Fall 2002

Workers Compensation
Section Newsletter

State Bar of Michigan Workers Compensation Section

Michigan Supreme Court Reverses *Haske* In *Sington*

In a fifty-two-page opinion, which includes an 11 page full dissent, a partial dissent, a concurring opinion and an unusual rebuttal of the dissent within the majority opinion, the high court has turned the workers' compensation law on its head. The court specifically overruled *Haske*, but does not mention *Sobotka*. Does this mean we will be using vocational experts again to determine Wage Earning Capacity? Who has the burden of proof? What impact will this have on the practice of workers' compensation law? To help you find the answers to these and other questions, see the case summary by Jerry Marcinkoski in this issue and plan on attending the program immediately after the 9:30 a.m. annual meeting on September 27 in Grand Rapids where Marcinkoski will once again square off with Daryl Royal (in the plaintiff trunks).

Annual Meeting
September 27, 2002 in Grand Rapids

The annual Business Meeting and Election of council members of the Workers' Compensation Section will take place at 9:30 am in the Pearl Room of the Amway Grand Plaza Hotel in downtown Grand Rapids. Among the items to be discussed at the meeting are:

1. The conclusions, consensus, and inferences, etc. to be drawn from the open meeting set by the Bureau for 9/6/02 at the Holiday Inn in Howell to discuss Medicaid and Sington issues.
2. The Council's recommendation to amend the Section By Laws to increase Dues by $5.00. This will be presented to the membership for vote at the State Bar Meeting in Grand Rapids.
3. Chas. Gilfeather's tentative schedule (or at least a location) for both Winter and Spring Meetings.

At 10 am Gerald Marcinkoski and Daryl Royal will present the defense and plaintiff perspectives on the recent Michigan Supreme Court ruling in *Sington* and as well as discussing other cases of note. This should prove to be an informative, if not vital program. For your convenience, you may register on line at *www.michbar.org*.

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RECENT COURT DECISIONS

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

Haske's Definition Of Disability Overruled

In *Sington v Chrysler Corporation (a/k/a DaimlerChrysler Corporation),* ____ Mich ____ (2002)(SC Docket No. 119291, filed July 31, 2002), the Supreme Court overruled the interpretation of "disability" set forth in *Haske v Transport Leasing, Inc., Indiana,* 455 Mich 628 (1997). *Haske* had said that the inability to do any job within one's qualifications and training equates with "disability." *Sington* says that there is no "disability" unless the employee is unable to do all equal paying jobs within one's pre-injury qualifications and training.
Sington summarized its overruling of *Haske*'s interpretation of the definition of disability, saying:

> In sum, we conclude, as did the Rea Court before use, that "disability" as defined in MCL 418.301(4) cannot plausibly be read as describing an employee who is unable to perform one particular job because of a work-related injury, but who suffers no reduction in wage earning capacity.

> *Sington* says disability is now established:
> If the employee is no longer able to perform any of the jobs that pay the maximum wages, given the employee's training and qualifications . . . .
>
> * * *
>
> . . . . Whether "a limitation" exists in an individual's "wage-earning capacity" where that individual is qualified and trained in more than one job therefore requires consideration of the effect of the work-related disease or injury on earning capacity in *all those jobs* in which the individual is qualified and trained. (Emphasis in original).

Or, put differently:

> . . . a condition that rendered an employee unable to perform a job paying the maximum salary, given the employee's qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training would not constitute a disability.

The facts giving rise to the above rule were as follows: Sington suffered a work-related shoulder injury. He underwent surgery and was voluntarily paid weekly workers' compensation for a time. After the surgery, he returned to work for DaimlerChrysler. He returned to the same department and classification that he occupied before the injury, but he now had permanent restrictions. His restrictions prevented him from performing tasks in his department that required above-the-shoulder work. DaimlerChrysler accommodated the restrictions. Sington's wages after the injury were the same as he had earned before the injury. He worked within his restrictions for about 2 years until he suffered a non-work-related stroke while on vacation. He never returned to work after the stroke.

The Court of Appeals, reversing the Magistrate and Appellate Commission, had held that plaintiff satisfied the definition of disability. Since he was disabled (under *Haske*'s interpretation of "disability"), the Court of Appeals had said plaintiff was laboring at favored work/"reasonable employment" while working under restrictions. And, since he lost such post-injury work due to a stroke, the Court of Appeals had said plaintiff was entitled to a resumption of weekly benefits under the favored work/ "reasonable employment" provisions, *e.g.*, benefits resume where the employee loses a job "for whatever reason" within 100 weeks or "through no fault of the employee" after 100 weeks.

The Supreme Court disagreed. The Supreme Court held that the Court of Appeals' decision was premised on *Haske*'s interpretation of disability and *Haske*'s interpretation was wrong. Sington's inability to do some work did not necessarily equate with disability and his performance of post-injury accommodated work did not necessarily render such work favored work/ "reasonable employment" if it was an equal paying work within his pre-injury qualifications and training reflecting an undiminished wage-earning capacity. The Supreme Court therefore remanded the case to the Worker's Compensation Appellate Commission for reconsideration in light of the new interpretation of the definition of "disability."

The *Sington* decision and the changes it effects in trying workers' compensation cases will be a topic of Worker's Compensation Section's discussions on September 6, 2002 (in Howell) and at the Section meeting in conjunction with State Bar meeting on September 27, 2002 (in Grand Rapids).

Appeal Dismissed For Failure To Timely Request An Extension Of Time To File Transcripts

In *Kurtz v Faygo Beverages, Inc,* ____ Mich ____ (2002)(SC Docket No. 118723, filed May 29, 2002), the employer prevailed with a petition to stop compensation benefits. The employee appealed to the Worker's Compensation Appellate Commission. But, the plaintiff did not file the trial transcripts within the statutory deadline. The Commission therefore dismissed the appeal, but added in its order that it would "consider a timely motion for reconsideration supported by affidavit or other evidence, showing that the reason for the tardy filing was beyond plaintiff's control." Plaintiff filed a motion for reconsideration explaining that he could not file the transcript in time because the court reporter did not complete the transcript by the deadline. The Commission issued an order denying reconsideration because no timely request for an extension of time to file the transcript had been filed.

The Court of Appeals reversed the Commission. But, on further appeal the Supreme Court reversed the Court of Appeals and reinstated the Commission's dismissal.

The Supreme Court said that the plaintiff's explanation for his failure to timely file the transcript did not excuse the failure to timely request an extension of time to file the transcript. The Supreme Court said that "a court reporter's delay in preparing a transcript does not necessarily excuse the late filing where the appellant fails to request an extension of time."

The Coordination Of Lump Sum Pensions

The Supreme Court has decided an unemployment compensation case, *Koontz v Ameritech Services, Inc,* ____ Mich ____ (2002)(SC Docket No. 116366, filed June 12, 2002), which is relevant to coordination of benefits in workers' compensation. Specifically, in resolving *Koontz* the Supreme Court overruled in part its holding in the workers' compensation case: *White v McLouth Steel Products*, one case in the trilogy whose lead case was: *Corbett v Plymouth Township*, 453 Mich 522 (1996).

The plaintiff in *Koontz* had received a lump sum pension and rolled it over into her IRA. The question presented was whether, given the rollover, she actually "received" the pension so as to permit coordination of the pension with her unemployment compensation benefits. The Supreme Court said that when a pension is rolled over into an IRA the employee has "received" it and, therefore, the pension is available for coordination of benefits. To reach this result, the Court had to overrule in part the workers' compensation case, *White v McLouth Steel Products*. In *White*, the Supreme Court had said that an employee does not "receive" pension benefits where the employee rolls the benefits over into an IRA and, per *White*, such pension is not available for coordination against workers' compensation benefits.

The *Koontz* Court noted that there was a secondary basis for the Supreme Court's decision in *White* not presented in *Koontz*. Specifically, the workers' compensation coordination provision refers to the "after tax" amount of the pension. MCL 418.354. By contrast, the unemployment compensation statute does not refer to the "after tax" amount. The *Koontz* Court said that, "We do not decide whether that aspect of *White* was decided correctly because it is irrelevant to our determination in this case."

Other Cases Pending Before Supreme Court

- *Sweatt v Department of Corrections* [application of the exemption from compensation "for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime" in § 361(1)].

Continued on page 4

Recent Court Decisions

Continued from page 3

- *Auto-Owners v Amoco Production Co* [whether a no fault carrier is entitled to be fully reimbursed for medical expenses from the workers' compensation carrier or whether the no fault carrier is subject to cost containment limitations, and whether 10% interest attaches to the medical reimbursement].
- *Daniel v Department of Corrections* [was employee's mental injury barred by his intentional and wilful misconduct?].

Court of Appeals

Voluntary Pays-Penalties

In *Morley and Bureau of Worker's Disability Compensation v General Motors Corporation/Benford v Delphi Automotive Systems Corp*, ____ Mich App ____ (2002)(CA Docket Nos. 233923, 233929, 234298, released for publication July 19, 2002), the Court of Appeals held that voluntary payment agreements are enforceable and the defendants' failure to pay pursuant to voluntary pay agreements within 30 days leaves the defendant liable for a penalty of $50 per day up to a maximum of $1,500 under MCL 418.801(2).

The plaintiffs in these consolidated cases resolved their claims by entering into voluntary pay agreements with their respective employers. The agreements were signed by the Magistrate and personally served on the parties. Neither plaintiff received payment within 30 days following the time the agreements were signed by the Magistrate and served on the parties. Therefore, they filed for penalties. The Magistrate granted penalties, but the Commission reversed. The Commission did so by concluding, as it had in a number of prior cases, that "no authority existed for awarding penalties because the voluntary payment agreements failed to constitute an enforceable order."

The Court of Appeals disagreed. The Court said while the Act explicitly recognizes the enforceability of decisions on the merits and redemptions that does not mean voluntary pay agreements are unenforceable. The Court said that the penalty provision recognizes the concept of voluntary payments where it describes penalties being imposed "in cases where there is no ongoing dispute". The Court also cited Administrate Rule 3(2)(b) which describes penalties being imposed where the employer agrees to pay benefits on a voluntary basis. The Court added that its holding does not interfere with MCL 418.831, which says that voluntary payment is not a determination of rights under the act, because § 831's language is contained on the voluntary pay form itself.

Rate Tables In Partial Disability Cases

In *Linton v Schafer Bakeries, Inc/Vaughn v Schafer Bakeries, Inc,* ____ Mich App ____ (2002)(CA Docket Nos. 231503 and 232075, released for publication June 25, 2002), the Court of Appeals addressed how to use the rate tables to calculate partial weekly rates of compensation.

In these consolidated cases, the plaintiffs sustained partially disabling work injuries and subsequently worked at light duty jobs for the ensuing years at lesser pay. Consequently, their weekly rates had to be calculated with reference to the partial disability provision, MCL 418.361(1).

The specific question presented was: In the years after the plaintiffs' dates of injury, do you continue to refer to the rate tables published for the year in which the injury occurred. Or, is the appropriate rate table the table published for the year in which the post-injury wages were earned?

The Court of Appeals, affirming the Commission, held that "when calculating partial disability benefits under MCL 418.361(1), the rate table for the year in which the claimant was injured should be consulted to determine a worker's average weekly wage at the time of injury, but for subsequent years in which wages were earned, the rate table for the year of those earnings should be consulted."

Section 222

In *McComber v McGuire Steel Erection, Inc,* ____ Mich App ____ (2002)(CA Docket No. 232776, released for publication May 31, 2002), the Court of Appeals addressed application of MCL 418.222 for plaintiff's alleged wilful non-compliance in failing to disclose subsequent employment on his application for mediation or hearing.

Plaintiff had suffered a work injury, eventually returned to work for his employer, but was then laid off in approximately 2 months. After his layoff, plaintiff worked briefly, 3-4 weeks, for US Steel in New York. Plaintiff quit working there because of pain which he attributed to his work injury.

A month after ceasing work in New York, plaintiff filed his application for mediation or hearing in Michigan. His application did not disclose the fact that he had worked at US Steel. At the start of the proceedings, defendant moved to preclude plaintiff from proceeding, alleging that plaintiff's failure to disclose his subsequent employment was wilful. The Magistrate denied the motion on the basis defendant had been aware of the omission in advance of the hearing and, as a consequence, there was no prejudice to defendant.

Defendant appealed, claiming that the Magistrate improperly denied the § 222 motion. The Commission agreed with defendant, stating that whether defendant was prejudiced did not matter. Instead, the only proper question was whether plaintiff wilfully failed to disclose his subsequent employment. As a result, the Commission remanded the matter for the Magistrate to answer that question.

On remand, the Magistrate found no wilful failure to comply. The Magistrate did so after plaintiff testified that he told his original attorney about his subsequent employment. The original attorney referred plaintiff to a different attorney who filed the application without having a direct conversation with plaintiff

on that particular point, although plaintiff said he told the second attorney's secretary about the subsequent employment. The Magistrate found that, since plaintiff had provided the information to the attorneys (or their offices) and did not know why it was not contained on his application, one could not infer that plaintiff intentionally withheld information. On appeal, the Commission disagreed saying that plaintiff's act of knowingly signing a document which lacked the requisite information constituted a willful failure to comply with § 222.

The Court of Appeals in turn reversed the Commission. The Court said that a party must "consciously, intentionally or deliberately fail to provide the information or materials required by § 222" in order to be prohibited from proceeding under § 222. The Court said that the "relevant inquiry" was "why was that employment not disclosed on his application?" In light of the fact that plaintiff did disclose subsequent employment to his original attorney and to his second attorney's secretary, the Court said that - in the absence of other evidence - it was equally plausible that plaintiff merely made a mistake or was careless in reviewing the application he signed. Therefore, the Magistrate correctly did not impose § 222's sanction.

Workers Compensation Appellate Commission

Offset For Net Profit In Post-Injury Business

In *Gordon v Henry Ford Health System*, 2002 ACO #23, plaintiff had been receiving weekly compensation benefits pursuant to an earlier award. In a petition to stop, the defendant claimed an offset or credit, under MCL 418.371(1) and MCL 418.361(1), for plaintiff's post-injury earnings attributable to her ownership of a group adult foster care home as well as earnings from rental properties. The Magistrate denied the credit. In an *en banc* decision, the Commission reversed that part of the Magistrate's decision denying credit for the net profit from plaintiff's business.

The Commission held that:

> We believe the correct rule is that an employer may receive credit for the net earnings of an individual who is able to operate an independent business after injury without regard to whether those earnings are denominated wages or profits. To refuse to permit credit in such a situation would enrich the employee at the employer's expense simply because the employee chose to operate her own business rather than return to service with another employer. We recognize that an employee who receives only income from passive investment in a business enterprise, without engaging in any substantial work in furtherance of the business enterprise, may not be charged with creditable earnings to offset compensation.

Consequently, the employer was entitled to offset the net profits from plaintiff's business, but denied credit for income from plaintiff's rental property.

Illegal Aliens

The Commission was deeply divided in the *en banc* case, *Vasquez v Eagle Alloy, Inc*, 2002 ACO #24. The issue was whether an injured illegal alien is entitled to workers' compensation benefits. In the controlling opinion, the Commission held that an illegal alien was not entitled to weekly benefits under MCL 418.361(1)'s language which says employers are not liable for compensation "for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime."

The Commission majority held that an undocumented worker "must commit multiple crimes in order to *obtain*" work, violating both federal and state statutes. Therefore, the Commission agreed with the Magistrate that "an undocumented worker's employment [was] impossible without committing a crime. Section 361 mandates that an undocumented alien's benefits are suspended during the period of his undocumented status." The Commission added that under § 361(1) "the suspension of benefits under section 361 ends when plaintiff can work without violating the law."

An additional reason offered by some Commissioners concurring with the controlling opinion was that there was no valid contract of hire.

Workers Compensation Section Newsletter

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Alexander T. Ornstein, Chairperson

Tim McAree, 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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Date: August 21, 2002

ANNOUNCEMENT

To: All Interested Individuals

From: Craig R. Petersen, Deputy Director

Subject: Claims Assigned to Mediation

In anticipation of adoption of the department's recommendation to reduce the number of mediators on or before November 1, 2002, I have instructed the bureau staff to limit the type of claims being assigned to mediation. Only the following claims will continue to be assigned to mediation:

- Closed-Period Claims
- Health Care Services Rules Hearings – 104Bs
- Medical-Only Claims
- No Record Of Insurance Coverage
- Penalty-Only Applications
- Unrepresented Parties
- Vocational Rehabilitation/ First Level Hearings

Application forms that have checked the mediation box "Yes," but do not meet the criteria above will be assigned for a pretrial before a magistrate.

Claims adjourned in mediation with new dates scheduled past November 1, 2002, should be transferred to the assigned magistrate until mediation docket schedules are determined by the bureau.

If you have any questions, please contact Craig Petersen at 517-322-1296 or *cpeter@michigan.gov.*

Governor Engler appoints Eleanor Powell to the Funds Administration-Board of Trustees effective June 24, 2002.

Governor Engler has appointed Eleanor Powell to the Funds Administration-Board of Trustees effective June 24, 2002. These are State administered workers' compensation funds consisting of the Second Injury Fund, Silicosis, Dust Disease and Logging Industry Compensation Fund, and the Self Insurers' Security Fund.

Powell is President and CEO of Michigan Construction Industry Mutual, a specialty carrier that provides workers' compensation coverage to employers in the construction and manufacturing sectors. She has maintained this leadership roll since 1984 and directed the organizational transfer of the Michigan Construction Industry Self-Insurers' Fund into Michigan Construction Industry Mutual on January 1, 2000. This was the first self-insured group fund to convert to a mutual insurance company in Michigan history.

Other accomplishments include appointment to the Workers' Compensation Appeal Board by then-Governor William Milliken in 1980, prior appointment to the Funds Administration-Board of Trustees from 1993 to 1999 by Governor Engler where she was representing the self-insured industry, and former member of the Michigan Self-Insurers Association and the Michigan Council of Self-Insured Group Administrators.

As trustee, Powell will be representing the insurance industry in the State of Michigan. Her term will expire in 2006.

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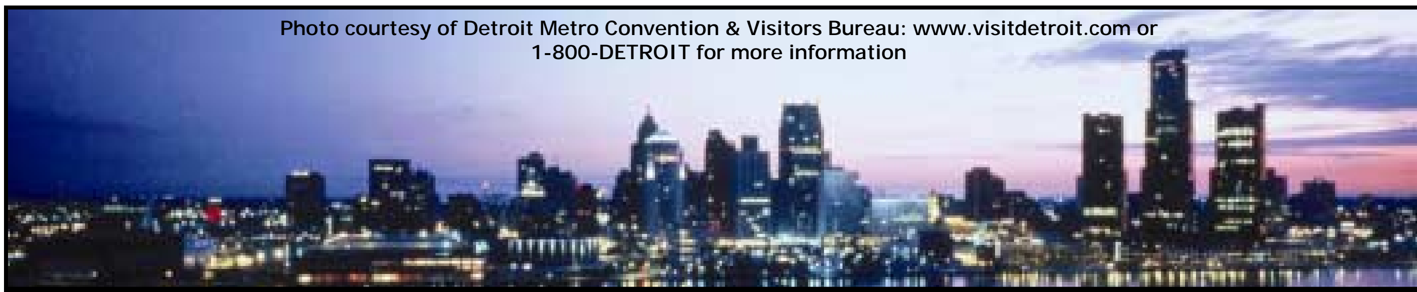


DETROIT TENTATIVE PROGRAM

International Association of Industrial Accident Boards and Commissions

88th Annual IAIABC Convention
October 5 - 9, 2002
Detroit Marriott Renaissance Hotel

October 4 and 5, 2002
EDI Committees
EDI 101, 201, and 301 training

Saturday, October 5, 2002
1:00 – 5:00 p.m. Registration
1:00 – 5:00 p.m. Executive Committee
1:30 – 3:00 p.m. *"Lessons Learned on Managed Care Performance Indicators for Workers' Compensation,"* panel discussion sponsored by Robert Wood Johnson Foundation
2:00 – 4:00 p.m. Standing/Committee Chairs
2:30 – 3:00 p.m. Refreshment Break – Exhibit

Sunday, October 6, 2002
(All committees meet throughout the day)
10:00 – 2:00 p.m. Exhibitor Setup
Noon – 3:00 p.m. Commissioner's Roundtable Lunch
3:30 – 5:00 p.m. Committee Leadership Training (Survey Design)
6:30 – 9:00 p.m. President's Reception

Monday, October 7, 2002
8:00 – 4:00 p.m. Exhibit Hall Open
8:30 – 3:00 p.m. General Session
8:30 a.m. Welcome – Craig Petersen, President & Convention Host
8:45 a.m. Welcome to Michigan – (TPA)
9:30 – 10:30 a.m. *"Navigating the Turmoil in Self-Insurance Bankruptcy Surety and Excess Insurance Markets,"* (Panel discussion)
11:00 – Noon *"Federal Bankruptcy: Handling a Self-Insured Employer Insolvency,"* Karen Cordry, Bankruptcy Counsel for the National Association of Attorneys General
11:00 – Noon *"Ergonomic Standards: Where is OSHA Headed?"*
1:30 – 2:30 p.m. *"HIPAA – Medical Privacy – Workers' Compensation,"* Panel Discussion
3:00 – 4:00 p.m. *"Guides for Rating Permanent Impairment: Discussion of the Special Needs for Workers' Compensation"* (By committee)
5:30 – 9:00 p.m. Henry Ford Museum

Tuesday, October 8, 2002
8:00 – 3:00 p.m. EDI-Claims/Systems
8:00 – 4:00 p.m. Exhibit Hall Open
8:30 – 9:30 a.m. *"Comparison & Trends Concerning Cost Containment Fee Schedules in Workers' Compensation,"* WCRI Staff
8:30 – Noon General Session - Business Meeting
9:30 – 10:00 a.m. *"Sheltered Workshops/Return to Work Programs – Steelcase Experience"*
10:30 – Noon *"Delayed Recovery Concerning Work Related Conditions,"* Dr. James Blessman, M.D.
12:30 p.m. Bus leaves for GM Plant Tour (limited to 50 attendees)
1:30 – 3:00 p.m. Coverage, Compliance
1:30 – 3:00 p.m. *"Information Resources - Where have all the claims gone?"*
1:30 – 3:00 p.m. *"Catastrophic Preparedness: The New York State WC Experience"*
1:30 – 3:00 p.m. *"Benefit Adequacy: A practical method for jurisdictional comparison of temporary benefits"*
1:30 – 3:00 p.m. *Undocumented Workers and WC Coverage*
1:30 – 3:00 p.m. Combined Claims Product Rollout
1:30 – 3:00 p.m. *"Social Security: Electronically Shared Data with State Jurisdictions"*
3:30 – 5:00 p.m. 2002 IAIABC Workers' Compensation Information Product Awards
3:30 – 5:00 p.m. *"Fraud, Misconduct, and Cheating – What you didn't hear on 60 Minutes"*
3:30 – 5:00 p.m. *"Strategies and Interventions to Improve Disability Management and RTW Outcomes"*
3:30 – 5:00 p.m. Associate Member Presentation – *"The Role of the Associate Member Council in the IAIABC*
3:30 – 5:00 p.m. *Medicare Involvement in Structured Settlements*
6:00 – 7:00 p.m. Cocktail Party
7:00 – 11:00 p.m. Annual Banquet and Dance

Wednesday, October 9, 2002
8:30 – 9:30 a.m. Business meeting
9:00 – 5:00 p.m. EDI Council
1:00 – 3:00 p.m. Executive Committee

For additional info on the Detroit 2002 Convention, contact Bruno Czyrka at: Michigan Bureau of Workers' & Unemployment Compensation
E-Mail: bczyrk@michigan.gov
Phone: (517) 322-1106

More information about the convention and the registration form can be downloaded from the **IAIABC website**.

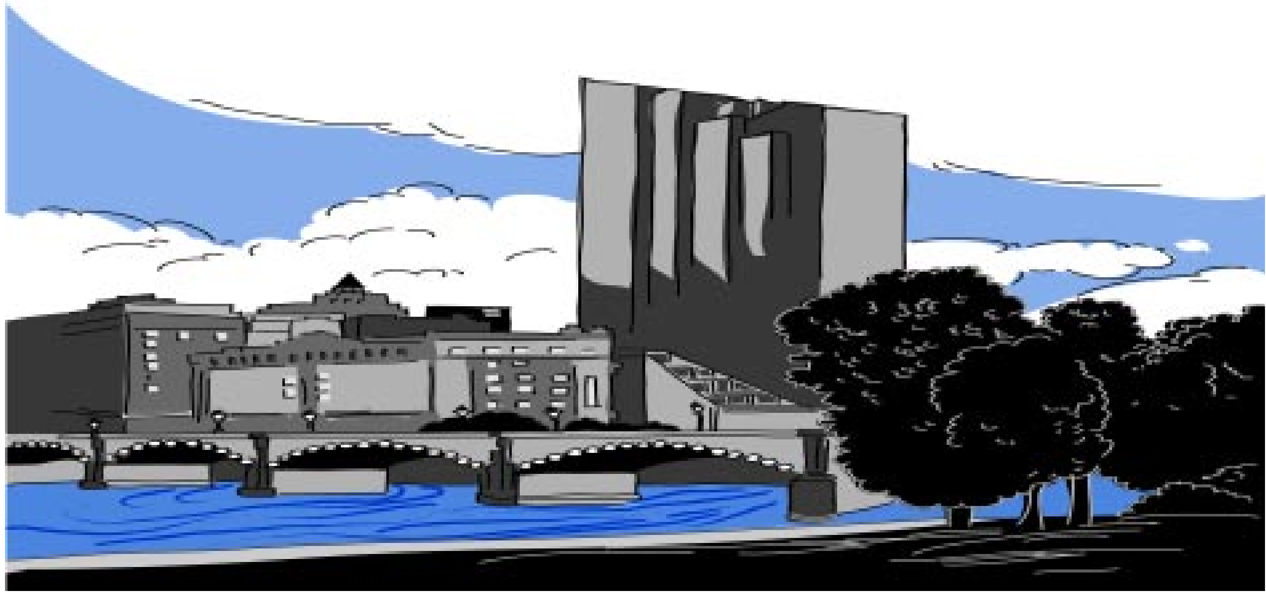
www.iaiabc.org/Meetings/Detroit-2002.htm

The 50-Year Club

Among the many members of the State Bar who will be honored for 50 years of service at the upcoming convention are some names quite familiar to those who have practiced in the workers' compensation arena for more than a few years. The list includes:

Willard Rapleye **Paul Van Hartesveldt** **Ricardo Meana** **Everett Allison**

Join us in extending our congratulations to these "pioneers" of the Michigan workers' compensation practice.



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