

Workers' Compensation Section Newsletter

Spring 2017



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From the Chair

By Ella S. Parker



There is a lot of information in this quarter's newsletter as we wanted to make sure that you are up to date with the magistrate appointments, assignments, Hall of Fame nominations and the procedures, as well as the upcoming Summer Annual Meeting from June 22 through June 24, 2017 on Mackinac Island.

Although Chief Magistrate Klaeren and Editor Jayson Chizick will update you on the magistrate's appointments and assignments, I want to wish former Magistrate Tim McAree all the best in his retirement and in his travels. I have to say that Tim's retirement party in January included a who's who of current and retired west Michigan workers' compensation attorneys and magistrates. I believe your editor has some pictures that he will be including in this newsletter.

I would also like to congratulate Bill Housefield on his appointment as a new magistrate. Both Tim and Bill have participated with our section in the past. Tim is a past editor of this newsletter and Magistrate Housefield actively participated on the council and is a past chairperson. If you have ever thought about participating on the council, feel free to ask these gentlemen about their experiences.

We are continuing to accept nominations for the Workers' Compensation Hall of Fame. One of the criteria for being considered for induction into the Hall of Fame is demonstrating a commitment to fostering and furthering the objectives of the Workers' Compensation Section of the State Bar. We have received some nominations but there is still time to submit or nominate individuals that meet the criteria, which can be found in the newsletter. The induction ceremony occurs at the dinner on June 22, 2017.

You may recall an email blast with information regarding the criteria and those who have already been inducted into the Hall of Fame. I inadvertently

Continued on next page

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Council Members

Term Expires June 18, 2017

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Matthew R. Conklin, Saint Joseph
Jeffrey S. Kirschner, Southfield

Term Expires June 19, 2018

Jayson A. Chizick, Clare
Danial J. Hebert, Farmington Hills
Christopher Westgate, Grand Rapids

Term Expires June 2019

Rosa Bava, Troy
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Richard N. Lovernick, Ann Arbor

Christopher J. Rabideau, Ex Officio

Mark Long, Director, Michigan Workers' Compensation Agency

Lisa Klaeren, Chief Magistrate, Michigan Workers' Compensation Agency

George Wyatt, III, Michigan Compensation Appellate Commission

Brian D. Shekell, Commissioner Liaison

This newsletter is published by the Workers' Compensation Section, State Bar of Michigan

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

Material for publication should be sent to the editor at:

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From the Chair Continued from page 1

left off one of last year's inductees, Daryle Salisbury. I sincerely apologize for this omission. For those of you who saved the list, please add Daryle's name to your copy.

We are looking forward to the Annual Meeting at Mission Point Resort. There have been quite a few renovations in the last year. While air conditioning is not normally a requirement on Mackinac Island, it certainly was the last time we held our annual meeting there. I still laugh about the Island resident riding his bike through town with a new air conditioner in a box in a basket on the front of his bike. Happily, Mission Point now has air conditioners in all their rooms.

Please Note: There are **two separate registrations** to complete if you plan to attend. The first registration is for the actual MEETING RESERVATION, which includes the Cocktail Party and Dinner on June 22, the Annual Meeting on June 23 and a breakfast buffet on June 23. You can register for the Meeting online through the State Bar of Michigan web site. <http://e.michbar.org> Please include the name of each of your adult guests and/or children. Every attendee will have their own name tag and this is usually where we place the drink tickets and breakfast vouchers.

The second registration is the HOTEL RESERVATION. You must call Mission Point at (800) 833-7711 and reserve for our block of rooms by Monday, May 8, 2017. If you have not yet made your reservations at the hotel, I would encourage you to do so. Rooms are available on a first come, first serve basis. We have blocked a limited number of rooms in several categories.

Shepler's Ferry Company will offer guests of the State Bar Workers Disability Compensation Law Section a discounted price per round trip ticket for adults and children. Please visit their website for the ferry schedule and plan accordingly. www.sheplersferry.com. Check-in time is at 4:00 pm. Our cocktail party is at 6:00 pm, with the dinner and the Hall of Fame Induction ceremony following at 7:00 pm.

Our annual meeting will be on Friday morning, June 23 and we are working on lining up excellent speakers. We are also working on some informal events for after the dinner on Thursday night and for Friday afternoon. We look forward to seeing you there. ✨



Courtesy Mission Point Resort

A Word from the Editor

By Jayson A. Chizick

"By working faithfully eight hours a day you may eventually get to be a boss and work 12 hours a day."

—Robert Frost



As the section celebrates the retirement of one magistrate (Tim McAree), we welcome the appointment of Bill Housefield as our new Okemos magistrate. A fantastic farewell party sent Tim off into retirement. No such party greeted Magistrate Housefield on his arrival, but I suspect that he would enjoy company when he arrives at the

Agency before the sun rises. Magistrate Housefield brings a career of experience as a workers' compensation practitioner. The Okemos Agency will be all the livelier under Magistrate Housefield's watchful eye. Welcome as well to Danial Hebert as our new council member. Danial is a hard working attorney, and I know that he will have a strong and reasoned contribution to make on the council.

The section had a spirited winter meeting in Lansing this year. There were many presenters and panelists, with a rather interesting discussion held on attorney fees. Word on the street is that our summer meeting will be amazing. The meeting will be held from June 22 – 24 at Mission Point Resort on Mackinac Island. There is information available in this newsletter about lodging and the meeting. Our group can only be enhanced with greater participation of the members. I encourage you to come and take part in the meeting and other activities planned. Our Section has a long tradition of attendance at meetings, and the benefit of having a vote counted toward your choice of leadership. There are few other opportunities to have the Director of the Agency, the Chief Magistrate and others in one room, at one time discussing the state of affairs of our workers' compensation system. Come and enjoy that opportunity.

I have previously used my newsletter space to discuss mentorship. It is a true privilege to teach and show new lawyers the "ropes" of our practice. Hopefully there are new lawyers in your firm that are considering a career in workers' compensation practice. If so, please have them join the Section and attend a meeting. It is often said that we are a small section. This may be true, but there are 602 practitioners listed as members of the workers' compensation section. Imagine how lively Mackinac Island would be if we all showed up!

From mentorship, we have leadership. Our Section has a long line of leaders that have cultivated their successors. I fondly remember one chair inviting me to participate on the council, but reminding me that membership leads to obligations. Your Council meets throughout the year. Whether you are a plaintiff or defense attorney, leadership by example helps our practice as a whole. To that end, please consider nominating a fellow retired practitioner to the Section Hall of Fame. Our Hall of Fame contains the names of so many people that have given much of themselves to our profession. This award goes above recognizing what one does for their own client, and recognizes the advancement of the profession and section. Honoring those chosen by the Hall of Fame committee is an enjoyable part of the section meeting. I suggest that hearing those stories of days gone by typically will make an exciting evening. Their past hard work, perhaps more than eight hours a day, is deserving of distinction. Join us to celebrate our section, leaders of the past, and to elect the leaders of our future.

See you on the Island...

—Jayson Chizick



Courtesy Mission Point Resort

Winter Section Meeting, Lansing



1. Chairperson Ella Parker provided an update from the council.
2. Director Mark Long updated the section of Agency news.
3. Jules Olsman provided a fun and informative keynote.
4. Treasurer Andrea Hamm updating the section on our finances.



Magistrate McAree's Retirement Party



Mag. Chris Slater saluting Mag. McAree in a fantastic speech.



Past Chair Chris Rabideau and current Chair Ella Parker toasting Mag. McAree.



Mag. McAree instructing Themis Fotio on how to bang a gavel.



Board of Magistrates Update

By Lisa Klaeren, Chief Magistrate

On January 26, 2017, Governor Snyder issued a press release announcing appointments to the Board of Magistrates. Five sitting magistrates were reappointed (Castora, Colombo, Timmons, Williams and Woons), with one new magistrate appointed. J. William (Bill) Housefield was appointed by the Governor to the Board of Magistrates to a term ending January 26, 2021, and will be assigned full-time to the Okemos Workers' Compensation Agency.

Mr. Housefield was appointed to the Board in the seat previously held by Magistrate Tim McAree. Magistrate McAree retired on January 26, 2017 after serving three terms on the Board. His work ethic and humor will be missed at the Grand Rapids Agency.

The four weeks that Magistrate McAree worked at the Grand Rapids Agency will now be split between Magistrates Timmons and Tjapkes. Okemos will be staffed by Magistrates Housefield, Woons and Klaeren. The only other change in docket assignments involves Magistrates Boyle and Williams. Williams will now be working a docket split between Pontiac and Detroit, and Boyle will be working a full-time docket in Pontiac.

Gov. Rick Snyder makes appointment and reappointments to the Workers' Compensation Board of Magistrates

Thursday, Jan. 26, 2017

LANSING, Mich. – Gov. Rick Snyder today announced the appointment of John Housefield of Haslett as well as the reappointments of Keith Castora of Canton, Jane Colombo of Grosse Pointe, Lisa Woons of Grand Rapids, Robert Timmons of Grand Rapids and David Williams of Grosse Pointe Woods to the Workers' Compensation Board of Magistrates.

Housed within the Department of Licensing and Regulatory Affairs Michigan Administrative Hearing System, the 17-member board chairs hearings on workers' compensation cases statewide.

"I thank these individuals for serving on this board and for the great work they can do serving the people of Michigan," Snyder said.

Appointment:

Housefield has been practicing law for 37 years, most recently at McGinty, Hitch, Housefield, Person,

Yeadon & Anderson, P.C., with a majority of his practice being in workers' compensation. He was elected and served nine years on the Workers' Compensation Law Section of the State Bar of Michigan. Housefield holds a bachelor's degree from Western Michigan University and a law degree from Thomas M. Cooley Law School. He will replace Timothy McAree.

Reappointments:

Castora worked as an attorney with the Foster, Swift, Collins & Smith law firm in Lansing and has more than 25 years of experience as a workers' compensation attorney. Castora holds a bachelor's degree from State University of New York at Stony Brook and a law degree from the Michigan State University Detroit College of Law.

Woons has worked as an attorney for the law firm of Kluczynski, Girtz and Vogelzang, defending employers, insurance companies, and self-insureds throughout the state. She has more than 20 years of experience as a workers' compensation lawyer. Woons holds a bachelor's degree and a law degree from Valparaiso University.

Colombo has worked in her own private practice as well as the law firm Evans, Pletkovic & Rhodes, P.C. She also served on the Workers' Compensation Appeal Board. Colombo holds a bachelor's degree in history from Eastern Michigan University and a law degree from the University of Detroit School of Law.

Timmons worked at his own private practice and previously was a managing partner for Boyden, Timmons, Dilley & Haney, PC, and Boyden, Waddell, Timmons & Dilley, P.C. He holds a bachelor's degree from Western Michigan University and a law degree from the University of Miami School of Law.

Williams worked as an attorney and a partner in Kluczynski, Girtz, Zamler & McCubbrey, PC. He has more than 34 years of experience in workers' compensation law. Williams holds a bachelor's degree from Wayne State University and a law degree from Wayne State University Law School.

Members will serve 4 year terms expiring Jan. 26, 2021. Their appointments are subject to the advice and consent of the state Senate. ✕

CMS and Redemptions – Issues to Consider

By Magistrate Chris D. Slater

The genesis for this article began when I had an idea about how to deal with Conditional Payments when the Centers for Medicare and Medicaid Services (“CMS”) determine that a Medicare Set Aside Trust (“MSA”) need not be established in a workers’ compensation redemption. That led to an analysis of other CMS-related issues which have relevance to workers’ compensation redemptions. The purpose of this article is to give attorneys some things to think about while a redemption is being negotiated and before it is presented to a Magistrate. It is not intended to be an exhaustive treatment of these issues, and it is not intended to be a substitute of an analysis of vendors who are paid for these services.

Under the Medicare Secondary Payor Act, CMS may have a claim both as to Conditional Payments (previously paid benefits) as well as reasonable and foreseeable future medical expenses (that are Medicare-covered and otherwise reimbursable items and services) related to an alleged work-related injury.

Let’s discuss the future interests first. Where CMS has potential exposure for future medical services, a MSA needs to be established to protect all parties. These parties include the claimant, the insurance carrier and/or employer, and the plaintiff’s (“claimant’s”) attorney. While specifically not required by statute, it has become common practice for employers and/or insurance carriers to seek CMS approval of an amount of money deemed by it as necessary to take into consideration and protect its interests.¹ This involves a formal submission of relevant medical information and billing data for services and medications which are reasonably anticipated to be incurred over the expected lifetime of the claimant. CMS will review a proposed MSA only where either: (1) the claimant is a Medicare beneficiary and the gross settlement amount exceeds \$25,000.00, or (2) the claimant has a reasonable expectation of receiving Medicare benefits within 30 months of the settlement, and the gross settlement exceeds \$250,000.00.

For cases that redeem for less than the \$250,000.00 threshold but greater than \$25,000.00, and where the claimant has a reasonable expectation of becoming a Medicare beneficiary within 30 months, more grey area is present. Some employers and carriers will insist on developing a formal analysis of likely Medicare exposure, with the claimant bearing the risk should the MSA later be determined to be inadequate. Others will develop a proposal in-house and pair with it with contractual assurances that they will take various steps to protect the claimant should CMS, at a later date, decide that the amount which was set-aside was inadequate.

It appears that the most common practice, however, is for the attorneys to agree upon an amount certain taken out of the total settlement to consider and protect Medicare’s interest. It is a prudent practice for the attorneys to discuss this issue before redemption papers are placed before a Magistrate. The rationale for the proposed MSA should be explained to the Magistrate before he or she goes on the record. During the hearing, the Magistrate will then have an opportunity to endorse the reasons enunciated for the proposed MSA as being reasonable. If all of this is done properly, this best protects the interests of all parties to the greatest extent possible absent formal CMS approval and absent a trial on the merits.²

CMS has adopted a curious and surprising rule for cases where the employer and/or insurance carrier have disputed liability from the onset of the claim. In cases where no monies have been paid to or on behalf of the claimant for any medical or wage loss benefits for an alleged work-related injury, a “zero allocation” has been found to be appropriate to address Medicare’s future interests.³ In other words, no matter how potentially strong or weak the underlying claim is for workers’ compensation benefits, where nothing has been paid, CMS has declared that it has no future interests in the settlement.⁴ Even so, CMS approval of the zero allocation is routinely sought prior to the redemption.

Let’s now turn to the back end of the equation: What if Conditional Payments have been made by Medicare? In more than a few cases, the total realistic value of the workers’ compensation claim does not come close to approaching the Conditional Payment amount. An obvious solution is for the employer/carrier to leave medical open and redeem out wage loss and vocational rehabilitation benefits. Many employers and carriers find this proposal to be unpalatable for various reasons. In the alternative, CMS has generally agreed that its recovery of Conditional Payments in this circumstance is limited to the amount of claimant’s net recovery in the workers’ compensation claim. See 42 C.F.R. §411.37(d). This position, taken literally, does little to incentivize a claimant to settle a case, since all of his or her money would go to CMS. In practice, however, CMS has not objected to a second check being cut by the employer/carrier in the identical amount that the claimant receives after attorney fees and case costs and administrative expenses are deducted and after the redemption has been approved.

There is another argument that may be attempted. Let’s assume that this is a claim where Medicare would agree to

a zero allocation for its future interests, but Conditional Payments are excessive. Logic would dictate that, since CMS has determined that it has no future interests in the workers' compensation claim, it must also then accept that it has no past interests (i.e. Conditional Payments) in the claim either.⁵ Put another way, since CMS has determined that it has no legal basis from which it may claim future benefits, the "hook" to claim an entitlement to be reimbursed for Conditional Payments must be missing as well.

I have not been able to find any authorities which indicate that CMS will accept this argument, although some vendors have discussed it. Nevertheless, it certainly seems that this is an argument which can be made in appropriate cases where the size of the Conditional Payment lien vastly exceeds the reasonable value of the underlying workers' compensation claim.

Another clear alternative to address Conditional Payments is to have a hearing over whether or not the treatment is work-related. This would only be appropriate where there was very little or no evidence causally relating a claimant's need for medical care to a work-related injury or where there were other serious deficiencies in the claimant's workers' compensation claim.⁶ A stipulation from the attorneys that an injury is not compensable or a cursory Green Sheet would likely be insufficient to withstand CMS scrutiny. A decision based upon a stipulated set of facts which contains an analysis of relevant medical evidence would more likely be upheld by CMS.⁷

Given the potential for serious consequences should CMS decide that either its past or future interests have not been considered properly, all parties to a redemption should be prepared to address and defend these issues relating to Medicare's past and future interests before redemption papers are presented to a Magistrate. If the interests of the parties

cannot be achieved through a redemption, consideration should be given to approaching a Magistrate to try a case on narrow medical issues to clarify CMS' potential interests in the underlying workers' comp claim. In any of these circumstances, a Magistrate will then be able to assist the parties in creating a record which can be relied upon should CMS raise any concerns in the future. ✕

Endnotes

- 1 While a claimant *must always* consider and protect Medicare's interests, the applicable regulations and statutes make clear that CMS approval of an amount is never required.
- 2 It is generally understood that CMS will accept a MSA amount designated in a redemption and approved by a Magistrate if it is reasonable.
- 3 Costs paid as a litigation expense by the employer/carrier do not count in this scenario.
- 4 A zero allocation may also be considered on a strictly medical basis where the claimant's medical care for the alleged work-related injury has been completed, and where the claimant's treating physician will certify the claimant will no longer need Medicare-covered treatments related to the work injury.
- 5 In spite of this the form letter by which CMS gives notice of approval of a zero allocation specifically notes that this determination "is independent of any determination regarding...recovery rights for conditional payments."
- 6 If there was strong evidence on the issue of causation, CMS would then properly demand reimbursement of all related Conditional Payments.
- 7 See April 22, 2003 *Memorandum Q & A* #5.



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History of Our Newsletter

By Ella S. Parker

While reflecting on this article, I came across the very first Newsletter for our State Bar of Michigan Workers' Compensation Section. The date was July 1957 and the newsletter was called "Review". There was no introduction. It started with a review of two Supreme Court cases. That was it. Stop for a moment and reflect on this, this July, our newsletter will be celebrating 60 years of publication. Wow!

It was not until the next newsletter in March of 1958 that the author or editor explained the purpose of the newsletter. It is unclear whether the Review was written by Samuel Schwartz as Chairman of the Publicity Committee, Burt E. Ballard, as "Chairman" of the Section, or Raymond Rapa-port, as "Case Reporter". All three names were at the top of *Review*. However, at that time, they noted their intent was to print the newsletter on 8 ½ x 11" paper, punched with holes on the side for filing in a three ring binder. They suggested that each Section member file these in the order received so that a complete and permanent review of "Workmen's Compensation materials, distributed by the Section, will always be available." *Review*, No. 2, March 1958, page 1. We need to remember that this was before the internet and websites, when everyone kept their own libraries on paper or in books.

These men went on to state that each newsletter would have four parts: Section news, trends or issues, Supreme Court decisions summarized and a digest of Appeal Board decisions. They pleaded for help and cooperation to succeed. Our format today generally follows the same outline and we continue to plead for cooperation to make our newsletter successful.

By January 1959, Pete Munroe was the Editor and Samuel Charfoos was the Chairman of the Section. Ironically, this issue was also numbered "2", as was the prior newsletter from a year before. Mr. Charfoos indicated:

"By far the greater part of workmen's compensation cases run their course without dispute or conflict. But the smaller part of the cases – approximately ten percent of the total – is a battleground. There are lawyers and administrative agencies and courts and, behind them, the State Bar and the legislature, to see that *fairness* and justice prevail.

"We are proud of the fact that throughout the strug-

gle lawyers remain gentleman and friend." *Review*, No. 2, January 1959, page 1.

I know you have heard the last part of this statement many times over the years. I, for one, am glad to see that this attitude has endured the test of time.

Apparently, there was a great deal of stress going on in 1959 as well. As a result, the council planned what appears to be the first annual summer meeting. It was an opportunity to have a "grand feast" where all could "gorge on" current problems in our field. As part of the event, there was to be a social gathering featuring golf to allow all an opportunity for fellowship. That tradition of an annual meeting continues today, although, due to declining numbers we have eliminated the golf outing for this year's event on Mackinac Island.

Mr. Charfoos left us with this thought in the February 1959 issue of *Review*:

"Never have the advocates who practice in the field of workmen's compensation law departed themselves with greater dignity and composure than in these times of stress. We believe that time will smooth away our vexations and bring solutions to the problems that confront us."

Many would say that we are still waiting for time to smooth away our vexations and bring solutions to the problems that confront us.

The December 1959 edition of *Review* was equally entertaining. Pete Munroe was still the editor but, by now, Jim Hill was Chairman. One of them presented a very entertaining summary of the annual meeting. I suspect it was Pete Munroe.

"The workmen's compensation law section came of age at the last meeting of the State Bar in Detroit. The tendency to speak forcefully on controversial issues, which began to manifest itself at the spring institute of the section, came to full blown at the fall business meeting. Nothing was swept under the rug. Everything that had been on everybody's mind concerning section affairs was brought into the light and given a good airing. Lawyers acted – and talked

Continued on next page

– like lawyers, and when it was over, everybody felt better.

* * *

Perhaps the most embattled figure at the meeting was that of Chairman Samuel Charfoos. Motions, objections, points of order, and sundry demands bounced off Sam like hail off a tin roof, but Sam rose nobly to the occasion and conducted a crisp, efficient meeting.” *Review*, December 1959, page 1.

While some things have changed in the last almost 60 years, some things have not. We still provide an update on Section news and case law summaries. But, we no longer send out mailings of our newsletter by paper, punched or not. Instead, they come via an email blast. However, one thing that has not changed is our plea to our members to participate. We need your help to succeed. If you have an article to submit, please forward those to Jayson Chizick.

Several years ago, someone suggested that we have copies of all our old newsletters sent to the State Bar to upload to our Section area. Denise LeVasseur volunteered to coordinate the effort. Unfortunately, they were scanned by year and the State would not accept them in that format. They asked that they be broken down into individual editions. I have spent a great deal of time doing that and hope to have them uploaded in installments over the next couple of months. The newsletters were sent to Donald J. Parthum. I am not sure who Mr. Parthum was or with whom he practiced, but these newsletters contain a treasure trove of information and I am thankful for him and Denise for their hard work in the past. Unfortunately, the newsletters stop in July 1990. We are missing records from then until the Spring of 1998. If anyone has these years around, I would appreciate obtaining a copy of them, either digitally or in print.

Please submit your articles to Jayson Chizick for consideration. ✕

SBM Seeks Applications for 2017 Pro Bono Circle of Excellence



The State Bar of Michigan invites all law firms of two or more attorneys to apply for the 2017 Pro Bono Circle of Excellence, recognizing each firm that fully complied with the State Bar's Voluntary Pro Bono Standard in 2016. The application deadline is April 7.

The Voluntary Pro Bono Standard applies to legal services for low-income individuals and organizations, as well as financial support for eligible nonprofit organizations providing free civil legal aid for the poor. Contributions to the Access to Justice Fund count toward fulfilling the Standard.

The Standard calls for attorneys to annually take three pro bono cases, devote at least thirty hours of pro bono service, or contribute \$300 to a legal aid provider organization. Firms that can afford to do so are asked to make annual financial contributions of \$500 per attorney and are recognized at the "Leadership Level" of the Circle of Excellence. Individual lawyers who meet the Pro Bono Standard are celebrated locally through their Access to Justice programs, and through the State Bar of Michigan's A Lawyer Helps website.

"Last year there were a record 56 firms and corporations in the Circle of Excellence in its newly redesigned format," SBM President Larry Nolan said. "I want to extend congratulations to all firms who have met these impressive standards and joined the State Bar in our pro bono efforts. I also want to encourage even more firms to get involved and help us build momentum and make an even bigger difference for those in need."

[Fill out a Circle of Excellence application form.](#) For more information, contact Robert Mathis at rmathis@mail.michbar.org.

Hall of Fame Nominations

It is that time of year again. It is time to start thinking about summer and the summer meeting. Our Section honors two new inductees as members to the Workers' Compensation Hall of Fame at our annual Spring/Summer Meeting each year. The event is well attended and is an opportunity for us to show our support for those who have influenced our practice and established themselves as proven leaders.

Do you know someone who you think is deserving of this honor? If so, please provide a written recommendation to a member of the Hall of Fame Committee, or any member of the Council. The Hall of Fame Committee this year consists of Ella Parker, Tim Esper, Chris Rabideau and J. William Housefield.

Your *written recommendation* should take into consideration the following requirements and provide an explanation as to how that individual has met the requirements:

- Must be retired or semi-retired from practicing Workers' Compensation.
- Must have at least 20 years of proven experience in the field of Workers' Compensation Law and be a licensed attorney.
- Possess the highest professional qualifications, ethical standards, character, integrity, professional expertise and leadership.
- Demonstrate a commitment to fostering and furthering the objectives of the Workers' Compensation Section of the State Bar.
- Provide exceptionally high quality professional services to clients, magistrates and the public.
- Provide significant evidence of scholarship, teaching, lecturing and/or distinguished published work in the field of Workers' Compensation.
- Stand out to newer attorneys as model of professionalism in deportment and advocacy; a person who should be emulated.
- Have earned the respect of the bench, opposing counsel and the Workers' Compensation community.
- Display civility in an adversarial relationship.
- Avoid allowing the ideology differences to affect civility in negotiations, litigation and other aspects of law practice.
- Demonstrate an active interest in resolving issues.
- Have a thirst for knowledge in all areas of the law that affects their representation of their clients in Workers' Compensation and actively participates in the Workers' Compensation Section.
- Have a reputation as an individual with broad knowledge and involvement in all aspects of Workers' Compensation law.

Please note that many people may be nominated, but only two will be elected.

The Committee will narrow down the nominations to the top four candidates. The Council will have the final vote on the two selected and they will advise the candidates of their selection.

Hall of Fame Members as of December, 2016

Adams, Ralph
Anderson, Richard A - 2009
Baril, John - 2010
Barney, Michael - 2008
Baxter, James
Benham, Robert Jr.
Calkins, Gary - 1998
Callie, Albert - 2002
Cardew, Ray - 2010
Carothers, Clarence
Charfoos, Myron - 2015
Charfoos, Samuel
Charters, John - 2014
Child, Libby - 1999
Cohen, Norton - 2000
Conklin, S. Gerard
Cooke, Molly
Cypher, Thomas - 2015
Czyrka, Bruno - 2002
Day, Nancy - 2009
Ducey, Donald - 1998
Flynn, Michael - 2013
Ganos, George
Griffin, Bruce
Gilman, Michael - 2002
Groesser, Terrence L. - 2016
Hodges, Robert C. - 1998
Hogle, Mark - 2002
Hughes, Timothy - 1999
Jaaskelainen, Gordon
Kelman, Jerome - 1998
Knapp, Donald
Korth, Nadine - 1999
Lacey, Ralph
Lazar, Paul - 2014
Levasseur, Norman - 2000
Loria, Donald
Listman, William - 2008
MacDonald, Robert J. - 2000
Marcus, Benjamin
McCroskey, Jerry S.
McNally, Thomas - 2012
Millender, Robert
Miron, John P.
Mitseff, Carl - 2000
Munroe, Peter
Nunn, Jeanne
Perkins, William
Powell, Eleanor - 2001
Poxson, Elijah
Rappaport, Roger - 2008
Rappaport, Raymond
Reamon, William G. - 2001
Richardson, Gerald - 2012
Ryan, Theodore
Ryan, James - 2008
Salisbury, Daryle - 2016
Schmidt, Richard
Skutt, Richard - 1999
Storie, H. Delbert
Stromaier, Alan
Tennis, Darrell
Timmer, James - 2011
Tomas, Paul - 2009
Trucks, Jay F. - 2011
Vahrtian, Ervin
Welch, Edward - 1999
Wilcox, Joseph - 2001
Will, Rodger - 2002
Woll, Arthur - 2009
Zielesch, Eileen Z



WORKERS' COMPENSATION LAW SECTION

Registration

Register online at <http://e.michbar.org>
 Meeting Registration Deadline: June 8, 2017

Summer Annual Meeting ● June 22-24, 2017

Mission Point Resort ● Mackinac Island, Michigan

Agenda

Thursday, June 22

- 4:00 p.m. Council Meeting (Harrisonville)
- 6:00 p.m. Cocktail Party (Courtside Patio)
- 7:00 p.m. Hall of Fame Induction Ceremony and Dinner (Summit Room)
- 9:00 p.m. After Party (TBD)

Friday, June 23

- 7:00-9:00 a.m. Breakfast (Voucher-Round Island Bar & Grill)
- 9:00-12:00 p.m. Annual Meeting and Elections (Sugarloaf)
- 12:00-6:00 p.m. Lunch and afternoon on your own
- 6:00-7:30 p.m. TBD

Optional Friday Afternoon Event

1:00 pm Group Bike Ride--Details to be posted at the hotel--
 No sign up needed. Contact Tim Esper at 313-820-0840 or jte@jtesperlaw.com

Visit Fort Mackinac, browse the shops on Main Street, or relax at the Spa

- Resort reservations cannot be made with this form. You must call 1-800-833-7711 to make reservation and indicate it is for State Bar Workers' Comp Law Section by **May 8, 2017**.
- **For additional information** about this event contact:
 Ella Parker, ella.parker@accidentfund.com
 Rick Lovernick, rlovernick@conklinbenham.com
 John Combs, jcombs@hickeycombs.com

P #: _____

Name: _____

Adult Guest(s): _____

Child(ren): _____

Your Firm: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: (_____) _____

E-mail Address: _____

Enclosed is check # _____ for \$ _____

Please make check payable to: STATE BAR OF MICHIGAN

To pay by credit card visit <http://e.michbar.org>

Cost

- Section Member - attending Annual Meeting (9-a.m-Noon) ONLY...FREE
- Section Member or Attorneys \$60
 (includes all meetings, events, 2 drink tickets for the cocktail party, and Friday morning's breakfast buffet)
- Guest of Attorney (registration for Hall of Fame Ceremony) \$30 x _____ = \$ _____
 (includes 2 drink tickets for the cocktail party, HOF ceremony & dinner, and Friday morning's breakfast buffet)
- Children under 16 year of age attending Hall of Fame ceremony \$15 x _____ = \$ _____
 (includes HOF ceremony & dinner, and Friday morning's breakfast buffet)

Total = \$ _____

Mail your check with the completed registration form to:

State Bar of Michigan
 Attn: Seminar Registration
 Michael Franck Building
 306 Townsend Street
 Lansing, MI 48933

Cancellations: All cancellations must be received at least 48 business hours before the start of the event and registration refunds are subject to a \$20 cancellation fee. Cancellations must be received in writing by e-mail (tbellinger@mail.michbar.org), fax (517-372-5921 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.) No refunds will be made for requests received after that time. Refunds will be issued in the same form payment was made. Please allow two weeks for processing. Registrants who cancel will not receive seminar materials.



Welcomes the
State Bar Workers Disability Compensation Law 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.

FERRY SERVICE TO THE ISLAND

As a carrier for Mission Point Resort, **Shepler's Ferry Company** ferry service will offer the guests of **State Bar Workers Disability Compensation Law Section** a discounted price per round trip ticket for adults & children. Self-parking (complimentary) or valet parking is available. Please visit the Shepler's Ferry website for ferry schedule & plan your travel itinerary accordingly.
www.sheplersferry.com

HORSE DRAWN SHUTTLE SERVICE

There is a hotel shuttle that meets each boat as it arrives on Mackinac Island. This service is \$5, per person, and cash is paid directly to the driver. If you are experiencing a delay between shuttles, please call Mackinac Island Carriage Tours Taxi at [906-847-3323](tel:906-847-3323). Please note that this service is not owned, or operated, by Mission Point Resort. Cost is always subject to change without notice.

EXPLANATION OF TRANSPORTING PERSONAL ITEMS

- Upon arrival to the ferry dock, all vehicles & guests will be greeted by a Shepler's dock porter
- Dock porters will unload all luggage items and tag them with a Mission Point Resort tag
- All luggage items will be loaded onto a cart & the guest will receive luggage claim tickets for all items
- Upon arrival to the island, the cart with luggage items will be taken to the resort by horse drawn carriage
- Guests will have the option to walk to the resort or take a horse drawn shuttle service. The distance is approximately ¾ mile
- Upon arrival to the resort, the front desk agent will ask for your luggage claim tickets
- All luggage will be delivered by our bellmen to your hotel room
- Upon departure, bellmen will come to the sleeping room to provide outgoing tags
- Items will be held in a secure holding area on the mainland until they are claimed with the outgoing claim ticket
- If you have business items to transport, please contact your Conference Service Manager for shipping instructions

Caselaw Update

By Martin L. Critchell

Since the last edition of the Newsletter, the Michigan Supreme Court has not announced a ruling concerning workers' compensation or accepted a case to consider a question concerning workers' compensation.

The Michigan Court of Appeals issued three opinions, *Florian v Grimm*,¹ *Adamiak v Adamiak*,² and *Walker v Dep't of Licensing & Regulatory Affairs/Workers Compensation Agency*.³ None are authoritative having not been released for publication,⁴ and none should even be cited given that existing authority was simply recognized and applied.⁵

The pronouncement by the Court of Appeals that "[Robert G.] Florian had no duty to seek lower-paying unskilled or light work"⁶ simply recognized and applied the ruling by the Court in *Stokes v Chrysler LLC*⁷ that "[t]he claimant must make a good-faith attempt to procure post-injury employment if there are jobs at the **same salary or higher** that he is qualified and trained to perform and the claimant's work-related injury does not preclude..."

In *Adamiak*, the court of appeals refused to consider the claim by Connie Joan Adamiak to all of the settlement of workers' compensation by her husband, Edward, because she had not objected to the treatment of the settlement as separate or non-marital property during the trial of her divorce. *Adamiak*.⁸ ("At trial, [Edward William Adamiak] asked that that settlement [of workers' compensation] be considered separate, non-marital property, and [Connie Joan Adamiak] did not object. However, in [Connie Joan's] motion for reconsideration, [she] argued for some portion of the settlement...[B]ecause [Connie Joan] first raised the issue of the workers' compensation settlement in her motion for reconsideration, it is not properly preserved.") Plainly, *Adamiak* is more about saving an issue for review than about the propriety of the workers' compensation settlement as separate or non-marital property and there is much, published authority about that.

In *Walker*, the court of appeals ruled that the Workers' Compensation Board of Magistrates had original subject-matter jurisdiction to decide the validity and efficacy of an Insurer's Notice of Insurance Policy or so-called Form 400 because of the existing, published authority of the Board's rules. *Walker*.⁹ ("To the extent [Joseph M. Walker] was objecting to the use of this form with respect to his workers' compensation claim, Mich Admin Code, R 792.11305(2) indicates that the forum in which the issue had to be raised was in the hearing before the [Board of Magistrates.]") (The problem occurred because Walker had filed a lawsuit in a circuit court

to declare the Form 400 invalid at the specific direction of the Michigan Court of Claims where he had first sued to invalidate the Form 400. (*Walker*.¹⁰)

The Michigan Compensation Appellate Commission issued three opinions that are noteworthy given each involved the availability of a sanction for particular conduct or inaction, *Olivares v Performance Abatement Services*,¹¹ *Capen v Omnisource Corp*,¹² and *Choppa v Clinton Twp*.¹³ Although none are binding as each decision was from a panel of three Commissioners,¹⁴ the application of the law is noteworthy because the circumstances that were involved commonly occur.

The case of *Olivares* involved the sanctions that are and are not available to the Workers' Compensation Board of Magistrates and the Appellate Commission when an employee files an application for mediation or hearing that is identical to a succession of applications that followed the disposition of the original application after a full hearing and that was final. *Olivares*.¹⁵

The Appellate Commission ruled that the only sanction that was available to the Board of Magistrates was dismissal of the application as barred by the disposition of the original application. *Olivares*.¹⁶ ("[The Board of Magistrates] concluded that [Joseph F. Olivares] did not allege a change of condition. Therefore, the [Board] concluded that [Olivares'] allegations are barred by the doctrine of *res judicata*.***The [Board] is correct.") This was the sanction as the Appellate Commission could not dismiss the application because Olivares had not paid a sanction that had been imposed by the court of appeals for an earlier appeal deemed vexatious. *Olivares*.¹⁷ ("it is not within the purview of the [Board] to enforce the Court of Appeals order [requiring Olivares to pay sanctions of \$250,000 and [Performance Abatement's] expenses of \$8,962.50 before any filing with the Court of Appeals.]")

The Appellate Commission also ruled that *it* could sanction Olivares for having appealed the decision by the Board dismissing the application by the terms of the doctrine of *res judicata*. *Olivares*.¹⁸ ("we warned [Olivares] that any attempt to re-litigate those [prior] opinions and orders would subject [him] to sanctions... We find that [his] current appeal is vexatious and dismiss his claim for review. Costs are assessed at the amount of \$2,500.00.")

The case of *Capen* involved the sanction available for the tardy payment of bills for medical care. After a decision allowing workers' compensation and the costs of certain

Continued on next page

medical care, the lawyer representing William H. Capen sent the bills to the lawyer representing Omnisource Corp and its workers' compensation insurer, Sentry Insurance, by certified mail. *Capen*.¹⁹ It was "unclear" what Omnisource's lawyer did upon receiving the bills. *Capen*.²⁰

The Appellate Commission ruled that a late payment penalty was not available after the bills went unpaid after thirty days because "the carrier did not receive notice of the bills being due..." *Capen*.²¹ Sending the bills to the lawyer was of no consequence because "relaying the bills through the carrier's attorney raises questions about notice and short circuits the very clearly written penalty statute." *Capen*.²² There was no mention of the rule that notice to a lawyer *is* notice to the person who hired the lawyer.²³

In the case of *Choppa*, the Workers' Compensation Board of Magistrates dismissed the application for mediation or hearing by an order stating that the reason was "for lack of progress" and adding that "[p]laintiff's attorney has been present to [sic at] all scheduled hearings. *Choppa*.²⁴

The Appellate Commission recognized that the Board of Magistrates had the authority to dismiss an application "for lack of progress," *Choppa*,²⁵ but ruled that authority could be exercised only after an evidentiary hearing to describe the particular circumstances to warrant a conclusion that there had been a lack of progress and the reason for that inaction. The Appellate Commission said nothing about judicial notice of the case file indicating the kind of hearings that had been convened and when each had occurred which might have revealed a pattern of adjournment without any action before another adjournment. ✖

Endnotes

- 1 Unpublished opinion of the Court of Appeals, issued on November 8, 2016 (Docket nos. 328451, 328460).
- 2 Unpublished opinion of the Court of Appeals, issued on December 1, 2016 (Docket no. 329611).
- 3 Unpublished opinion of the Court of Appeals, issued on January 24, 2017.

- 4 MCR 7.212(C)(1), first sentence. ("An unpublished opinion [of the Michigan court of appeals] is not precedentially binding under the rule of stare decisis.")
- 5 *Id.*, second sentence. ("Unpublished opinions should not be cited for propositions of law for which there is published authority.")
- 6 *Florian* at 7.
- 7 481 Mich 266, 283, 750 NW2d 129 (2008). (emphasis added)
- 8 Unpublished opinion of the Court of Appeals, issued on December 1, 2016 (Docket no. 329611) at 2.
- 9 Unpublished opinion of the Court of Appeals, issued on January 24, 2017 (Docket no. 328721) at 4.
- 10 *Id.* at 3.
- 11 2016 Mich ACO 19.
- 12 2016 Mich ACO 21.
- 13 2016 Mich ACO 25.
- 14 *Marshall v D J Jacobetti Veterans Facility (After Remand)*, 447 Mich 544, 548-549; 526 NW2d 585 (1994).
- 15 2016 Mich ACO 19, 2.
- 16 *Id.* at 1.
- 17 *Id.*
- 18 *Id.* at 2.
- 19 2016 Mich ACO 21, 1, 8.
- 20 *Id.* at 2.
- 21 *Id.*
- 22 *Id.* at 8.
- 23 *Dickinson v Dustin*, 21 Mich 561 (1870). *Kastle v Clemmons*, 330 Mich 28; 46 NW2d 450 (1951).
- 24 2016 Mich ACO 25, 1.
- 25 *Id.* at 3.

