

STATE BAR OF MICHIGAN

Workers' Compensation Section Newsletter

Fall 2022



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Workers' Compensation Law Section Winter Meeting

Friday December 9, 2022 | 9 am-Noon

The Inn at St. John | Judea Room
44045 Five Mile Road | Plymouth, MI

Agenda

8: 30-9 am Hot Breakfast

9-10 am General Business Meeting

10-10:15 am Break

10:15-11 am Guest Speaker Nathan Gross MD

A medical synopsis of those afflicted with work injuries while suffering from pre-existing age-related degenerative changes, and the issues associated with proving a medically distinguishable change of pathology.

11-11:15 am Guest Speaker Michael Reinholm-Accident Fund Company

The evolution and history of case law before and after the 2003 Michigan Supreme Court decision in *Rakestraw v General Dynamics* and statutory codification in Sections 301 and 401.

11:15-noon Magistrate Roundtable- Magistrates Kevin Kales, David Williams, Bill Housefield, and David Grunewald

Panel discussion on the application of Section 301 and 401 statutory codification post Rakestraw.

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

Alicia W. Birach, Newsletter Editor

Opinions expressed herein are those
of the authors or the editor and do not
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From the Chair

Workers Compensation Law and the Generational Nexus

Phillip I. Frame, Section Head, State Claims, Labor Division,
Department of Attorney General

It is a funny thing about childhood. Many children spend their childhood dreaming about being astronauts, firemen, ballerinas, doctors, and baseball or football players. It is part of the charm and magic of childhood. It is the magic of being young and thinking the sky was the limit and anything was possible. Reality starts in the about the 5th grade when you realize that maybe being a baseball or football player is just not going to happen when you get cut from the team after tryouts, or when you realize that getting knocked senseless by the kid down the street that is twice your size doesn't seem like fun.

The second dose of reality strikes when you trot off to college and there are kids in college that are born with brains the size of Texas, and you realize that you sadly were not one of them. Those are the astronauts and doctors of today. Oh, the ballerinas, do they really have to stand on their toes all day?

The third dose of reality is after college. You have this piece of parchment and you're loaded with debt from school. Mom and dad proudly say congrats and welcome to real life, you have to pay that debt back with your own money. Now what?

Welcome to real life. Well Dad is a lawyer, and he makes decent money, and he paid back his college debt and has a nice house. Maybe that will work for me. Great, now take on more debt for a law degree. When you get that even larger piece of parchment you can chart your own course in the field of law and practice in any field you like, right?

Funny thing that happens after you get that degree and when you look around in the field of law and realize that what dad does sounds kind of fun and interesting, and you say what the heck, maybe I will try that. Years later here you are doing the same thing as dear ole' dad. You are making a good living and dear ole' dad is slowing down and thinking of warmer climates and greener golf courses to try.

Workers' Compensation has a unique and very warm group of practitioners that do make a nice living and do good work for their clients. What makes this area of practice stand out as exceptionally unique is the frequency by which our children join in our fun.

The generational nexus in workers compensation law has been a curiosity of mine for many years and I decided to recruit many of the names you will see below to help me count the number of parent/grandparent/child combinations in our small practice area. We really have fewer than 100 lawyers actively working, making their living in this practice area on a full-time basis.

I have found 27 different combinations of children or grandchildren who have, for whatever reasons, decided to practice workers' compensation law where their forefathers "toiled".

Here are the results of my curiosity:

1. Ray and Roger Rapaport
2. Lou and Tom Ognisanti
3. Paul and Mary Lazar
4. Jay and Todd Trucks and "sons"

5. Richard and Michael Doud
6. Duncan and Robert MacDonald
7. Tim and Ben Liggett
8. Joseph and Matt Conklin
9. Melody Page and Teresa Martin
10. Michael and Dennis Flynn
11. Jim Geroux and Carrie Barrett
12. Lou Gregory and Paula Gregory-Olivarez
13. Bill Sr. and Bill Jr. and Marti Reamon
14. Jim and Jessica Stark.
15. Karl and Jacob Bender
16. Dick and Randy MacArthur
17. Steve and Jeff Kaufman
18. Bill Sr. and Bill Watkinson Jr.
19. Fred Sr. and Fred Bleakley Jr.
20. John and Nick Charters
21. Roy and Dan Hebert
22. Gary and Brian Galin
23. Norm and Denise Levasseur and Dan King
24. Arthur and Peter Woll
25. Dick and Mark Anderson
26. David IV and David Williams V
27. George and Sandra and John Ganos

The lawyers on the above list should be honored and proud to be part of this fine and very unique tradition of urging and supporting their children's and grandchildren's desire to be part of this practice. For the parent, they must feel pride and great assurance that what they did for a living had value and importance to their child. For the child, it shows respect for his or her father's or mother's chosen craft and provides the child with mentoring from someone the child has known all his or her life.

I spoke with a few active members on this list and what I learned was amazing and encouraging for our practice.

From Jacob Bender I learned:

Growing up it was never really a question of what I was going to do or where I was going to work...I really liked seeing how he was able to help people when they didn't know where else to turn...it is a special opportunity to forge not just a great

personal relationship with your father, but a great professional one as well.

From Jess Stark I discovered:

Working for my dad after law school was supposed to be temporary, but something strange happened: I actually enjoyed practicing workers' compensation...sometimes the mentorship from dad and others has been pure support and sometimes tough love, but I have the benefit of knowing it always comes from a good place.

From my many discussions with Mary Lazar, she always speaks of her dad in loving terms and his support without hesitation. Mary is one, like many others, in the list above that went straight from law school into their parents' law practice. Mary shared what she learned from her dad:

Attitude – the importance of attitude – that is what I learned from my dad. What I am still learning, even now when he is 95 and obviously nearing his final transition. “If you are going to do it, do it with genuine enthusiasm”. I cannot count the number of times I heard it. Like the joke goes, the older I get, the smarter he gets. Never a complaint, never anything but a kind word, even now.

As I sit at his desk at the law firm he and Larry Hanba created, with the employees he hired, I think back to my middle school and high school years. He was 45 years old, with five kids, three in college, and decided to go to law school. He took a course to help him pass the LSAT. I did the grading of his practice tests. I think maybe that connected me to his law school journey and showed me that law school would be a good fit for me.

I've said it before, and it remains true: I realized very early on that all I had to do was to try to do what he did, how he did it, and not screw up, and I'd be successful. Do the work, be prepared, be honest, and I'd do just fine. And he was right.

He instilled in me a love of the work and most importantly the people in this business. As he said countless times, “it beats working!” He is so right.

Having Paul Lazar as my dad and my professional mentor has been an honor and a privilege. I'm the luckiest person in the world!

The practice of workers compensation law has endured over 100 years. There may be fewer cases and fewer players but those that have remained have obviously stayed for many good reasons and it appears our chosen law practice will continue to flourish and remain unique and enriching for generations to come. ✂

Update from the Director

Jack Nolish, Michigan Workers' Disability Compensation Agency Director

The 2022 election has passed. The voters have spoken. The results brought sunny days to many and cloudy days to others. It is time to move on in the latest version of normal. One of my tasks as Director involves addressing a steady stream of complaints from injured workers, employers, and legislators about the ills of Workers' Disability Compensation. What is the most common complaint? The time cases spend on the docket.

Most, if not all, of the readers of this newsletter spend a significant amount of their time reading medical records and reports. Because of this, there should be awareness of the "SOAP" elements of a medical record:

1. **S**ubjective complaints
2. **O**bjective findings
3. **A**ssessment
4. **P**lan

Will this system provide a means of taking care of these WDCA complaints? Now that the patient has arrived at the office, let us apply the SOAP approach to see how these complaints can be treated.

Subjective complaints: "My case is taking too damn long! My lawyer can't seem to get the case to trial. It keeps getting adjourned (sometimes relayed by a state rep or senator)." Vocational Rehabilitation has all but disappeared. The Magistrates indicate that they have the capacity to try cases as needed. There are legislative and precedential pre-existing conditions impacting every part of the contested case body.

Objective findings: WDCA data shows that as of 9/30/2022, **55%** of the cases on the Board of Magistrates docket state-wide are 19 months and older while **39%** are 24 months and older. Both categories are showing only slight improvement from the year before. The average redemption, adjusted for inflation, is **85%** of what it was 10 years ago. Litigation of cases has become complex, costly, and statistically has a limited likelihood of success for an injured worker. Even if wage loss benefits are paid, weekly benefit rates can be reduced by PIWEC, various setoffs and age reduction. Less than 10% of the claims being paid reach the maximum rate for the date of injury. Rates are locked in at date of injury and lose value over time due to inflation. The average weekly wage loss compensation rate is near the federal poverty level for a single worker but falls below that specified for a family of four and way below the United Way's ALICE rate for Michigan.

A Diagnosis: **LLS: Litigium Laboriosus Syndrome**

Plans: As in healthcare, different specialists have different proposals:

- The Legislature Clinic has already recommended and funded three years of temporary magistrates.
- The Lawyer Outpatient Care Facility is recommending significant increase in mediation/facilitation and might consider agency funded arbitration.
- The Walk-in Care State Wide Agency is recommending complete evaluation of the existing WDC Act and processes followed by statutory lobotomy and implantation of modern, equitable statutes.

As the **Perpetually Caring Person (PCP)** in charge of this patient, I do have some ideas.

- The consensus from the bench and bar is that the problem is not the lack of available trial time. Trials are available as needed. Since we need options beyond that provided by the legislature, I am working with LEO legislative staff to see if we can legislatively expand the options provided in the recent supplemental budget that only provides for temporary magistrates.
- Assuming we are able to get the desired flexibility, create a panel of mediators/facilitators that would be paid on a per diem basis and who would not be subject to the limitations and schedule challenges inherent in serving as a temporary magistrate. Making funding available for arbitration as provided in MCL 418.864 would provide another option for parties that has been used successfully in the past.
- It is time for a fresh, objective, top to bottom look at the entire system. The 1984 report by Prof. St. Antoine is more than a little stale. The 40th anniversary of that report should be celebrated with an updated version as provided by statute.

With a protocol consisting of good faith analysis and implementation of needed statutory and administrative rehabilitation, a collegial approach to system-wide improvement by the seasoned professionals that practice in the WDC family, and a set of carefully administered cash infusions from the legislative dispensary, this patient can be cured. ✕

Message from WDCAC Chair

Daryl Royal, Workers' Disability Compensation Appeals Commission Chair

Since my last report in the Spring newsletter, Commissioner Granter Ries has been reappointed for an additional four-year term, which expires on July 31, 2026.

As I write this in early November, we have 27 pending appeals, a net change of minus-four since the 31 appeals I reported in the Spring. We received just 20 claims for review last year, and we are on track for even fewer new appeals this year.

The revised administrative rules which took effect in December 2021 eliminated the requirement that litigants send us an "original" or "hard copy" of any document that has been filed by fax or electronic filing ("FTS"). One copy is sufficient, however submitted. Please make sure to put the docket number of your case on anything you file.

Here are a few more tips, offered in the spirit of helping us all get to the correct result:

- When referring to facts in your briefs, include citations to specific page numbers in the record supporting those facts. Otherwise, we have to search for

support for the facts you reference, and we may not find it.

- When filing a brief, always remember our limited factual review standard. On appeal, the issue is *not* whether the plaintiff met his or her burden of proof. Instead, we determine whether the magistrate's findings were supported by competent, material, and substantial evidence. This sounds very basic, but it's a point that briefs sometimes fail to observe.
- When briefing a disability issue, be sure to cite the correct standard. The *Stokes* standard applicable to pre-2011 amendment cases is similar, but *not* identical to, the current statutory standard. The difference can be critical.

These tips would also be useful in preparing a trial brief for filing before a magistrate. ✖

Moving? Changing Your Name?

In order to safeguard your member information, changes to your member record must be provided in one of the following ways:

- [Login to SBM Member Area](#) with your login name and password and make the changes online.
- [Complete contact information change form](#) and return by email, fax, or mail. Be sure to include your full name and P-number when submitting correspondence.
- [Name Change Request Form](#)—Supporting documentation is required



Invite someone you know to join the fun.

Invite someone to join the section.

Section membership forms can be found at <http://www.michbar.org/sections>

2022 Annual Meeting Recap

By Alicia W. Birach, Attorney at Foster Swift Collins & Smith PC

The 2022 Annual Meeting was held from June 30- July 1, 2022, at Crystal Mountain Resort in Thompsonville. Section members celebrated our new Hall-of-Famers: Rosa Bava, Michael Sanders, Richard Warsh, and Steven Pollok. Milton Means was also honored as the 2022 recipient of the Donald Ducey Civility Award.

During the meeting, a panel of magistrates and members of the bar offered perspective on the Administrative Rules changes and Doug Klein provided an update on issues related to Medicare.

Additionally, a new slate of Council Officers were elected and we bid farewell to outgoing Chairperson, Jayson Chizick. We all owe Jayson our gratitude for his years of dedication to the Section and his skilled guidance during challenging times. He worked tirelessly on behalf of the section members to help us get back to "business as usual" and address issues impacting members of the bar. ✨



Job Search Requirements for Firefighters and Police Officers

By Jessica N. Super, Attorney at Miller Cohen, PLC

As members of the Workers' Compensation Section, we know that there are carve outs that exist in the Michigan Worker's Disability Compensation Act for firefighters and police officers that make it easier for people in these work categories to obtain benefits. One such carve out is outlined in Section 302 of the Worker's Disability Compensation Act, which defines what firefighters or police officers are eligible and provides a different definition for wage earning capacity than what is found in section 301 of the Act.

The language used in section 301 implies that the jobs reasonably available to an injured worker can be hypothetical jobs available based on one's work qualifications or training. However, under section 302, the definition of wage-earning capacity specifically excludes the phrase "whether or not actually earned" that is used in the general definition provided in section 301, thus creating an argument that a firefighter's or police officer's wage-earning capacity is based on jobs reasonably available within their specialized fields. Broken down, the crux of the argument is that, because the language is missing, the legislative intent must have been to eliminate the hypothetical jobs posed by vocational experts based on the injured worker's transferable skills. For more information, please see Judge Slater's analysis outlined in the article, *Demystifying Section 302-A Police Officer/Firefighter's Wage-Earning Capacity Analysis*.

Until this year, the issue of whether a firefighter or police officer must look for work outside of the field of firefighting or police work was left untouched by magistrates. However, two decisions that have a direct effect on the interpretation of Section 302 and what constitutes a good faith job search were recently issued—one by Magistrate Grunewald and one by Magistrate Woons.

Magistrate Grunewald decided *Daniel McLaughlin v Grosse Ile Township* on May 16, 2022. *McLaughlin* involves a police officer who injured his left wrist during a police training. Testimony of vocational expert Guy Hostetler was

taken in preparation for trial. Mr. Hostetler testified that if the Plaintiff was able to work within his restrictions, he had the training qualifications and skills for work in several areas which would yield an income of at least \$20.00 per hour. Magistrate Grunewald found the vocational expert's testimony persuasive in determining that the Plaintiff was only partially disabled, reasoning that Plaintiff did not make a good faith job search for work that was reasonably available to him after his date of termination. While section 302 is not specifically referenced in Magistrate Grunewald's decision, the opinion has a direct effect on its interpretation as he based his decision on hypothetical jobs presented by the vocational expert that were outside of the category of police officer. Ultimately, this decision creates a persuasive argument that a good faith job search for police officers involves searching for jobs outside of their specialization as police officers.

Magistrate Woons decided *Brian Currier v Cascade Charter Township of Kent County* on August 1, 2022. *Currier* involves a firefighter that suffered an injury to his right ankle when he jumped out of a fire truck. Directly at issue was whether the claimed disability was due to the alleged personal injury. Plaintiff's counsel argued that a reduction in Plaintiff's wage-earning capacity would be inconsistent with section 302 of the Michigan Worker's Disability Compensation Act. Magistrate Woons disagreed with Plaintiff's testimony that he does not have to look for work because he only has to look for jobs as a firefighter, holding that because section 302 does not say that Plaintiff only has to look for jobs as a firefighter or police officer, it can be inferred that an injured police officer or firefighter must still make a good faith effort to look for other jobs within their qualifications and restrictions.

The cited decisions by the magistrates call into question whether firefighters and police officers must look for other types of jobs within their qualifications and restrictions. ✖