

STATE BAR OF MICHIGAN

Workers' Compensation Section Newsletter

Fall/Winter 2016



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From the Chair

By Ella Parker



Sometimes it seems like just yesterday I became involved with the Workers' Compensation Section as a council member. At other times, it seems like it was an eternity ago. A lot has happened since I was originally elected in the summer of 2008. Many celebrated our State's 100 year Anniversary of Workers' Compensation in Michigan. Many mourned new statutory changes to our state laws, questioning what impact they would have on our practice. Throughout the changes, our Section has held its head up high and continued, for the most part, to work congenially with opposing counsel while advocating strongly for our clients. I hope to continue to foster that spirit of cooperation during my term as Chairperson of the section.

In light of my new role, Jayson Chizick has graciously agreed to take over the role of Editor of this Newsletter. I hope all of you continue to work with Jayson and provide articles for submission. Newsletters cannot be written, if authors do not contribute stories. Please know that I am extremely grateful for all of you who have helped me by contributing in the past.

I am also very grateful for Chris Rabideau's leadership and guidance to our Section over the years, along with Bill Housefield, Dave DeGraw, John Sims and the list goes on. I could always count on Chris to do what was right in any situation. I also know that Chris was comfortable enough with me to let me know when he disagreed with a suggestion or thought I might have had. I always try to do what is right myself and will do my best to lead this Section with the same grace and respect that past leaders have shown. I know that our current council are also comfortable enough to express their opinions as well. Feel free to contact me with any questions or concerns.

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From the Chair Continued from page 1

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Term Expires June 18, 2017

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Jeffrey S. Kirschner, Southfield

Term Expires June 19, 2018

Jayson A. Chizick, Clare
Mark Moushin Sesi, Mount Clemens
Christopher Westgate, Grand Rapids

Term Expires June 2019

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Mark Long, Director, Michigan Workers'
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Lisa Klaeren, Chief Magistrate, Michigan
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George Wyatt, III, Michigan
Compensation Appellate Commission

Brian D. Shekell, Commissioner Liaison

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Jayson A. Chizick, Newsletter Editor

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

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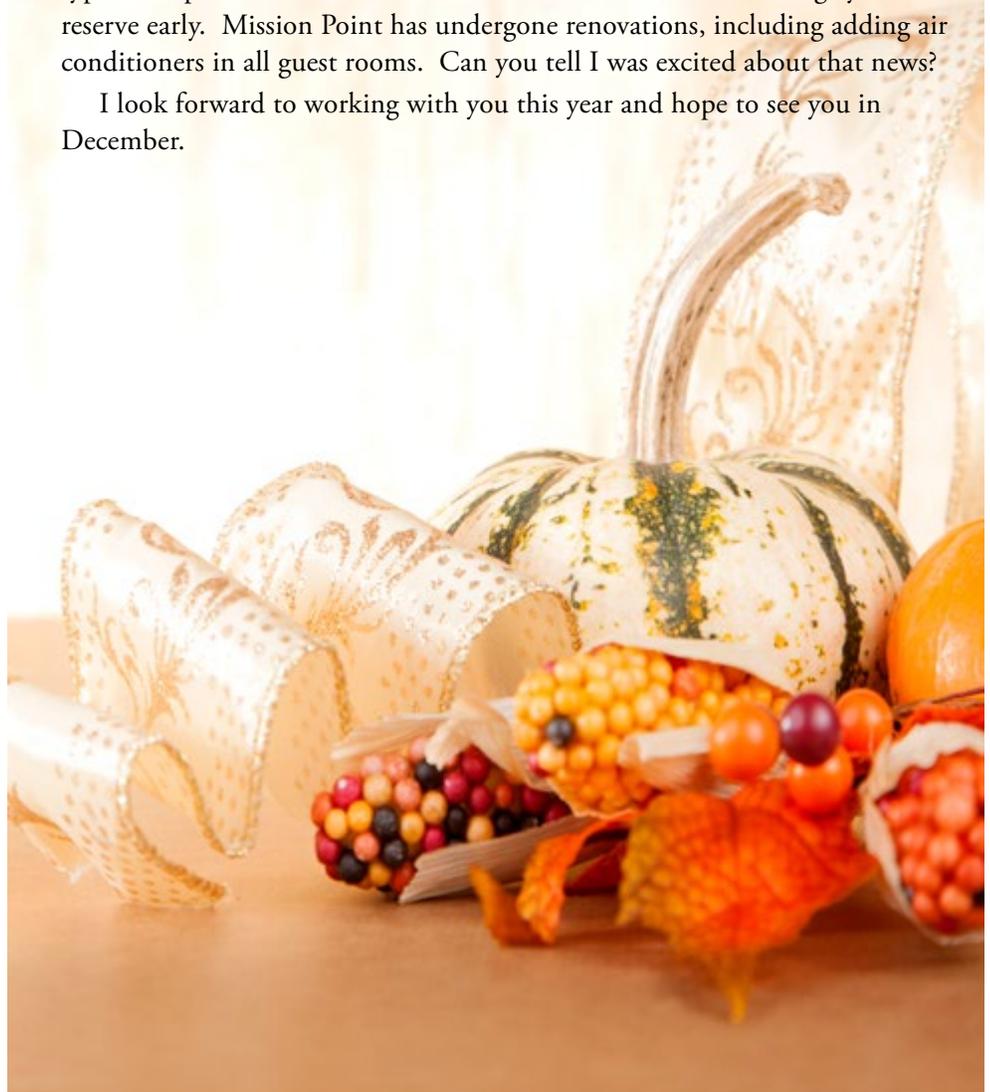
Turning to upcoming events and two additional people who have contributed tremendously over the years, Andrea Hamm and Phil Frame are in the final stages of planning our Annual Winter Meeting on December 9, 2016 from 9:00 am to 12:00 pm. This year it will be held at:

Crowne Plaza Lansing West
925 S. Creyts Road, Lansing MI 48917
crowneplaza.com/lansingwest
(517) 391-1295

We will have continental breakfast items available beginning at 8:30 am.

Finally, I wanted to let you know that we are actively working on the Annual Summer Meeting. If any of you have any specific topics you would like covered, please let either myself, Rick Lovernick or John Combs know, we are co-chairing the event. In 2017, we are returning to Mackinac Island and Mission Point Resort. The dates are June 22 – 24, 2017. If you would like to make your room reservations early, the instruction form and room type descriptions are included in the newsletter. I would encourage you to reserve early. Mission Point has undergone renovations, including adding air conditioners in all guest rooms. Can you tell I was excited about that news?

I look forward to working with you this year and hope to see you in December.



A Word from the Editor

By Jayson A. Chizick

"The greatest good you can do for another is not just to share your riches, but to reveal to him his own."

—Benjamin Disraeli



We live in interesting times as workers' compensation practitioners. The impacts of the 2011 amendments to the Act are coming into focus as practitioners on both sides of the bar come to grips with our new landscape. As a section, we persevere and learn from our experiences and from others on a daily basis. I have heard from many different magistrates and attorneys stories of the good old days of "comp." Fascinating stories can be heard whenever I ask one with hair a few shades more gray than mine. We should tell those stories more and, as editor of this newsletter, I welcome your contributions to future publications recounting fun or serious stories (with names withheld). Let us celebrate who we are, who we have been and where we are going to remind us of how to bring our section together going forward.

"You are of a new young generation" I have heard repeatedly. While this allows me to forget that I was licensed 15 years ago, the fact rings true. We are a section of experience, filled with members that have practiced in the field for over a generation. Seasoned practitioners are often available with

tips and thoughts at just about every Agency on any given day. I encourage section members to take a step beyond the casual encounter. Look inside your firm and identify an attorney that dabbles in workers' compensation law. Bring them to depositions and encourage attendance at facilitations. Provide that attorney with a mentor who knows the people and the ropes. It is not that the section requires an injection of "new blood," but we would benefit from introducing new people and new ideas to what I comfortably call our way of life.

In my relatively short career, I have been lucky to learn from some of the best in the business. Their time and investment in me has paid off handsomely, not just personally, but by allowing me to mentor others. As a young lawyer in Florida, my mentors not only threw me into the fire, but they made me work for my answers. They forced me to think about the problem, remember that the livelihoods of our clients were involved and to work hard to protect those clients. In Michigan, my mentors taught me the value of people, a positive personality and respect for all who I encounter, whether they are client or foe. Mentorship is the ultimate pay it forward and our practice is and will be better for it. Will you do what you can to invest in a young attorney? The section would benefit from new members, so please consider signing up some or all members of your firm for section membership.

Council meetings always seem to include spirited discussions of current happenings in the world of workers' compensation. Chief Magistrate Klaeren, Commissioner Wyatt and Director Long are often present, and give a status report of important information. I have often received very direct responses to questions. Your attendance at council meetings is always welcome.

Under the leadership of Ella Parker, the council plans our upcoming winter meeting, council meetings and what will undoubtedly be a fantastic summer meeting on Mackinac Island. Stay tuned for more information on the summer meeting. Check out the information for our winter meeting in the following pages. Your contribution to future newsletters, the section council, your practice and those who follow your leadership by example are appreciated in advance. ✂



Summer Section Meeting

The summer section meeting was a success! We were fortunate to hear from a number of speakers, and have elected our new section council leadership. If you see your section leaders in the halls of an Agency, ask them how you can help improve the section. Volunteers are always welcome.



There was a peaceful transition of power from Chris Rabideau to Ella Parker.



Your new section council executives from left: Andrea Hamm, Treasurer; Dennis Flynn, Secretary; Ella Parker, Chair; and Tim Esper, Vice Chair



We honored Terry Groesser and Daryle Salisbury for entry into our Workers' Compensation Section Hall Of Fame



*Then we celebrated.
From left to right:
Andrea Hamm, Jayson Chizick, John Tomasik, Mike Brenton, Mike Reinholm, Chris Westgate, (hiding) Mag. Tim McAree, and Dan Zolkowski*

From the Appellate Commission

By George Wyatt, III

There were 119 workers' compensation (WC) appeals pending at the end of October 2016. Eighteen controlling decisions had been issued year to date, versus nineteen for all of 2015. Oral argument was recently held on a City of Kalamazoo case involving issues including, but not limited to, the interplay of sections 161 and 354. Several other decisions are in progress that should issue before year end. The MCAC continues to operate under a corrective action plan with the US Department of Labor with the objective of achieving a 40 day average case age by March 31, 2017 with respect to unemployment (UI) appeals. The MCAC has reported a UI average case age of 78 days for each month since June 2016. The MCAC is also in the midst of a MAHS mandated "RPM" review of its processes with the objective of stream-

lining the handling of unemployment appeals. Pending unemployment appeals at the MCAC stood at 1,260 at the end of October, 2016.

On Friday, December 2, Commissioner Rachel Lipinski will be leaving the MCAC to accept a position with the Michigan State Lottery. She is working to conclude her work on all cases to which she is assigned, with respect to both WC and UI. Her colleagues thank Rachel for her contributions and wish her well in her new position. Rachel will be vacating a position at MCAC that runs to July 31, 2019. The MCAC chair has urged that Commissioner Lipinski be replaced with an appointee with workers' compensation experience. Anyone with interest in applying for the position should do so at the Governor's website. ✂

Board of Magistrates Update

By Lisa Klaeren, Chief Magistrate

The Board of Magistrates recently met at the Okemos Agency to discuss issues of importance to both the bench and bar. With the magistrates spread throughout the State, it was nice to get together in person, rather than by phone conference.

At our October meeting, the magistrates discussed, at length, the Scheduling Order we have been utilizing since the implementation of the Administrative Hearing Rules. We have been using this Order for almost two years, and that experience (along with the initial interpretation from the Michigan Compensation Appellate Commission ("MCAC")), has given us a lot of information to use in evaluating the effectiveness of the Order. These discussions are ongoing, and I anticipate some changes in the future. If anyone has comments or opinions they would like to contribute to this discussion, please be sure to let a magistrate know.

Accuracy of redemption papers continues to be an issue. First and foremost is the incorrect listing of the parties on the paperwork. These names need to match the names on the most recent Notice of Hearing. If they do not match, the redemption cannot proceed until the names are corrected. Checking your paperwork, before you provide the papers to

your clients and/or the magistrate, will help make the process run smoother. Math errors and inappropriate expenses are two additional, common mistakes.

As more and more redemptions are done by affidavit, the parties need to remember that the Affidavit in Lieu of Personal Appearance needs to cover all aspects of the redemption. The magistrates are noting use of form affidavits that do not take into consideration additional factors of importance to the redemption, such as direct payments and Medicare set-asides. It is imperative that this information be included so that the magistrates can make a determination that the claimant is fully aware of the consequences of their actions.

As many of you are aware, the Self-Insured Security Fund has been working diligently through the back log of cases related to the Delphi bankruptcy. By the end of the year it is estimated that there will be approximately sixty to eighty remaining cases to be resolved. These remaining claims will be pulled from the "Await Other" category shortly after the first of the year, and will be placed on the active docket. Due to the age of these claims, I anticipate them moving more quickly through the system, so be prepared.

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Board of Magistrates Update

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Another group of cases that have remained pending in the "Await Other" category are what have been referred to as the GM-CAP cases. It is estimated that there are 950 cases that fit within this description. The staff at each location has reviewed all of the files in this category, in an attempt to identify the exact number of claims. Many of you may have received telephone calls from the staff for clarification, where it is not clear if the claim is a GM-CAP case or not. Your assistance in clarifying this issue is appreciated.

In addition, I have been advised that there may be additional avenues being explored relating to these claims, either individually or as a group. While that decision is pending,

I urge anyone who has a claim that they want pulled from the "Await Other" category, to advise the magistrate. Any such claim will then be placed on the active docket, and will proceed as any other claim.

On January 26, 2017, six of the fourteen magistrates' terms expire. Although it is a bit early to know what the Governor is planning to do, there may be openings on the Board of Magistrates. If anyone has any questions or interest in such an appointment, be sure to give me a call.

As always, if there are any issues or problems that you are aware of, and want to bring to my attention, I remain available by phone or in person. ✖

A Tribute to Magistrate McAree

By Christopher Westgate

January 2017 will see the departure of the longest serving current Workers' Compensation Magistrate, Tim McAree, as he has elected to retire. Prior to taking the appointment to the Board of Magistrates in January 2005, Magistrate McAree had a varied career which began as a workers' compensation claims representative at Chrysler. During that time, Magistrate McAree attended law school and became a member of the Michigan Bar in 1977.

After the receipt of his license, he initially did workers' compensation defense under Norm LaVasseur before joining the Detroit Board of Police Commissioners as an investigator. After a few years in that position, he followed the sirens call back to workers' compensation with the Budd Company overseeing their internal workers' compensation department. In 1985, Magistrate McAree made the fateful decision to move his family to Grand Rapids and took a position at Kluczynski, Girtz and Vogelzang. While in Grand Rapids, he continued doing workers' compensation defense, ultimately working with Lacey and Jones for 12 years prior to his appointment.

Recently, I was able to sit down with the Magistrate McAree to reflect on his career and decision to let the sun set on his 40+ years in workers' compensation.

What was your favorite part of the job as a Magistrate?

I loved to write decisions early on in my tenure and took great pride in producing a well thought out and fair opinion that was supported by the law and facts. When I started I was writing somewhere around 40 decisions a year and this year I will likely produce less than 10.



What were the biggest changes you witnessed in your career?

When I began in the 1970's any connection to work was enough to make a claim compensable. That has changed dramatically to where now the work must be much more directly related to the injury/disability. Proofs on cases have

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A Tribute to Magistrate McAree

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expanded dramatically which make the cases much more costly to prosecute and defend.

What will you miss most about your job?

Mostly I will miss the humor and camaraderie of the Bar. I have always enjoyed the interaction with the attorneys who I practiced with and who practice in front of me. Our section has always been cordial and supportive of one another even in the scheme of being adversarial. I will also miss the interesting cases that I have seen over the years that challenged my understanding and application of the law.

Magistrate McAree plans to spend more time traveling in his retirement and spending time with his children who reside on opposite coasts. He is also hoping to take

classes in the future in areas of interest unrelated to workers' compensation.

On a personal note, since I have been practicing, Magistrate McAree has been ever present in the Grand Rapids Agency. I have tried, redeemed and handled countless cases in front of Magistrate McAree over the years and have always found him to be prepared, professional and polite to everyone who has been in his courtroom. I am grateful to have been able to learn how the workers' compensation process works from Magistrate McAree and appreciate all the time he spent with me as a young lawyer learning how to handle cases. The Section and I would like to thank Magistrate McAree for all of his service over the last 12 years and wish him the best in his retirement. ✂

Retirement
Just Ahead

**Magistrate McAree's
Retirement Party!**

Date: Thursday, January 26, 2017
5:00 p.m. - 7:30 p.m.

Cost: \$10.00 or any donation to go towards party/gift. RSVP to Beth by January 12th

Location: Mill Creek Tavern
3874 West River Drive Comstock Park



Compromising Medicare Conditional Payments- The Regulations Also Apply to Medicare Supplement Plans

By Chuck Palmer, cpalmerpc@sbcglobal.net

I have written before about how Medicare is required by regulation to reduce their conditional payments recovery proportionately to the same percentage of the worker's compromise settlement. I'm writing again to tell you that **Medicare supplement insurance plans also are subject to the same regulations that require Medicare to compromise their conditional payments recovery.** Blue Cross' Medicare/supplement plan is called Medicare Advantage, and Health Alliance Plans are called HAP Senior Plus. All of the other private medical insurance plans have similar Medicare supplement plans. If any of these plans file a lien or request reimbursement, you can reduce the repayment by the same percentage of a compromise your redemption represents compared to a life-long open award. I recently reduced a Medicare supplement plan claim from \$18,000 to \$1,000 using the Medicare conditional payment regulations set out below. When the plan contacted me about repayment, I asked them to verify that the plan was a Medicare plan. When they responded that they were, I sent them the calculations and rounded the figure up to \$1,000. They agreed and were paid out of the redemption.

The regulations require that the Medicare reimbursement be reduced by the percentage compromise the worker is settling for. For example, if the worker is settling for 50% of the past and future benefits, then Medicare or the Medicare supplement plan must reduce their conditional payments by 50%.

The regulations which require Medicare to reduce their conditional payment reimbursement are found at 42 C.F.R. Section 411.40-411.47. 42 C.F.R. Section 411.47(2), provides:

If the settlement does not give reasonable recognition to both elements of a workers' compensation award or does not apportion the sum granted, the portion to be considered as payment for medical expenses is computed as follows:

(i) Determine the ratio of the amount awarded (less the reasonable and necessary costs incurred in procuring the settlement) to the total amount that would have been payable under workers' compensation if the claim had not been compromised.

(ii) Multiply that ratio by the total medical expenses incurred as a result of the injury or disease up to the date of the settlement. The product is the amount of the workers' compensation settlement to be considered as payment for medical expenses.

Using this procedure, the Medicare conditional payments can be significantly reduced in all redemption settlements. First, take the total settlement amount and deduct the attorneys' fees and costs. Second, using the worker's wage loss rate, calculate the past and future wage loss that could be recovered if the worker won an open award for the rest of their lifetime, using the Social Security life expectancy tables. Don't forget to reduce the wage loss rate by the estimated old-age social security reduction at the worker's full retirement age or any anticipated pension entitlement. The ratio is then calculated by taking the net settlement to the worker, divided by the potential past and future wage loss recovery over their lifetime. You are then entitled to reduce the repayment amount to that ratio.

If you have a Medicare conditional payment request not involving a Medicare supplement plan, make your request to Centers for Medicare Services (CMS), requesting they reduce the conditional payments pursuant to 42 USC 411.47. Include a copy of a Workers Settlement Statement showing the worker's net recovery, a copy of the conditional payment demand letter, and your calculation of the apportionment ratio. MSPRC does not do the apportionments, so you must send your request to CMS:

Department of Health and Human Services
Centers for Medicare and Medicaid Services
233 North Michigan Avenue, Suite 600
Chicago, IL 60601-5519

Medicare should not be getting 100% repayment from redemptions when the regulations clearly provide that they are only entitled to a reduced amount, based on the compromise of the worker's potential total claim. It is only fair that if our clients are compromising their claims that Medicare should do likewise. Too bad they don't apply the same regulations to MSAs! ✖

State Bar of Michigan Workers' Compensation Section Winter Meeting

December 9, 2015, 9:00 am – 12:00 pm

Continental Breakfast and Registration will begin at 8:15 am

Crowne Plaza Lansing West
925 S. Creyts Road, Lansing MI 48917
crowneplaza.com/lansingwest, (517) 391-1295

Introduction: Ella Parker

Agenda

- 9:00 – 10:00 am** **General Business**
Chairperson's Report – Ella Parker
Secretary's Report – Dennis Flynn
Treasurer's Report – Andrea Hamm
Director's Report – Mark Long
MCAC Chair's Report – George Wyatt, III
Chief Magistrate Report – Chief Magistrate Lisa Klaeren
- 10:00 – 10:15 am** **Break**
- 10:15 – 11:00 am** **The Many Liens of Comp**
Speaker – Jules Olsman: Olsman MacKenzie & Wallace
- 11:00 – 11:45 pm** **Panel Discussion: Attorney Fees & Liens**
Case Presentation – Donald Waldron, Jr: Rapaport, Pollok, Farrell & Waldron, P.C.
Moderator – Phil Frame
Panel – John Combs; Jayson A. Chizick; and Andrea Hamm
- 11:45 – 12:00 pm** **Appellate Update**
Speaker – Daryl C. Royal



**Welcomes the State Bar of Michigan Workers' Compensation Section
Thursday June 22, 2017 to Saturday June 24, 2017**

ROOM DESCRIPTIONS & RATES, based on single or double occupancy

Garden Double Rooms – Two double beds in the straits lodge \$195.00

Straits View King Rooms – One king bed in the straits lodge with water views \$225.00

Lakeside Garden Double Rooms – Two double beds in the main lodge with garden & lake views \$225.00

Family Suites – Two bedroom unit with up to three beds in the straits & main lodge \$300.00

Lake View King Rooms – One king bed in the main lodge with water views \$225.00

The above room rates do not include 6% sales tax, 2% local assessment, 10% resort levy. A one-time charge of \$6.00 per person will apply for luggage transfer from the mainland to the resort and back. Children 17 years of age & younger stay for free. Children 12 & under eat for free. \$25.00 additional per guest for triple and quad occupancy.

RESERVATION INSTRUCTIONS

- Reservations can only be made by calling group reservations at (800) 833-7711.
- All reservations must be made by **Monday May 8, 2017**. Rooms are based on availability at the time of calling in.
- An advanced deposit of one night's room and tax is required to confirm your reservation. Mission Point Resort accepts Visa, MasterCard, American Express & Discover. Credit card will be charged for the deposit at the time of booking.
- If paying by check, reservation will be held for 10 days pending receipt of the check.
- Reservations must be canceled at least 14 days prior to arrival to receive full refund.



Caselaw Update

By Martin L. Critchell

Since the last edition of the Newsletter, the Michigan supreme court, Michigan court of appeals, and Michigan Compensation Appellate Commission have issued several pronouncements affecting workers' compensation.

Roseman v Detroit

Mark A. Roseman sought to avoid the "exclusive remedy" rule from applying to a lawsuit that he filed for damages from his employer, the City of Detroit, and other employees of the City, Mukash Patel, Dennis Stokes, and William McPherson, after he was injured at work.¹ He did not say that the court had jurisdiction because of statutes in the workers' compensation act allowing a court jurisdiction when the lawsuit was for damages because the employer had an employee pose as a contractor,² intentionally injured the employee,³ was not insured for the liability of workers' compensation,⁴ or the employee was injured while socializing or during recreation.⁵ None of these four circumstances were even remotely present. Instead, Roseman said that the rule did not apply because it was a defense that the City lost when not included in first responding to his lawsuit.⁶ The City, Messrs. Patel, Stokes, and McPherson, and an amicus curiae⁷ said that the rule concerned the jurisdiction of a court that could never be lost not a defense of immunity that an employer could lose by not including it in responding to the lawsuit.

The Michigan supreme court ruled that the "exclusive remedy" rule was no defense to a lawsuit for damages that an employer might waive or forfeit but instead described the authority of a court to hear the case, subject matter jurisdiction which cannot be waived or forfeited. *Roseman v Detroit*.⁸ ("we [remand] this case to the Wayne Circuit Court for the court to consider whether it has subject matter jurisdiction to hear [Roseman's] claims pursuant to MCL 418.131(1), and MCL 418.827(1).")

The decision by the Court is important for three reasons. First, the Court recognized the existing understanding of the rule from the two statutes in the workers' compensation act and refused modifying the rule to a defense that might be lost by inaction of the employer or employees when sued. Second, the decision was emphatic as it was unanimous. And finally, the ruling was decisive as the Court did not think that there was any room for debate as it was preemptory.

Arbuckle v Gen Motors LLC

A statute in the workers' compensation act says "Except as otherwise provided in this section, the employer's obligation

to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts ***".⁹

Previously, the Michigan supreme court established that the reduction or "coordination" was imperative because of the text *shall be*.¹⁰ And in that case the Court recognized that MCL 418.354(1)(b), (c), and (11) allowed an employer to waive "coordination" in just three circumstances.¹¹

Now, the Court has decided a dispute over the availability of a waiver allowed by §§ 11.¹² Robert Arbuckle said that an agreement between his employer, General Motors, and his union, the UAW reached in 1990 that waived "coordination" under §§ 11 was perpetual.¹³ GM replied that agreement and all of the subsequent agreements with the UAW that GM would not "coordinate" weekly compensation with the disability pension had expired by their own terms and was replaced by an agreement in 2009 allowing coordination allowing "coordination."¹⁴ Then, Arbuckle said that the agreement in 2009 could not apply because he was neither an employee of GM nor a member of the UAW then.¹⁵

The Court ruled that the agreement in 1990 that was effective when Arbuckle left work was valid but only for the period stated and could not supersede the subsequent agreements¹⁶ given a decision by the United States Supreme Court¹⁷ upholding the authority of a union to negotiate the rights of former members that had not vested.¹⁸

The decision shares some of the features of the other decision by the Court. First, it recognized a rule – "coordination" – and an exception described by law and then established the rule could apply because the circumstances did not meet the terms of the exception. Also, the decision was emphatic as there was no disagreement among the Justices.

MCR 7.215(C)(1)

The Court has established when a court or a party may cite an unpublished opinion of the Michigan court of appeals:

"Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented."

This change in the rules is important given how so many of the decisions by the court of appeals about workers' compensation are unpublished.

Continued on next page

Measel v Auto Club Ins Co

The definition of “the practice of chiropractic” changed on January 1, 2009 with the enactment of 2009 PA 223. Before, the practice of chiropractic was limited to the diagnosis of spinal misalignment,¹⁹ adjustment of spinal misalignments that were diagnosed,²⁰ and the use of “analytical instruments, nutritional advice, rehabilitative exercise, and adjustment apparatus.”²¹ Afterwards, the definition was enlarged to include an interview to learn the patient’s medical history,²² a physical exam,²³ ordering and reviewing tests such as an x-ray or MRI,²⁴ and using “physical measures.”²⁵ And on June 1, 2010 the Michigan Department of Community Health issued a letter to licensed chiropractors explaining that *physical measures* in 2009 PA223 included massage and ultrasound.²⁶

This change was crucial to the Michigan court of appeals in deciding the case of *Measel v Auto Club Ins Co*.²⁷ The change meant that it was entirely proper for Rosemary Batanjski, D.C., to conduct a “new patient” interview and then a physical examination of Jenifer Measel, provide ultrasound therapy, and prescribe and oversee a course of massage therapy because these were within the definition of the practice of chiropractic when Measel was injured on August 28, 2012.²⁸ But while entirely proper for Batanjski to provide this and charge Measel, the change also meant that Auto Club Insurance did not have to reimburse Measel because when the change in the definition of chiropractic was made, the no-fault statute was amended to limit the reimbursement for chiropractic services as *previously* defined.²⁹ The court of appeals accurately observed that “reimbursement is only required under the no-fault act if the service was included in the definition of ‘practice of chiropractic’ under MCL 33.16401 as that statute existed on January 1, 2009”³⁰ and then concluded that the complete physical exam by Batanjski was not within the definition of chiropractic before 2009 having examined more than the spine of Measel³¹ and that neither ultrasound nor massage therapy had been included in the definition before 2009.³²

Measel’s argument to avoid the limitation on reimbursement was that Batanjski had not personally provided the ultrasound and massage therapy.³³ This idea was flatly rejected because Batanjski ordered and supervised the individual ultrasound and massage therapists.³⁴

Medina-Lopez v Wirtz Mfg Co, Inc

A party must provide particular information to another party when filing or answering a formal claim for workers’ compensation. And later, a party must provide any information sought by another party described in a written order – a subpoena – issued by the director of the Workers’ Compensation Agency, the Board of Magistrates, an arbitrator, the Appellate Commission³⁵ and, if the employee was injured after December 18, 2011 when 2011 PA 266, applies, a lawyer representing a party.³⁶

When Rafael Medina-Lopez filed a claim that Wirtz Manufacturing was responsible for the cost of attendance provided by his wife after an injury on January 26, 2012 the lawyer for Wirtz issued two subpoenas.³⁷ One subpoena was for records of the medical care provided to the wife.³⁸ And the other was for records of employment of the wife.³⁹

After all of the subpoenaed records had been given to the lawyer for Wirtz⁴⁰, the lawyer for Medina-Lopez asked the Board of Magistrates to order them returned to his wife.⁴¹ The Board did with the exception of the records concerning the time of her employment⁴² that the Appellate Commission approved as “within this discretionary power.”⁴³

The decision by the Appellate Commission is important for two reasons. First, it establishes that a subpoena can be contested at any time given that the Appellate Commission approved the order by the Board to return the records after those records had already been released by the terms of a subpoena. And second, anyone can contest a subpoena given that the Appellate Commission approved the order by the Board in response to a request by Medina-Lopez and, not by the people who had created the records, had possession of the records, or the person who was the subject of the records (the wife of Medina-Lopez.)

Corrigan v New Page Corp

The Appellate Commission ruled in deciding the case of *Trammel v Consumers’ Energy Co*⁴⁴ that an injured employee could establish a specific loss from the loss of function before having an implant, not afterwards.

Boyd J. Corrigan tried to avoid this ruling by saying that knee joint replacement was the only means for him to end the pain and impairment from an injury to the knees and that it was irrelevant that he worked after the injury right up until the surgery.⁴⁵ The Appellate Commission rejected both of these ideas saying, “while [Boyd J. Corrigan] may have felt that, if he wished to alleviate the pain in his [injured] knee, he had no alternative but to have the knee replaced, the fact remains that this surgery was elective” and “[weekly compensation for a specific loss] was meant to compensate a worker who has suffered a loss, regardless of his or her ability to work *after* the loss.”⁴⁶

Although not strictly authoritative having been decided by a panel of three Commissioners, the decision continues and extends the prior rulings about *Trammel* in *Verville v Michigan*⁴⁷ and *Pudvan v Midland Cogeneration Venture*.⁴⁸

The decision remains useful even after the amendment to the workers’ compensation act that applies to those employees who are injured after December 18, 2011.⁴⁹ An injured employee who cannot qualify under *Trammel* because of *Corrigan* cannot qualify under the amendment that adds the ability after the joint replacement into consideration.

Van Gilder v Doviak Trucking, Inc

The Michigan supreme court has established that the time for filing the transcripts of a hearing,⁵⁰ the time for filing a brief,⁵¹ and the time for filing a cross-appeal with the Appellate Commission⁵² is determinate and not flexible.

The case of *Van Gilder v Doviak Trucking, Inc*,⁵³ involved a tardy filing of a proof of service⁵⁴ as the lawyer filed a brief with the Appellate Commission on the last available day but did not file a document showing that a copy had been provided to the other lawyer until three days later.⁵⁵

The lawyer claimed that the time for providing the brief and proof of service to the other lawyer could be excused given his "substantial compliance" with the other requirements for pursuing an appeal.⁵⁶ The Appellate Commission flatly rejected this saying that, "the application of substantial compliance to procedural rules is no longer necessary"⁵⁷ and "counsel's late filing was completely under his control, not in the hands of a court reporter. This makes his decision not to request an extension inexcusable."⁵⁸ ✕

Endnotes

- 1 *Roseman v Detroit*, unpublished opinion of the Court of Appeals, issued on May 7, 2015 (Docket no. 3146501) at 1-2.
- 2 MCL 418.171(4), first sentence.
- 3 MCL 418.131(1), second sentence.
- 4 MCL 418.641(2).
- 5 MCL 418.301(3), second and third sentences.
- 6 *Answer to application for leave to appeal*.
- 7 Michigan Self-Insurers Association. Martin L. Critchell was counsel for the MSIA.
- 8 *Roseman v Detroit*, 499 Mich 904; 877 NW2d 721 (2016).
- 9 MCL 418.354(1), second sentence.
- 10 *Smitter v Thornapple Twp*, 494 Mich 121, 136, 138; 833 NW2d 875 (2013). ("the word 'shall' generally indicates a mandatory directive, not a discretionary act. *** The coordination of benefits is mandatory, not discretionary...")
- 11 *Id.* at 137. ("the scope of allowable waiver encompasses only 'disability insurance payments under subsection (1)(b) and (c) and subsection (11)...")
- 12 *Arbuckle v Gen Motors LLC*, 499 Mich 521; 873 NW2d 590 (2016).
- 13 *Id.* at 530.
- 14 *Id.*
- 15 *Id.*
- 16 *Id.* at 541.
- 17 *Allied Chem & Alkali Workers of America v Pittsburgh Plate Glass Co*, 404 US 157, 171 n 11, 181 n 20; 92 S Ct 383; 30 L Ed 2d 341 (1971).
- 18 *Arbuckle* at 541-543.
- 19 MCL 333.16401(b)(i).
- 20 §§ (b)(ii).
- 21 §§ b(iii).
- 22 MCL 333.16401(1)(e)(ii)(B).
- 23 §§ (e)(ii)(A).
- 24 §§ (e)(ii)(D), (E).
- 25 §§ (e)(iv).
- 26 Letter from the Bureau of Health Professions to Chiropractic Licensees (June 1, 2010).
- 27 314 Mich App 320; ___ NW2d ___ (2016).
- 28 *Id.* at 328.
- 29 MCL 500.31076(b).
- 30 314 Mich App at 335.
- 31 *Id.* at 337.
- 32 *Id.*
- 33 *Id.* at 334.
- 34 *Id.* at 335.
- 35 MCL 418.222(2), (3).
- 36 MCL 418.853, second sentence.
- 37 *Id.*, third sentence.
- 38 *Medina-Lopez v Wirtz Mfg Co, Inc*, 2016 ACO 10 at 2.
- 39 *Id.* at 1.
- 40 *Id.* at 2.
- 41 *Id.* at 3.
- 42 *Id.* at 2.
- 43 *Id.* at 1-2.
- 44 *Id.* at 8.
- 45 2009 Mich ACO 126 at 12. ("we consider the evidence submitted by [Boyd J. Corrigan] that his leg was destroyed or ruined, or had lost its usefulness *prior* to the time of his knee replacement surgery.") (emphasis added.)
- 46 *Corrigan v New Page Corp*, 2016 Mich ACO 2 at 13.
- 47 *Id.* at 13.
- 48 2014 Mich ACO 41.
- 49 2015 Mich ACO 4.
- 50 2011 PA 266, codified at MCL 418.361(2), second sentence.
- 51 *Kurtz v Faygo Beverages, Inc*, 466 Mich 186; 644 NW2d 710 (2002).
- 52 *Marshall v DJ Jacobetti Veterans Facility (After Remand)*, 447 Mich 544; 526 NW2d 585 (1994).
- 53 *Scharnitzke v Coca-Cola Enterprises*, 493 Mich 947; 828 NW2d 19 (2013). Martin L. Critchell was counsel for Coca-Cola Enterprises.
- 54 2016 Mich ACO 9.
- 55 *Id.* at 2.
- 56 *Id.* at 3. ("[Don Van Gilder's] brief contends that, if nothing else, his filing adhered to the spirit of the published rules and that the substantial compliance doctrine should apply.")
- 57 *Id.* at 3.
- 58 *Id.*