, and care about their cases. They have a right to expect that their cases will be handled zealously and professionally in a dignified setting. But it is not just the reality of professional handling of their cases that matters—appearances also matter. How often have we seen, or actually participated in, a casual, too-friendly conversation between opposing counsel that may or may not also involve the assigned magistrate? In my opinion, however, there is a line that is all too frequently being crossed. That line is at the courtroom door when the attorneys walk into the courtroom with their clients for pre-trial matters, and especially for redemption hearings.

Often a party will be sitting in the back of the courtroom waiting to redeem his case. Sometimes an unrepresented party will be in the courtroom waiting his turn to see the magistrate. He is very aware of what is going on around him. He watches and listens to the attorneys that are in line waiting to see the magistrate. When the parties and their attorneys are in the courtroom ready for a redemption hearing, there is an interval when the magistrate is reviewing and checking the papers before starting the hearing.

Sometimes everyone present is relieved that the case is settled and there is a degree of good will, even happiness, in the air. Sometimes just the opposite may be true.

Now comes the rub. Frequently the close professional friendship of the attorneys is placed on display, typically in front of plaintiff and sometimes their friends and family. Attorneys proceed to engage in casual conversation and joke with each other like they are the best of friends, thereby reinforcing negative public stereotypes about attorneys. Plaintiffs sit at the back of the room, wondering whether they are just along for the ride, wondering whether the attorney-attorney relationship is more important than the attorney-client relationship, whether the attorneys getting along with each other, getting the case over with, and making a living is more important than a fair and just resolution of their case. Sometimes the magistrate gets drawn in to the conversation. I have seen instances in which the attorneys have let me know ahead of time or during a redemption hearing that plaintiff has concerns and distrust about the system, his employer, the insurance carrier, or even about his own attorney, and yet the same casual too-friendly conversation still takes place, thereby reinforcing that distrust.

For most parties, it is their first time in a courtroom. They are comparing what they observe to what they see on television and to their preconceived notions about the legal process and the legal profession. We do want them to feel at ease and we also want them to feel a sense of the dignity about the legal process in which they are engaged. They go home and will tell family and friends about their experience in court. I do not mean to suggest that attorneys should have their trial game face on at all times. It is important to show the public that quality professional legal representation does not require that we be disagreeable

or that we appear disagreeable. But there is an important difference between behaving like good friends and behaving friendly. Politeness and cordiality are always appropriate.

We must remember that the hearing offices and courtrooms are here to serve the parties—not attorneys or magistrates. We have a responsibility to elevate the public perception of the legal profession, and, thereby, "improve relations between the legal profession and the public" (Rule 1—State Bar of Michigan). I ask that you think about how you relate to each other in the courtroom and in the waiting rooms—anywhere the public is present. I know that situations will differ. We do not need to sacrifice being a workers' compensation "community." However, the public we all serve is entitled to come away from their workers' compensation hearing offices impressed with the dignity of the process, and with a sense of both the appearance and the reality that we are here to serve them and not ourselves.

Workers' Compensation Appellate Commission

By Martha M. Glaser, Chairperson

Once again this year there was a wonderful turnout for the section's annual meeting. The weather was beautiful, the food was great, and the camaraderie was, as usual, superb.

As of June 15, 2007, the Commission has issued 135 decisions. Many of those have concurring and/or dissenting opinions. It would be a daunting task for most practicing attorneys to read each and every one of our decisions. Approximately 80 percent of those cases involve questions of proof on either *Sington* or *Rakestraw.* Most of those questions are whether the magistrate's fact finding is supported by competent, material, and substantial evidence on the record.

There are, however, questions raised in some cases which will become the issues that may eventually change years or even decades of precedence. We invite and encourage you to take the time once a month or even once every two or three months to review our website link *recent opinions of interest.* You can find it at *www.michigan.gov/wca* (click on appellate commission). There you will find cases that involve issues not currently on the workers' compensation community's radar. Both sides of the bar can benefit from the discussions within the majority, concurring, and dissenting opinions.

Continued on page 15

Attorney Fee Agreements in Michigan

By Joel Alpert

The Institute for Continuing Legal Education (ICLE) has updated its publication *Attorney Fee Agreements in Michigan*. Joel Alpert and Richard Warsh have recently assisted in the revision of the chapter regarding the practice area of workers' compensation. Honorable Richard M. Skutt, to whom a debt of gratitude is owed, assisted in the initial publication of this chapter.

Included among the revisions is a reference to *Grievance Administrator v Boffman*, Atty. Discipline Board, 03-1235-GA, wherein the distinction between a "general retainer" and an "advanced payment of fees" was explained. An "advanced payment of fees" remains the property of the client and must be kept in a client trust account until earned. A "general retainer" is a fee paid solely for availability and does not involve an advance fee, but rather, a fee earned when paid. As a result, care must be taken regarding into which attorney's account the fee is deposited—the attorney's client trust account or the attorney's general account.

This chapter is also updated in regard to *Donoho v Wal-Mart Stores, Inc*., 2004 Mich ACO 142,18 MIWCLR 140 (2003), Supreme Court app lv den; Docket #127537. In *Donoho*, the Magistrate's order requiring the defendant to pay plaintiff's attorney's fees on awarded medical expenses was affirmed.

Noting the complex statutory and administrative regulation of attorney's fees in workers' compensation cases, and the frequent lack of full explanation of fee and cost provisions to the client, a suggestion is made that a written fee agreement be entered into between the client and the attorney. An updated workers' compensation retainer agreement is included in the revised chapter. Because of recent changes in mandated records retention policies, it is suggested that the fee agreement is a good vehicle for the expression of the firm's record retention policy.

Revisions also note that, as of the date of publication, *Franges v GMC*, 404 Mich. 590 (1979), which details with allocation of attorney's fees and costs in the third-party cases involving work-related injuries, is currently under attack in the appellate courts by employer interests. See *Hayden v General Motors Corporation*, 2005 ACO 150, 477 Mich 1057, lv den (2007).

The new publication is now available and its purchase is worthy of the consideration of all workers' compensation practitioners.

Super Summer Meeting

By Murray Feldman

Your section's annual meeting was held June 14-15, 2007 at the Crystal Mountain Resort. Much important section business was conducted, and a good time was had by all who attended.

New officers were elected. Paula Olivarez was elected chairperson; Murray Feldman, vice chairperson; Joel Alpert, secretary; and David DeGraw, treasurer. In addition, J. William Housefield, Jr. was elected to the council to replace Len Hickey, our outgoing chairperson. Congratulations to outgoing Chairperson Len Hickey on a great year as chairperson.

In addition, Mr. Robert Kluczynski was appointed minister of fun/mischief. Watch future editions of this newsletter and notices at the various bureaus for details of our first fun outing to be organized by Klu in the very near future.

At the council meeting, your council approved, as a pilot program, a three-year, $1,000-per-year Workers' Compensation Section scholarship at the UDM School of Law. This approval was in response to a request made by UDM's Dean Mark Gordon. The recipient will be selected by Dean Gordon based on a series of identifiable criteria, and once the recipient for 2007 is identified, further details will be provided.

At our annual meeting, we were treated to excellent presentations by outgoing Chairperson Len Hickey, incoming Chairperson Paula Olivarez (the queen of workers' comp), Martha Glaser of the Appellate Commission, and Jerry Marcinkoski on the state of the law. Justice Elizabeth (Betty) Weaver of the Michigan Supreme Court was our guest speaker, and she provided a most interesting presentation on a variety of issues, focusing on her concerns regarding the Michigan Supreme Court and its present policies.

In this newsletter, you will see another article reflecting on a visit Joel Alpert and others made to Washington, D. C., to meet with Senator Debbie Stabenow regarding the Medicare issue. Your section council encourages you to contact your U. S. representatives and senators to support the bill referred to in that article and to urge passage. 🛠

Justice Elizabeth Weaver

Jerry Marcinkoski

Paula Olivarez—Queen of Comp

Incoming Chair Paula Olivarez and Outgoing Chair Len Hickey

The Queen's Court

Mr. Alpert — Back from Washington

Martha Glaser

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

There are noteworthy developments since the last newsletter on all fronts: the Supreme Court, the Court of Appeals, and the Workers' Compensation Appellate Commission.

Supreme Court

Outstate Injuries

On May 23, 2007, the Supreme Court issued a decision with respect to Michigan's jurisdiction over injuries occurring outside the state of Michigan. The case is *Karaczewski v Farbman Stein & Company*, 478 Mich 28; ____ NW2d ____ (2007).

The facts of the case were that plaintiff had been hired by defendant to work in Michigan. At the time of hire, plaintiff was a resident of Detroit and the contract of hire was made in Michigan. Two years later, defendant transferred plaintiff to Florida to assume a position there. Nine years after that, while working for the defendant in Florida, plaintiff fell from a ladder injuring his wrist and knee. At the time of his injury, plaintiff was a resident of Florida. Plaintiff received benefits under Florida's workers' compensation system for a period of time, until he exhausted his remedies there. At that point, he filed his application in Michigan. The defendant disputed Michigan jurisdiction.

The relevant statute is MCL 418.845. It says that Michigan has jurisdiction over injuries "suffered outside this state where the injured employee is a resident of this state at the time of injury and the contract of hire was made in this state." Although the statute requires residency in Michigan at the time of injury, case law construing § 845 over the years created the controversy addressed in the case.

Originally, the Supreme Court in *Roberts v IXL Glass Corp*, 259 Mich 644; 244 NW 188 (1932) held the residency requirement did not apply because the residency requirement conflicted with a different provision in the Act at the time. In 1943, the legislature repealed the provision that conflicted with the outstate jurisdiction provision. Thereafter through the years, eight of nine court cases addressing the question indicated the residency requirement did apply to outstate injuries. The Supreme Court then took up the question again 14 years ago in *Boyd v W G Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993).

Boyd held that *Roberts*' holding that Michigan residency at the time of injury is not required for outstate injuries was still good law. *Boyd*'s reasoning was that the legislature had not explicitly overruled *Roberts*.

The Supreme Court has now overruled *Boyd* in *Karazcewski*. *Karazcewski* says the residency requirement does apply to outstate injuries. *Karazcewski*'s reasoning is "*the law means what it says*" and there had been no need for the legislature to specifically overrule *Roberts* because in 1943 the legislature had repealed the statute *Roberts* considered to be in conflict with § 845. Slip op at p 15 (emphasis in original).

Karaczewski concluded by outlining procedurally which cases its rule applies to: "Accordingly, our holding in this case shall apply to all claimants for whom there has not been a final judgment awarding benefits as of the date of this opinion." Slip op at p 18 n 15. The Supreme Court's ruling was 4-1-2. Justice Corrigan authored the majority opinion with Chief Justice Taylor, Justice Young, and Justice Markman concurring. Justice Weaver concurred with the majority except with respect to application of the new rule. Justice Weaver would apply the new rule only to this particular plaintiff and prospectively. Justice Kelly, with Justice Cavanagh concurring, dissented.

Supreme Court Order in *Stokes v DaimlerChrysler Corporation*

On April 13, 2007, the Supreme Court issued an order in *Stokes v DaimlerChrysler Corporation* directing oral argument and supplemental briefing on one issue.

Recall that the Workers' Compensation Appellate Commission had issued an *en banc* decision in this case addressing application of the definition of compensable disability as described by the Supreme Court in *Sington v Chrysler Corporation*, 467 Mich 144; 648 NW2d 624 (2002), including the use of discovery as part of the disability determination. The Commission's *en banc* decision was 3-2 and affirmed the Magistrate's open award of total disability. The defendant appealed that decision to the Supreme Court seeking to bypass the Court of Appeals. The Supreme Court in response stayed the Commission's decision and ordered the Court of Appeals to hear the case and issue a decision by October 2006.

The Court of Appeals issued its decision, now found at 272 Mich App 571; 727 NW2d 637 (2006). In that decision, the Court of Appeals reversed or vacated many holdings in the Commission's majority's decision. But the Court of Appeals' majority affirmed the result in *Stokes*. The Court of

Appeals' majority said plaintiff had proffered sufficient proof to make a *prima facie* case of compensable disability. The Court said the burden of proof then shifted to the defendant and defendant did not rebut plaintiff's case. The Court of Appeals' dissenter would have reversed and remanded to the Magistrate. The dissent said the Commission's result should not be affirmed "because of the numerous legal errors in the WCAC's en banc opinion." *Stokes*, 272 Mich App at 598. And the dissent disagreed with the majority with respect to the question of whether plaintiff met his burden of proof and whether defendant was given adequate opportunity to present its defense.

The defendant most recently appealed the Court of Appeals' decision to the Supreme Court. The Supreme Court's order of April 13, 2007 in response to that appeal says in pertinent part:

> We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the burden-shifting analysis described in the Court of Appeals opinion in this case relieved the plaintiff of the burden of proving that he was disabled from all jobs within his qualifications and training, as required by *Sington v Chrysler Corp*, 467 Mich 144 (2002). *Stokes*, 477 Mich 1097; 729 NW2d 511 (2007).

The parties filed supplemental briefs on June 8, 2007. The case is likely to be scheduled for oral argument before the Supreme Court later this year.

Supreme Court Order Relating to *Rakestraw v General Dynamics Land Systems*

In *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003), the Supreme Court held Mr. Rakestraw, who brought to the workplace a pre-existing non-work-related condition, had to demonstrate a "medically distinguishable" problem as a result of work to differentiate his claim from his pre-existing non-work-related condition. Recently, in *Simpson v Borbolla Construction & Concrete Supply, Inc*, 274 Mich App 40; 731 NW2d 447 (2007), the Court of Appeals addressed application of *Rakestraw* in a case in which the pre-existing condition was work-related.

The facts of *Simpson* were that plaintiff, an iron worker, suffered a work-related left wrist fracture in 1979. He continued to work through the years for various employers. His last employer was Borbolla Construction, where he worked only one day. Plaintiff claimed his one day of work at Borbolla Construction aggravated his earlier wrist problems and he could no longer continue to work. His doctor testified that the original 1979 work injury had gone untreated and progressed to necrosis of the bone.

Plaintiff filed his claim for a wrist injury exclusively against the last employer. The Magistrate and Workers' Compensation Appellate Commission granted plaintiff an open award based on his last day of work with Borbolla Construction. Borbolla Construction appealed.

One of Borbolla Construction's arguments to the Court of Appeals was: plaintiff did not satisfy *Rakestraw*'s "medically distinguishable" requirement by virtue of his one day of work at Borbolla Construction. The Court of Appeals responded by holding *Rakestraw* does not apply. The Court of Appeals said that *Rakestraw* is "factually distinguishable" because in *Rakestraw* the pre-existing condition was non-work-related, whereas in this case it was work-related. *Simpson*, 274 Mich App at 46. The Court of Appeals said:

> the focus of *Rakestraw* was clearly on causation, i.e., whether the plaintiff's injury arose out of and in the course of employment. [Citation omitted]. The significance of the preexisting condition in *Rakestraw* was not so much that it was preexisting, but rather that it was not work-related. The purpose of requiring a "medically distinguishable," work-related injury in *Rakestraw* was to establish causation, not to simply distinguish the preexisting condition from a "new" injury. *Simpson*, 274 Mich App at 46.

In a footnote, the Court of Appeals added that, "even assuming *Rakestraw* is applicable, the medical evidence presented below supports the WCAC's finding that plaintiff's current condition is 'medically distinguishable' from the injury he suffered in 1979." *Simpson*, 274 Mich App at 46 n 4.

Borbolla Construction appealed the Court of Appeals' decision to the Supreme Court. On June 1, 2007, the Supreme Court entered an order, the substantive portion of which says:

> We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the Court of Appeals erred in holding that *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003), does not apply where the preexisting condition is work-related. (Supreme Court Docket No. 133274, order entered June 1, 2007).

The parties were ordered to file supplemental briefs by July 13, 2007. Oral argument in this case will also likely occur later this year.

Continued on next page

Recent Cases
Continued from page 11

Court of Appeals

Injuries Sustained While Traveling

Last year in a published decision in *Bowman and Auto Club Insurance Association v R. L. Coolsaet Construction Company and Second Injury Fund*, 272 Mich App 27; 723 NW2d 583 (2006), the Court of Appeals had adopted the "traveling employee doctrine" found in Professor Larson's treatise. That original *Bowman* decision held that, under this doctrine, a claimant who sustains an injury while traveling as part of his or her employment is essentially covered portal-to-portal, unless the injury is incurred pursuing a personal errand or pursuing an activity whose major purpose is social or recreational. The employer and the Fund appealed the original *Bowman* decision to the Supreme Court.

The Supreme Court had issued an order in response to those appeals, the substantive portion of which says:

> The Court of Appeals erred by adopting the "traveling employee" doctrine under the circumstances of this case. Here, the employee was traveling from his worksite to his home for the time being at the time of his injury. The general rule, that injuries sustained by an employee while going to or coming from work are not compensable, is applicable even when an employee's residence is temporary because of a particular job assignment. *Graham v Somerville Construction Co*, 336 Mich 359 (1953). *Bowman*, 477 Mich 976; 725 NW2d 55 (2006).

The Supreme Court then remanded the case to the Court of Appeals to address compensability under the general going-to-and-coming-from-work rule with its exceptions.

In a published decision on remand, the Court of Appeals recently affirmed the Appellate Commission's denial of benefits. The Court of Appeals held the general rule applied and plaintiff did not fit the case within any recognized exception to that general rule. *Bowman*, ____ Mich App ____; ____ NW2d ____ (2007) (Court of Appeals Docket No. 258518, entered April 10, 2007). The Court of Appeals' decision has not been appealed by plaintiffs.

The facts of the case were that the claimant, a pipefitter, bid on a job in northern Michigan. The job lasted a number of weeks so plaintiff relocated via his trailer to a campground near the worksite during the project. One day after work was cancelled due to rain at the worksite, plaintiff was driving to his campground trailer when he was struck by an automobile and seriously injured.

One question presented in the case was whether plaintiff fell within the exception to the general rule that says the general rule does not apply where the employer provides transportation. Here, the employer had paid plaintiff for use of plaintiff's truck (with its attached equipment) by means of a separate "rig rental" lease agreement. That agreement included the proviso that the employer would furnish plaintiff with a credit card for use of the purchase of gasoline including gas for personal trips. The Court of Appeals did not find this exception operative here because the agreement between plaintiff and his employer was not part of the employment contract between plaintiff and the employer but part of a separate rig rental lease.

Additionally, the Court of Appeals did not find that plaintiff's employment subjected him to excessive traffic risks, as opposed to risks borne by travelers in general. Therefore, that exception was not found applicable either.

Workers' Compensation Appellate Commission

Directions to Rate Tables are Incorrect for Death Cases

In *Pulsipher (Dec'd) v Statewide Forest Products and Silicosis, Dust Disease and Logging Industry Compensation Fund*, 2007 ACO #96, the Commission addressed a number of issues relating to the death of Mr. Pulsipher shortly after his hire by Statewide Forest Products.

One of those issues involved the rates of compensation in the tables of average weekly wages and rates published by the Workers' Compensation Agency. The Agency's book contains columns of wages and rates, including "directions" on how to read the tables.

The Commission held that the directions on how to use the tables are incorrect as they relate to death benefits. Specifically, direction #3 says:

> 3. Determine the employee's number of dependents. NOTE: Deduct one dependent for death cases. Example: A decedent with three dependents would be represented in the "two" dependency column.

After long historical analysis, the Commission said the "'deduct one dependent in death cases' may not be utilized to set the rate of workers' compensation benefits." Therefore, in the case before the Commission, the Commission said the decedent's dependent wife was the decedent's "only dependent, and the rate payable to her is determined by reading from the 'one dependent' column in the rate tables."

WCAC Briefs After Remand

In *Torrey v Delphi Corporation*, 2006 ACO #183, the Commission had, at an earlier stage in the proceedings, remanded the case to the Magistrate for a supplemental analysis of the *Sington* disability question. The Commission retained jurisdiction in remanding the case. The Magistrate issued a supplemental decision and the case then automatically returned to the Commission. The Commission advised the parties in a letter of a post remand briefing deadline. Neither party filed a timely brief after remand. The defendant made a late request to extend the time to file its supplemental brief six weeks after the deadline. Defense counsel implied he had not received in a timely fashion the Commission's letter setting the deadline.

The Commission rejected defense counsel's extension request, saying "defense counsel should have introduced affidavits from his staff indicating that no staff member received the Appellate Commission's letter and that a diligent search of defense counsel's office did not produce the letter." The Commission then summarily affirmed the Magistrate's remand decision saying, "[w]e cannot independently search for errors in a magistrate's decision" where none are identified by the parties.

The Commission's ruling was 2-1, with the Chairperson characterizing the majority's ruling as "too harsh." The Chairperson would have afforded counsel the opportunity to provide the affidavits.

Marijuana Smoking and Intentional and Wilful Misconduct

In *Beck v TGM Broadband Cable Services, Inc. and Accident Fund Insurance Company of America*, 2007 ACO #53, the Commission affirmed an open award of benefits, rejecting the defendants' argument for application of MCL 418.305's intentional and wilful misconduct bar where the claimant was a chronic marijuana user.

Plaintiff was a cable installer. He acknowledged "for the last 20 years" it had been his "regular practice … to smoke four to five bowls of marijuana, the equivalent of 2 to 21/2 marijuana cigarettes, at home each evening." The night before his injury he smoked his usual amount of marijuana in his work van while it was parked in his garage at home.

The next day, at approximately 2:30 p.m. in the afternoon,he was driving to a service call as part of his job and attempting to simultaneously refer to a map. In so doing, his van crossed the center line, crashed into an oncoming car, and killed the occupant of the other car. Plaintiff was injured in the crash as well. He later pled guilty to the criminal charge "operating a motor vehicle while intoxicated causing death."

Among the defendants' challenges to the Magistrate's open award was the argument that plaintiff's guilty plea barred him from collecting benefits because he was injured as a result of his own intentional and wilful misconduct under § 305. The Commission disagreed. While acknowledging there "is no question the plaintiff's post-injury urine test was positive for the presence of marijuana," the Commission affirmed the Magistrate's preference for plaintiff's expert testimony to the effect that plaintiff was not acutely intoxicated at the time of the injury and the alleged detrimental effect of chronic marijuana use on his ability to drive was unpersuasive.

MPCGA and Dual Employment Reimbursement

In two recent cases, the Appellate Commission held the Michigan Property & Casualty Guaranty Association [MPCGA] steps into the shoes of a bankrupt "insurer" and is entitled to reimbursement from the Second Injury Fund [SIF] under the dual employment provision. The cases are: *Carter v Southwest Standard Service and Casualty Reciprocal Exchange (Insolvent)/Michigan Property & Casualty Guaranty Association and Second Injury Fund (Dual Employment Provision)*, 2007 ACO #104 and *Smith v Parkland Inn and Casualty Reciprocal Exchange (Insolvent)/Michigan Property & Casualty Guaranty Association and Second Injury Fund (Dual Employment Provision)*, 2007 ACO #112.

These cases involve situations in which the employees have dual employment at the time of their injuries. The employers' carrier obtained reimbursement of a portion of the weekly benefits it paid plaintiffs from the SIF under the dual employment provision of MCL 418.372. However, the carrier of the employers later became insolvent and, as a result, the MPCGA began paying benefits on behalf of the insolvent insurer, as required by MCL 500.7901. MPCGA then sought reimbursement from the SIF under the dual employment provision. The SIF refused to reimburse MPCGA as not being entitled to the reimbursement under § 372. In each case, the Magistrate held the SIF must reimburse MPCGA and the SIF appealed the issue.

The Appellate Commission affirmed the Magistrate in both cases with respect to the reimbursement question.. In *Carter*, the Commission rejected the SIF's argument that MPCGA is not an insurer or self-insurer as contemplated by the language in the dual employment provision. The Commission primarily relied on the insurance code to say that

Continued on next page

Recent Cases
Continued from page 13

"MPCGA steps into the shoes of the insolvents [carrier], as if [the carrier] were still solvent."

In *Smith*, the Commission also discussed whether the definition of "insurer" in MCL 418.601 of the compensation statute included the MPCGA. The Commission concluded it did, rejecting the SIF's argument that "insurer" in § 601 only includes insurance companies. The Commission said that the MPCGA transacts the business of workers' compensation, constitutes an organization, and – consequently – possesses the same rights as the insolvent insurer.

No Credit for Redemption with Previous Employer

In *Jones v Detroit Medical Center*, 2007 ACO # 84, the defendant argued the Magistrate's open award of benefits should be modified to reflect a weekly credit for a workers' compensation redemption that took place against a different defendant years earlier. The defendant primarily relied on *Thick v Lapeer Metal Products*, 419 Mich 342; 353 NW2d 464 (1984). The Commission rejected the argument. The Commission said *Thick* "does not extend to two separate injuries against different employers just because the two claims involved the same body part." The Commission said that, while this plaintiff's 1998 and 2003 claims involved injuries to the same body parts, she had "recovered and worked without restrictions or medical care for four years" until the latter injury. As a result, the Commission said, she suffered a "separate and distinct injury while working for this defendant" and the defendant enjoyed no "credit" for the prior redemption.

Subsequent Non-Work-Related Auto Accident

In *Dennis v Waterland Trucking Service, Inc*, 2007 ACO #124, plaintiff's claim for a work-related back disability due to injuries in 2000 was complicated by the fact that he was later involved in a non-work-related automobile accident in 2003. The automobile accident caused a worsening of his work-related back pain and radicular symptoms. The Magistrate granted plaintiff a closed period of benefits through the date of the auto accident. The Magistrate said the evidence did not preponderate in favor of finding plaintiff's back symptoms after that date were the result of the 2000 work injury.

The Commission disagreed. It held plaintiff was entitled to open award not a closed award. The Commission's lead opinion reasoned that, "[t]he fact that a vehicle accident makes a compensable condition worse does not make the condition no longer compensable. *Feldbauer v Cooney Engineering (On Remand)*, 205 Mich App 284 (1994)." The subsequent controlling opinion agreed and added that *Dean v Chrysler Corporation*, 434 Mich 655; 455 NW2d 699 (1990) did not require a different result. The controlling opinion distinguished *Dean* from the instant case, saying Ms. Dean was traveling to a medical appointment for treatment of a work-related injury when she sustained multiple injuries in an auto accident. *Dean* held she was not entitled to *additional* workers' compensation benefits as a result of that vehicle accident.

Union Steward's Injury Not Work-Related

In *Smith v DaimlerChrysler Corporation*, 2007 ACO #119, plaintiff was a union steward. He was injured in an automobile accident while attending an offsite seminar jointly sponsored by the plaintiff's union and the defendant. The conference took place on union premises. Plaintiff, like the other attendees, was selected for attendance by his union. His attendance was optional not mandatory. The union, but not the employer, paid plaintiff for his travel expenses and time missed from work.

The first Magistrate who had decided the case found the injury work-related, primarily on the basis that plaintiff's attendance at the conference was a benefit to the employer. The Commission in its first decision had remanded the case for more detailed findings on defendant's role in sending plaintiff to the conference. On remand, the case was assigned to a new Magistrate, given that the prior Magistrate was no longer on the Board of Magistrates. The new Magistrate reviewed the matter and denied benefits on the basis that the injury was not work-related.

The Commission affirmed the Magistrate's denial on the basis plaintiff's attendance at the conference was neither "definitely urged" nor "expected" by defendant. And, the Commission said there was no specific employer benefit, "as distinguished from a vague and general benefit" to the employer. The Commission also rejected plaintiff's argument that the Magistrate exceeded his authority by performing a legal analysis that, in essence, vacated the decision of the prior Magistrate. 🛠

State Bar of Michigan Annual Meeting, ICLE Solo and Small Firm Institute Set for Sept. 26-28 in Grand Rapids

The State Bar of Michigan ushers in a new era as it holds its 72nd Annual Meeting in conjunction with the ICLE Solo and Small Firm Institute. Both events will take place September 26-28 at the DeVos Place and Amway Grand Plaza Hotel in Grand Rapids.

Other highlights of this year's meeting, themed "An Annual Meeting Like Never Before," include:

- The Annual Meeting Golf Outing, which begins at noon Wednesday. The registration fee for the four-person scramble at The Meadows at Grand Valley State University includes 18 holes of golf, cart rental, and lunch. Participants are eligible to win awards and prizes.
- The SBM Awards Banquet, which starts at 6:30 p.m. Wednesday. Winners of the five major State Bar awards will be recognized. The Michigan Defense Trial Counsel and the Michigan Trial Lawyers Association will present their Respected Advocate Awards during this ceremony.
- Thursday's inaugural luncheon, set for noon. Michigan Supreme Court Chief Justice Clifford W. Taylor will swear in the 73rd president of the State Bar, Ronald D. Keefe, and other officers. The State Bar Representative Assembly and Michigan State Bar Foundation will also honor its 2007 award winners.
- The Michigan Legal Milestone at Friday's luncheon commemorating the special role of attorney Prentiss M. Brown in the building of the Mackinac Bridge. This year marks the bridge's 50th anniversary. Brown, a St. Ignace native known as the "Father of the Mackinac Bridge," spearheaded the effort to get the span built and served as chairman of the Mackinac Bridge Authority for 24 years.

For more information on this year's Annual Meeting, visit the State Bar of Michigan website at *www.michbar.org/annualmeeting.cfm* or contact SBM events manager Kari Brandel at (517) 346-6371 or *kbrandel@mail.michbar.org*.

Workers' Compensation Appellate Commission
Continued from page 7

Some of the issues discussed in cases at that site are: intentional and willful misconduct, necessary and reasonable medical treatment, travel arising out of and in the course of employment and, MCL 418.305.

This is an easy tool to keep yourself in the know and anticipating future court rulings.

The next year should prove to be very interesting for this section. The Supreme Court has requested oral argument on whether leave should be granted in *Stokes v DaimlerChrysler SCT # 132648. Stokes* addresses issues raised by *Sington.* The Supreme Court has also requested oral argument on whether leave should be granted in *Simpson v Borbolla Construction & Concrete Supply, Inc. SCT # 133274. Simpson* addresses issues raised by *Rakestraw.* As previously indicated, these two cases, *Sington* and *Rakestraw,* are responsible for approximately 80 percent of our appeals. Decisions from the Supreme Court on either or both of these cases could have a profound effect on the way workers' compensation cases are developed and tried.

The members of this Commission wish you all a warm and relaxing summer, but not too warm.

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