

STATE BAR OF MICHIGAN

Workers' Compensation Section Newsletter

Fall 2023



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STATE BAR OF MICHIGAN
WORKERS' COMPENSATION LAW SECTION

WINTER SECTION MEETING

DECEMBER 8, 2023, 9:00 AM

Crowne Plaza Lansing West
925 S Creyts Rd, Lansing, MI
*No registration necessary



**Workers' Compensation Law
Section Council****Matthew R. Conklin**

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Jessica Super, Newsletter Editor

Opinions expressed herein are those
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Material for publication should be sent
to the editor at:

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From the Chair

Matthew R. Conklin

I am honored to serve as the section chairperson for 2023-2024. Over the last 16 years, I have practiced other areas of law, such as medical negligence, no-fault, and premise liability; however, I am drawn to the practice of workers' compensation.

Unlike Jeff Appel and Rick Warsh, I did not grow up dreaming of becoming a workers' compensation attorney (I am referencing Jeff's 2022 Hall of Fame induction speech that I hope someone recorded because it was highly entertaining). I dreamed of becoming an airline pilot. However, the 9/11 terrorist attacks sent the aviation industry into a tailspin. I enjoyed an undergraduate Introduction to Aviation Law course, so I decided to go to law school.

Tim Kragt and Len Smit hired me before I had my bar results. I spent those first few months reading Ed Welch's book and following them around to hearing sites and depositions. After being sworn in, they gave me about two dozen files. I am grateful for the mentorship from the bench and bar in the early years. I am incredibly thankful for the hearing site assistants who pointed out the opposing attorneys and helped assemble redemption packets.

Please thank the assistants the next time you are at a hearing site. And the next time you see or speak with an Agency representative, please thank them too. What they do for us and our clients is immeasurable.

The Hall of Fame committee is accepting nominations for the 2024 Hall of Fame. Please email your nomination to me—Matt@conybearelaw.com. The Hall of Fame criteria is reprinted in this newsletter. Please submit your nomination before February 1, 2024.

Finally, I need to thank Jessica Super for serving as the newsletter editor. There is little joy in chasing down articles from contributors but Jessica manages to do it with a smile. ✂

Mission

The Workers' Compensation Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, its website, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan.

A Time for Gratitude

Chief Magistrate Kevin Kales

As the season rolls on, I want to take a moment to express some gratitude. As newly appointed Chief Magistrate, I tried to step back to see the bigger picture. This larger perspective makes it clear that the value of neutral fairness should be our code. It is this value that explains the public trust in our court system and our laws. Watching those around me working to help our system apply fairness made it clear that much thankfulness was in order. I will try to do my best to encourage neutral fairness in our court. My door will always be open for anyone who has questions or problems in our system.

So many people deserve thanks for their work which helps push us in the right direction.

I am grateful for the administrative staff at our court – at every level. They never fail to keep our documents moving. Through the stress of fast-paced court days, they have always helped us stay in motion. Through normal times, through COVID times, they have always been there to assist all of us. We have no system without them.

I am grateful for all the hard-working staff at each of the law firms. Typing documents, filling in gaps, answering phones, filing documents, finding files, and dealing with difficult clients. These people seem to work tirelessly to help all of us stay on track. They keep our law firms running. Each time I have called a law firm, they have been tremendously helpful and courteous. We have no system without them.

I am grateful to the workers in our state. They go to work and keep our business and economy running. Some work in dangerous and difficult situations. Some work until they can no longer function. When things fall apart for them, they place their trust in our system to help find neutral fairness. We must not let them down. We have no system without them.

I am grateful to the employers and insurance adjustors in our state. Opening businesses which create economic opportunities for all of us. This is the main engine which drives our state forward. The insurance adjustors provide the

protection our workers need. When disputes arise, they also place their trust in our system to find neutral fairness. Often, they pay benefits, and we don't see how they have already done the right thing and sometimes; nothing more is owed. We must not let them down. We have no system without them.

I am grateful for our lawyers -- on both sides. They file the cases and responses, gather evidence, and go to mediation. When necessary, they take cases to Trial. They argue at mediation and raise their voices when they need to straighten me out. Fantastic! They have found a way to keep pushing for neutral fairness in a system of laws that – on its face – can often seem unfair. Guided by fairness and integrity, they show no signs of surrender. We have no system without them.

I am grateful to our magistrates and mediators. Some travel great distances to keep our courts open. Each and every one of them have impressed me with their desire to be helpful to the parties. We will mediate any case – no matter how many times it takes. I have heard some of them working to explain things to parties over and over again. Doing their best to find neutral fairness. We have no system without them.

I know I speak for everyone when I try to explain my gratitude for the woman who truly keeps everything running. Anne Williams is a treasure. She seems to be able to juggle 15 balls at once. I have worked in the private sector for 35 years, but I have never seen anyone with skills and a work ethic like her. She always has an answer or suggestion to help us all stay on track. Whenever I am searching around for answers to keep us moving toward neutral fairness with efficiency – she already has it. Our system does not function without her.

So take a breath, take a moment. Stop and show some gratitude to all the people who keep you on track.

Happy Holidays to us all. ✨



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>

Case Law Update

Jacob Bender

Supreme Court Cases

Cramer v. Transitional Health Services of Wayne
(MI Supreme Court, Case #: 163559)

The Michigan Supreme Court explicitly rejected the *Martin* test and held that the standard for assessing psychiatric injury in workers compensation cases is to be assessed under the totality-of-circumstances standard found in *Farrington v. Total Petroleum, Inc.*, 442 Mich. 201 (1993).

Under the modified *Farrington* standard, plaintiff must demonstrate that the distress that led to her suicide was “significantly caused or aggravated by employment considering the totality of all the occupational factors and the claimant’s health circumstances and nonoccupational factors.” *Cramer v. Transitional Health Servs. of Wayne*, No. 163559, 2023 WL 4845610, at *15 (Mich. July 28, 2023) (quoting *Farrington v. Total Petroleum, Inc.*, 442 Mich. 201, 216-217 (1993)).

When evaluating the “significant manner” requirement, the Michigan Supreme Court held that courts should assess:

“The temporal proximity of the [injury] to the work experience, the physical stress to which the plaintiff was subjected, the conditions of employment, and the repeated return to work after each episode.” Depending on the circumstances, other relevant factors might include the natural history of any underlying or preexisting condition and whether the condition would have worsened naturally in the absence of occupational contributors. Finally, where mental injuries are concerned, we agree with the observation in *Lombardi* that the “significant manner” analysis must consider whether “the events occurring at work had more than a minor contributing, aggravating, or accelerating effect in the overall psychiatric scheme.” However, as we stated in *Farrington*, these factors are “not all inclusive.” *Farrington*, 442 Mich. at 221, 501 N.W.2d 76. As we ruled in *Farrington*, “[a]fter the enactment of the ‘significant manner’ amendments, these occupational factors must now be considered together with the totality of claimant’s health circumstances to analyze whether the [mental or physical] injury was significantly caused by work-related events.

Id. (citations omitted, emphasis in original). The Court held that “nothing in MCL 418.301(2) suggests that the workplace factors must be the most significant cause of a mental disability for it to be compensable, there can be more than one significant contributing factor for a compensable condition to exist.” *Id.* (emphasis added).

John Doe v. General Motors LLC
(MI Supreme Court, Case #: 163775)

John Doe was by a large press when it contacted a 6-inch-tall steel storage block and compressed it down to 2-3 inches, before ejecting it from the press like a cannonball. The steel fragment that was ejected struck Plaintiff’s groin, severely injuring him and severing both his testicles.

He sued for intentional tort and lost at summary disposition before discovery concluded. The Court of Appeals upheld this in an unpublished decision. It was appealed to the Michigan Supreme Court, which voted 4-3 to remand it to allow Plaintiff to engage in discovery and prove there was circumstantial evidence of Defendant’s intent to injure.

Court of Appeal Cases

Wittenberg v. Bulldog Onsite Solutions
(2023 WL 2051191)

Wittenberg fell approximately 30 feet while working for Bulldog as a rigger. Wittenberg received workers compensation benefits after his injury, but maintained he was an independent contractor. He was paid via 1099, held himself out as an independent contractor, and worked at other jobsites for other employers.

He sued Bulldog for negligence, and the circuit court dismissed that case under the exclusive remedy provision. The COA reversed and remanded, holding:

1. Receipt of workers compensation benefits does not necessarily mean that the recipient falls within the exclusive remedy provision of the Act; and
2. When determining whether an individual is an employee for purposes of the exclusive remedy provision, the trial court should not use the economic realities test. Instead, it should use MCL 418.161(l) and (n) (the 20 factor IRS test) and the criteria laid out in *Drob v. SEK 15, Inc.* 334 Mich. App. 607, 617 (2020).

WDCAC Cases

Gruber v. Wolf Creek
(2023 ACO#1)

Plaintiff alleged an injury arising out and in the course of his employment. Wolf Creek’s insurer argued that Plaintiff was excluded from coverage under the employer’s workers compensation policy, and the magistrate agreed.

Plaintiff founded the company and held various roles in it over the years. Eventually, his stock percentage fell from 100% to 35%. He had previously signed a written application

for exclusion from coverage and never rescinded it. Plaintiff argued that a subsequent change in the circumstances meant that the exclusion was no longer valid.

The WDCAC affirmed the magistrate, holding that Plaintiff met the criteria under Section 121 to be allowed to be excluded from coverage and that Plaintiff had to revoke the exclusion to end it.

The WDCAC was appealed to the COA, which denied leave. It has been appealed to the Michigan Supreme Court though the Court has not taken any action on it yet.

Carson v. Bandit Industries
(2023 ACO#3)

The WDCAC applied the COA's holding in *Fisher v. Kalamazoo Regional Psychiatric Hospital*, 329 Mich. App. 555 (2019) allowing recoupment of workers compensation benefits even in the absence of fraud (though subject to the 1 year back rule).

Notably, the WDCAC held that a plaintiff does not need to explicitly raise the 1 year back rule as a defense for it to be applicable. It also held that defendants are limited to requesting the amount of recoupment in their petition (or any amendment), and that it cannot be subsequently changed in an appeal brief after the close of proofs.

Walton v. Nexteer Automotive Corp.
(2023 ACO#4)

Plaintiff worked for Defendant building and maintaining tools and machines. While driving in the plant on June 30, 2014, he was struck by a fork truck, causing injuries to his thoracic and cervical spine. Due to his need for accommodated work, he was given a new job performing preventative maintenance on the machines. He did this work until August 28, 2015, when he stopped working due to a non-occupational knee injury. Defendant did not allow him to return to work for them, and he later found work as a part-time school bus driver. The Magistrate issued an open award with wage loss beginning the date he was formally terminated by Defendant after trying to return to work.

The WDCAC reversed the magistrate's decision, holding that the magistrate's analysis of whether there was work that Plaintiff was qualified and trained to do that paid within the same salary range as his maximum wages failed to consider his post-injury machine maintenance job. The WDCAC also held that the magistrate misunderstood the restrictions that were in place at the time wage loss was ordered to begin. While the machine maintenance job lasted less than 100 weeks and could not be considered to have established a new wage-earning capacity, MCL 418.301(9) still states that disability and wage loss must first be established and the WD-

CAC held that a magistrate cannot short-circuit the analysis under MCL 418.301(5) with 418.301(9)'s "100 week rule."

Also notable is that Defendant had a policy that an employee's receipt of SSD benefits resulted in that employee's loss of seniority. Defendant tried to argue that Plaintiff receiving SSD benefits meant he was therefore "at fault" for losing his job and thus not owed any wage loss. The WDCAC disagreed with this argument.

Justin Overly v. J. Stevens Construction et al.
(2023 ACO#5)

Quandel Construction hired J. Stevens Construction as its roofing contractor. J. Stevens was permitted to hire subcontractors and hired Wolf Lake Construction as its subcontractor. Wolf Lake (specifically Raul Alviar) hired Plaintiff to work on the roof. Plaintiff fell from the roof and was severely injured. Wolf Lake was supposed to carry workers compensation insurance and didn't, accordingly J. Stevens (and its insurer) were held responsible under the "shoot through" provision of MCL 418.171.

The issue in this case is whether Mr. Alviar had authority from Wolf Lake to hire Plaintiff. In its opinion, the WDCAC affirmed the magistrate's finding that Mr. Alviar possessed such authority. The WDCAC noted that Mr. Alviar "entered into a subcontracting agreement with [the contractor that hired Wolf Lake], contacted potential employees, transported them to the jobsite and housed them nearby, and obtained medical care for plaintiff after his injury."

Defendant has requested leave from the COA to appeal this decision, and the COA has yet to rule on the request.

Mills v. D M Burr Facilities Management
(2023 ACO#7)

Plaintiff was injured at work, and representing himself, sought medical benefits under the Act. He saw a Dr. Ryan, who issued an opinion that the magistrate relied on when finding that plaintiff had established a work-related knee injury. Defendant timely objected to the admission of Dr. Ryan's testimony as hearsay, and the magistrate took these objections under advisement (but did not rule on them prior to the close of proofs).

The WDCAC reversed and remanded the magistrate's decision, holding that the magistrate admitting Dr. Ryan's report despite Defendant not having an opportunity to question Dr. Ryan as to the basis of his opinions raised significant due process and fairness issues. This was compounded by the magistrate issuing his ruling after the record was closed which meant defendant was unable to respond with evidence on the record.

Kollinger v. Miller Broach
(2023 ACO#8)

Defendant subpoenaed records from the Unemployment Insurance Agency (UIA) and the UIA responded with a motion to quash the subpoena. The magistrate denied the motion to quash and the UIA appealed.

The WDCAC affirmed the magistrate (though it reversed the magistrate's finding of contempt by the UIA), holding the following:

1. The UIA is considered a "party", but only to the extent that it involves enforcement of or disputes regarding the subpoena it has received.
2. UIA records are not exempt from disclosure under MCL 421.11(b)(1). They are relevant to the proceedings, and it would not be a burden or unduly burdensome for the UIA to produce them.

The UIA has requested leave from the COA to appeal this decision, but the COA has yet to rule on this request.

Washington v. Euclid Industries (2023 ACO#9),
Rosa Lopez v. Dana Holding Corp. et al (2023 ACO#10),
David Bellamy v. Sundance Beverage (2023 ACO#11),

Tyronica McBride v. Benteler Automotive Corp. (2023 ACO#12)

In all these cases, the plaintiff alleged a disabling injury arising out of and in the course of their employment and Defendant subpoenaed plaintiff's unemployment records from the UIA.

In nearly all these cases (with minor variations), the magistrate ruled and the WDCAC affirmed that the UIA was required to provide the records to Defendant (citing *Kollinger*). One exception is *Lopez*, in which the magistrate's order was remanded because it was a two-paragraph order without an accompanying opinion. This prevented the WDCAC from conducting meaningful review of the underlying reasoning and was grounds for remand.

Cases to Watch

Dunn v. General Motors
(COA #364551)

This is a pre-2011 injury case. Plaintiff was a clerical employee with upper extremity injuries. The magistrate found Plaintiff only partially disabled by her injuries, which did not exempt the Plaintiff from reduction in wage loss benefits due to her residual wage-earning capacity under the pre-2011 language of MCL 418.361 (1).

Of note, this case was appealed by Plaintiff to the Court of Appeals on January 11, 2023. Plaintiff appealed the WDCAC's finding that it lacked jurisdiction over the question of whether Defendant could recoup overpaid wage loss benefits from her pension payments.

Another issue on appeal is that language in Defendant's pension plan granting early retirement to individuals and stated that this was only done for individuals that Defendant agrees are "wholly and permanently prevented from engaging in regular employment or occupation for remuneration or profit as a result of bodily injury or disease." Plaintiff argues that since Defendant agreed that Plaintiff was "wholly and permanently prevented from engaging in regular employment or occupation for remuneration or profit as a result of bodily injury or disease" for purposes of her pension, that admission should be binding on it for purposes of her workers compensation case as well (meaning she meets the *Sington* and *Stokes* standards and that total disability benefits should have been awarded).

Leave for appeal has been granted, but no oral arguments have been held or decision issued yet. ✖



Memo from the Director

Jack A. Nolish, Michigan Workers' Disability Compensation Agency Director

Many of you have heard my various presentations which reference a hypothetical worker's compensation claim starting with "Charlie falls off a ladder..." followed by a description of what I personally view as the regressions in Michigan law diminishing injured worker protections over the last 25 years. With the legislative majority shifting after the last election, I thought this newsletter would be filed with my insightful agency perspectives on changes in the law in terms of how such changes might impact the administration of the WDCA. As of now, however, no sweeping reform packages have been introduced and for the time being, that memo remains unwritten. Instead, we have seen articles regarding the 2023 legislative session, such as: *Gongwer News Service: Legislature Calls It Quits On '23* and *MIRS (Michigan Information and Research Service) Legislature Adjourns Before December For First Time In 55 Years*, "The first Democratic-majority Legislature in 40 years will officially end its session on [Tuesday], the first time the House and Senate has adjourned before Thanksgiving since 1968." See *Legislature adjourns before December for the first time in 55 years*, The LivingstonPost.com.

As an early member of the "Baby Boom," the reference to 1968 caught my attention. I was around in 1968, when

so many momentous things occurred. Newspaper headlines during that year included titles, such as: March 13: *President Lyndon Johnson announces he will not seek re-election*, April 4: *Martin Luther King, Jr. is assassinated*, April 11: *President Lyndon B. Johnson signs the Civil Rights Act of 1968, prohibiting discrimination in the sale, rental, and financing of housing*, June 5: *Senator Robert F. Kennedy, a U.S. presidential candidate, is shot at the Ambassador Hotel in Los Angeles, by Sirhan Sirhan.... Kennedy dies the next day*, August 28: *Riots in Chicago*. Eventshistory, November 13, 2023, <https://www.history.com/topics/1960s/1968-events>.

Perhaps this adjournment (*sine die*) will be remembered as part of this past momentous year that included ongoing deadly conflicts in Ukraine and Israel, catastrophic earthquakes, hurricanes, fires, floods, past president indictments, and repeated mass shootings across the country. As we enter the joyous holiday season and year end time of reflection, let us not forget that, if 2023 fits the pattern of the last decade or so, by year's end WDCA will have received about 20,000 reports of work-related lost time injuries. ✖

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



SBM WC Law Section**Hall of Fame Criteria****October 15, 2021**

The Workers' Compensation Law Section (the Section) honors deserving candidates for our Hall of Fame every year, and those awards are presented at the Spring Annual Meeting usually held in June. This annual meeting is always well attended, especially so because the Hall of Fame nominees are present with their families to receive their awards. This event is an opportunity to show our mutual support for those who have positively influenced our practice and established themselves as proven leaders in our field of law.

The Hall of Fame sub-committee (the Committee) is established by the bylaws of the Section and consists of the Current Chair, current Vice-Chair, and past two Chairs. This committee will open the nomination process in the fall of the year and seek up to 4 deserving candidates for the Hall of Fame from nominations from The Section membership.

Once a slate of deserving candidates is selected by the Committee, the council will be asked to vote on that slate of candidates. If approved the Hall of Fame slate of candidates will be informed by the Committee and invited to attend the Spring Annual Meeting.

The recommendations for Hall of Fame membership should consider one or more of the following criteria:

- *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 Section.
- *Provide exceptionally high-quality professional services to their clients and the public.
- *Provide significant evidence of scholarship, teaching, lecturing and/or distinguished published work in the field of Workers' Compensation Law.
- *Stand out to newer attorneys as models of professionalism in deportment and advocacy; a lawyer to emulate.
- *Have earned the respect of the magistrates, opposing attorneys, and the Workers' Compensation community including injured worker advocacy groups and employer groups.
- *Avoid allowing any ideological differences with opposing attorneys to affect civility in negotiations, litigation process and other aspects of the field of practice.
- *Have a thirst for knowledge in other areas of law that positively affects their representation of clients in the Workers' Compensation arena.