

STATE BAR OF MICHIGAN

Workers' Compensation Section Newsletter

Spring 2022



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Upcoming Event

HALL OF FAME DINNER and ANNUAL MEETING

June 30-July 1, 2022
Crystal Mountain Resort
Thompsonville

(Details on page 3)

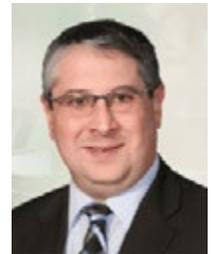
From the Chair

Jayson Chizick

“A successful man is he who receives a great deal from his fellow men [and women], usually incomparably more than corresponds to his service to them. The value of a man, however, should be seen in what he gives and not in what he is able to receive.”

—Albert Einstein

As I reach the twilight of my term as chair of the Section, I am humbled by the knowledge that the collective effort of men and women in our practice has succeeded in preserving our way of doing business. We have come so far from the despair of 2020, the possible dismantling of our customary practice and now, with the cooperation of Bench, Agency and Bar have reached a new normal. Appearances by Zoom and phone remain options, but now our “normal” includes face to face interaction where one can see the smile (or other facial gesture) of the opposing attorney. I vividly remember that day in Grand Rapids in March 2020, when Magistrate Slater gathered with all counsel and pronounced the Agency closed to the public. The progression from closure to Zoom/phone hearings was nearly seamless. Credit is due to the Agency and the Board of Magistrates for not missing a beat and providing a resource for continued file activity before the Board. Dialogue and cooperation with the Section Council permitted the steady flow of information to the practice. Your Section Council team has provided service under the pressure of finding a way through circumstances never seen by our practice. I genuinely believe that this service by your fellow bar members significantly impacted the favorable outcome that we see in our practice today. A full list of the Council members are on the masthead of this newsletter. Please thank them for the gift of their time, knowledge and hard work!



Jayson Chizick

Big things have happened in our Section over the past year. Director Nolish, Chief McMurray and Chair Royal have constantly communicated with Council, and have accepted opinions, recommendations, and criticisms from the Council. Members of Council were instrumental in the creation of the

Workers' Compensation Law Section Council

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Council Members

Term Expires June 2022

Jessica M. Stark, Grand Rapids
John W. Tomasik, Farmington Hills
Dan J. Zolkowski, Lansing

Term Expires June 2023

Jacob C. Bender, Adrian
Alicia W. Birach, Southfield
Sean C. Shearer, Troy

Term Expires June 2024

Danial J. Hebert, Farmington Hills
Samuel J. Larrabee, Escanaba
Benjamin M. Veldkamp, Grand Rapids

Andrea L. Hamm, Ex Officio

Jack Nolish, Director, Michigan Workers' Disability Compensation Agency

Hon. Luke McMurray, Chief Magistrate, Board of Magistrates

Daryl C. Royal, Workers' Disability Compensation Appeals Commission

Danielle Mason Anderson, Kalamazoo Commissioner Liaison

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 necessarily reflect the opinions of the section council, the membership, or their employers

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new WDCA, BOM and other rules. The most significant change was the attorney fee rules in Rule 408.44. This monumental shift in fees better addresses the representation requirements of the modern workers' compensation system. Our annual meeting on July 1, 2022, will include panels with members of the Section and Board of Magistrates discussing various rules and the practical impact on our practice. There are too many Section members to thank individually for helping to make the rule changes a reality. I am thankful to each of you for your hard work.

The Council continues to work with the Agency and Board of Magistrates regarding issues important to the practice. Current issues include record requests and the never-ending releases involved in obtaining records; medical provider compliance with requests for fee schedule billing forms; UIA record production problems; and many other items. If you have an issue that you wish to raise, please consider emailing one of your Council members.

Our Annual Meeting begins with our Hall of Fame dinner on June 30, 2022, at Crystal Mountain. Inductees include Rick Warsh, Mike Sanders, Steve Pollok and Rosa Bava. All four Hall of Fame inductees were nominated by way of extensive letters from our membership. The Hall of Fame committee considered many nominations but felt that the combination of leadership (3 are former section chairs), scholarly activity, practice leadership/mentorship and fulfillment of the other Hall of Fame criteria called for the selection of these four giants of workers' compensation. On a personal note, each of the inductees have inspired me in different ways. Rosa was a friend, a mentor and a shining example of leadership in a very dark time early in the pandemic. Despite her personal struggles, she led the practice during the darkest of times. Rosa's leadership helped our practice thrive despite adversity. Rick Warsh has been a lion of the practice for the better part of my lifetime. He has been involved in many of the most important decisions impacting our practice and has bridged difficult issues with the defense practice over the years. Mike Sanders has mentored a law firm full of lawyers. When I first met Mike, it was difficult to believe that he was the leader of one of the largest firms in Michigan. Mike is a friendly guy at all times, but watch out when his advocate face turns on. I always know when I am about to get a lesson on lawyering when I see that advocate face. Steve Pollok's name is synonymous with the term plaintiff lawyer. A fierce advocate for his clients, Steve has always been a gentleman, an educator, a source for humor and a mentor to any young lawyer who had the fortune of a first appearance with him as opposing counsel. I hope that you will join me in honoring the inductees on June 30, 2022.

As we have done in the past, we will do again with our "Spring" Annual Meeting. An agenda and hotel information is included in this newsletter. I hope that you will attend our Hall of Fame dinner and annual meeting, June 30-July 2, 2022, at Crystal Mountain. Please accept my sincere appreciation for the honor of serving as your Section Chair. I will remember this year fondly. It is my hope that you will consider serving on the Council in the future. The work is rewarding, and I have received so many blessings from the past 9 years on the Council.

See you at the Mountain,

Jayson Chizick

HALL OF FAME DINNER and ANNUAL MEETING June 30-July 1, 2022

Crystal Mountain Resort, Thompsonville

Cost: \$50, for Hall of Fame Reception & Dinner. Annual Meeting FREE to attend.

[Register now!](#)

AGENDA

June 30, 2022

5:00 p.m. Hall of Fame Reception

6:30 p.m. Hall of Fame Dinner

July 1, 2022

8:00 a.m. Breakfast at meeting at Crystal Mountain

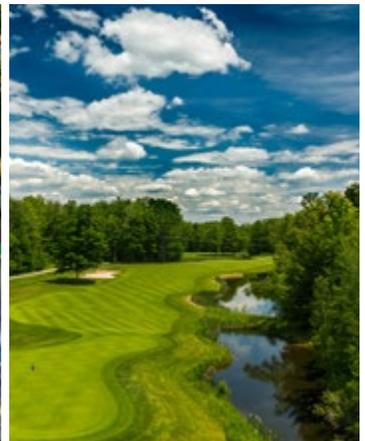
9:00 a.m. Annual Meeting (also available for viewing only via Zoom)—[SEE PAGE 5](#) FOR AGENDA

Afternoon Golf outing; cost \$90/person—PLEASE CONTACT DAN ZOLKOWSKI, DAN.ZOLKOWSKI@AFGROUP.COM, FOR DETAILS

Resort Accommodations

Reservations can be made by calling 1-855-520-2974 or by booking online at [Book Online Here](#). (Group name: Workers' Compensation Law Section of the State Bar of MI, Group #: 46F8CO)

For best availability and selection, reservations should be made by **May 31, 2022**. Reservations received after this date will be taken on a space-available basis and at the prevailing discounted rate.





Group Name: **Workers' Compensation Law Section of the State Bar of MI**

Group #: 46F8CO

Issued: 12/23/21

Dates: June 30, 2022-July 2, 2022

Reservations may be made by calling 1-855-520-2974, by utilizing this form or by booking online at [Book Online Here](#). This is a direct link to the Crystal Mountain online booking system with your group code.

A selection of overnight rooms are being held exclusively for **Workers' Compensation Law Section of the State Bar of MI**; for best availability and selection reservations should be made by **May 31, 2022**, reservations received after this date will be taken on a space-available basis and at the prevailing discounted rate. If room type requested is not available, the next available room type and rate will be confirmed. Crystal Mountain does its best to accommodate requests, however cannot guarantee specific rooms/units. Please inquire with reservation staff for additional unit types available beyond those listed.

Check-in: 5:00pm **Check-out: 11:00am**

Room	Single/Double Rate Thu 06/30	Single/Double Rate Fri 07/01	Indicate 1 st & 2 nd Choice
Hotel Room	\$209	\$359	
Suite	\$259	\$439	

*Quoted rates and service fees are subject to 6% state tax, 5% CVB assessment and 9% service fee.

Package Includes: Lodging Only (per unit, per night)

- Up to 2 children ages 17 & under sleep free when occupying same room with 1 paying adult.
- **There is a \$20.00 plus tax, per person, per night charge for additional adults above the quoted occupancy.**
- Credit card imprint is required at check-in for all guests.

Deposit / Cancellation Policy: A deposit equal to the first night's lodging is required with each reservation. Please make check or money order payable to Crystal Mountain or include a credit card number below. Do not send cash. Deposit is fully refundable, less a \$10 administrative fee if cancellation or modification occurs at least 7 days prior to your arrival date. Deposits are non-refundable if the cancellation occurs within 7 days of arrival. Modifications to your reservation including changing dates or reducing the length of your stay will result in a charge equal to one night's stay. **No refund on unused portion of package stays.**

Group #: 46F8CO

[Please Print](#)

Arrival Date: _____ Departure Date: _____ Number of: Adults in Party: _____ Children 17 & under: _____

Mr. Mrs. Ms. Dr. (circle one): Name: _____

Address: _____

City: _____ State: _____ Zip: _____ Telephone #: _____ (Home)

E-mail Address: _____ (Work)

Conference attendees sharing same room: _____

Special requests: (handicap accessible, etc.): _____

Would you like to be contacted for lesson, recreation, tee time or spa reservations? Yes _____ No _____

Signature: _____ Date: _____

Tax exempt individual: If your agency is tax exempt you may qualify for exemption from the 6% state use tax; reservations are not exempt from the 9% service fee or the 5% CVB assessment. To qualify for exemption please complete the [tax exempt form](#) and provide any required documentation. Reservations must be paid with agency funds. (Personal funds or cash do not qualify for tax exemption)

Payment Options:

By a secure online link with a credit card: once we get this form, we will send you a secure online link to submit your deposit, along with a credit card authorization form.

By check: please include this form with the check and mail to the address provided below.

Please contact Reservations with any questions at 1-855-520-2974. The information can be provided in the following ways:

Mail to: Crystal Mountain Resort Reservations
12500 Crystal Mountain Drive
Thompsonville, MI 49683

Email to: reservations@crystalmountain.com

For office use only:

Res # _____ Initials: _____ Date: _____ Notes: _____

Workers' Compensation Law Section Annual Meeting Agenda

July 1, 2022

1. Call to Order at 9 a.m.
2. Recognition of Council Members, Hall of Fame Inductees and Don Ducey Award Winner
3. Treasurer's Report-Rick Lovernick
4. Secretary's Report-Matt Conklin
5. Agency Director's Report-Jack Nolish
6. Chief Magistrate's Report-Luke McMurray
7. Appeals Commission Report-Daryl Royal
8. Break
9. Medicare Update-Doug Klein
10. Attorney Perspectives on Rule Changes-Dawn Drobnich and Robert MacDonald
11. Magistrate Perspectives on Rule Changes-Chris Slater, Bill Housefield & Lou Ognisanti
12. Elections of Officers and Council Members:
The Nominating Committee and Council propose the following candidates for Council offices:

Chairperson:	Phillip Frame
Vice Chairperson:	Matt Conklin
Secretary:	Rick Lovernick
Treasurer:	Sean Shearer
Council terms ending 2025:	Jess Stark, John Tomasik and Dan Zolkowski
Council term ending 2023:	Jessica Super
13. Old Business
14. New Business
15. Adjournment

Please consider joining our Golf outing following the Annual Meeting.

Contact Dan Zolkowski at dan.zolkowski@afgroup.com for details

Notice to the Membership Pursuant to Article III, Section 1 of the Council Bylaws

The Nominating Committee has made the following nominations for election at the Annual Meeting scheduled for July 1, 2022 at Crystal Mountain:

Executive Council 2022-2023 proposed slate:

Chair: Phillip Frame
Vice Chair: Matthew Conklin
Secretary: Richard Lovernick
Treasurer: Sean Shearer

Council for term ending 2025:

Jessica Stark
John Tomasik
Dan Zolkowski

Council for term ending 2023 (replace Shearer if nominated to Treasurer):

Jessica Super

Other nominations may be made from the floor at the Annual Meeting.

Update from the Director

Jack Nolish, Michigan Workers' Disability Compensation Agency Director

Just ten days into the new year, the Center for Medicare Services, CMS, released an updated reference document: **Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) Reference Guide Version 3.5** <https://www.cms.gov/files/document/wcmsa-reference-guide-version-35.pdf>. This CMS document provides updated guidelines regarding WCMSA's that have not been pre-approved by CMS at the time of redemption. We have no data on the utilization of unapproved WCMSA accounts, but the practice apparently has caught the attention of CMS.

The reference document starts with a caveat: 1.0 *There are no statutory or regulatory provisions requiring that you submit a WCMSA amount proposal to CMS for review. If you choose to use CMS' WCMSA review process, the Agency requests that you comply with CMS' established policies and procedures.*

According to Paragraph 1.1, the guidelines are to give the reader needed insights: "Clarification has been provided regarding the use of non-CMS-approved products to address future medical care" (Section 4.3).

4.1 Considerations and Guidelines. An individual or beneficiary **may** consider seeking CMS approval of a proposed WCMSA amount for a variety of reasons. The primary benefit is the certainty associated with CMS reviewing and approving the proposed amount with respect to the amount that must be appropriately exhausted. It is important to note, however, that CMS approval of a proposed WCMSA amount is **not** required.

The CMS suggestion that, "[i]f you choose to use CMS's WCMSA review process...." sounds like the Don in the *God-*

father making an “offer you can’t refuse.” Folk song legend Pete Seeger wrote: “If I had a hammer ...” but CMS does say “if” when describing their hammer in situations where a WCMSA is not pre-approved:

4.1.4 Hearing on the Merits of a Case. Because the CMS prices are based upon what is claimed, released, or released in effect, CMS must have documentation as to why disputed cases settle future medical costs for less than the recommended pricing. As a result, when a state WC judge or other binding party approves a WC settlement after a hearing on the merits, Medicare generally will accept the terms of the settlement, **unless the settlement does not adequately address Medicare’s interests.** This shall include all denied liability cases, whether in part or in full. **If Medicare’s interests were not reasonably considered, Medicare will refuse to pay for services related to the WC injury (and otherwise reimbursable by Medicare) until such expenses have exhausted the entire dollar amount of the entire WC settlement. Medicare may also assert a recovery claim, if appropriate. (emphasis added)**

There are criteria for when a WCMSA should be approved by CMS:

8.1 Review Thresholds. CMS will review a proposed WCMSA amount when the following workload review thresholds are met:

- The claimant is a Medicare beneficiary, and the total settlement amount is greater than \$25,000.00; or
- The claimant has a reasonable expectation of Medicare enrollment **within 30 months of the settlement date** and the anticipated total settlement amount for future medical expenses and disability or lost wages over the life or duration of the settlement agreement is expected to be **greater than \$250,000.00.**

A claimant has a reasonable expectation of Medicare enrollment within 30 months if any of the following apply:

- The claimant has applied for Social Security Disability Benefits
- The claimant has been denied Social Security Disability Benefits but anticipates appealing that decision
- The claimant is in the process of appealing and/or re-filing for Social Security Disability benefits

- The claimant is 62 years and 6 months old
- The claimant has an End Stage Renal Disease (ESRD) condition but does not yet qualify for Medicare based upon ESRD

These criteria are not new. What seems to have caught their attention is the utilization of privately drafted WC-MSA’s that are not submitted for pre-approval. The employer/carrier will work with one of the services that analyzes the case and proposes a set-aside account. At the redemption, the magistrate is advised of the account and that the defendant carrier/employer will protect the injured worker from problems with CMS by agreeing to hold the worker harmless for medical that CMS believes should have been paid out of the WCMSA if the set-aside amount proves to be inadequate. Sounds like it should work.

The magistrate, of course, is charged under the statute with making sure that the redemption meets the requirements of the WDC Act:

418.836 Approval of redemption agreement; findings; factors considered in making determination; employer as party.

Sec. 836. (1) A redemption agreement shall only be approved by a worker’s compensation magistrate if the worker’s compensation magistrate finds **all** of the following:

- (a) That the redemption agreement serves the purpose of this act, is just and proper under the circumstances, **and is in the best interests of the injured employee.**
- (b) That the redemption agreement is voluntarily agreed to by all parties. If an employer does not object in writing or in person to the proposed redemption agreement, the employer shall be considered to have agreed to the proposed agreement.
- (c) That if an application has been filed pursuant to section 847 it alleges a compensable cause of action under this act.
- (d) That the injured employee is fully aware of his or her rights under this act and the consequences of a redemption agreement.

(2) Parties may stipulate in writing to the determinations in subsection (1). If all parties stipulate in writing to those determinations, the stipulation may serve as a waiver of hearing, and the magistrate may approve the redemption agreement. A magistrate may conduct a hearing on a proposed stipulation.

(3) In making a determination under subsection (1), factors to be considered by the worker's compensation magistrate shall include, but not be limited to, all of the following:

- (a) Any other benefits the injured employee is receiving or is entitled to receive and the effect a redemption agreement might have on those benefits.
- (b) The nature and extent of the injuries and disabilities of the employee.
- (c) The age and life expectancy of the injured employee.
- (d) Whether the injured employee has any health, disability, or related insurance.
- (e) The number of dependents of the injured employee.
- (f) The marital status of the injured employee.
- (g) Whether any other person may have any claim on the redemption proceeds.
- (h) The amount of the injured employee's average monthly expenses.
- (i) The intended use of the redemption proceeds by the injured employee.

(4) The factors considered by the worker's compensation magistrate in making a determination under this section and the responses of the injured employee thereto shall be placed on the record.

(5) An employer shall be considered a party for purposes under this section.

The nightmare scenario occurs when the injured worker is post redemption and exhausts the WCMSA funds for medical care with the expectation that CMS will then take over providing reimbursements for the subsequent care. Unfortunately, CMS looks at the situation and doesn't agree with the amount of the set-aside and does not reimburse the provider until the entire amount of the settlement is used. If care was already paid by CMS, they charge it back to the provider who in turn comes after the injured worker for reimbursement, or CMS comes to the defendant for payment. It is even more complicated when there has not been a determination of which medical conditions are covered in the settlement and CMS sees the agreement to redeem covering any and all medical conditions, sometimes referred to as "skin and contents."

Then, the injured worker may look to the "hold harmless" provision to kick-in but the defendant disputes which medical cost is involved for which condition. Is it too late to ask for a redemption review? Was it something that was disputed? Absent a decision, order, or stipulation, how is the

decision made? Back to the magistrate? Depositions taken and submitted? Compliance hearing requested?

How, where and by whom will this be sorted-out? Sending an email to the Director's attention is not going to do it. Since many redemptions are approved based on affidavits, pleadings and presentations by counsel, all on a very limited record, there is little basis for a decision that CMS is likely to accept. A "Rule V" hearing is not the place to produce the full and complete record necessary for determination of the work injury related medical care including relationship, reasonableness, and necessity. This means that when one of the WCMSA problems comes up as described in the guidelines, since "medical was left open," the matter goes back to a magistrate on a new 104A filing for taking full proofs on all the necessary issues. A costly and time-consuming process. If a redemption review is timely filed, absent a complete redemption hearing record with detailed findings of what is covered by the hold harmless agreement, it may be hard to determine if the statutory obligation of making sure the redemption was "in the best interests of the injured employee" has been satisfied. This might result in the whole redemption being set-aside. But, since the CMS problem is likely to appear well after the review period, it is equally hard to see how the Director has a good way to correct the situation.

When redeeming a case without submitting the WCMSA agreements to CMS for approval, the only certainty is uncertainty.

Note: As this memo was headed for publication, CMS released another "reminder" that was focused on claims it might make against a group health plan. [Group Health Plan Recovery | CMS](#) This is of particular interest to counsel representing employers who are self-insurers for their employee health insurance or perhaps all cases where some work-injury related medical expenses were paid by group health coverage:

The Medicare Secondary Payer (MSP) provisions of the Social Security Act (found at 42 U.S.C. § 1395y(b)) require Group Health Plans (GHPs) to make payments before Medicare under certain circumstances. For additional information on this topic, please visit the [Medicare Secondary Payer](#) page. If Medicare paid primary when a GHP had primary payment responsibility, CMS will request repayment. This request for repayment is termed GHP recovery.

CMS also released a second updated reference document, Version 3.6 on March 21, 2022:

The WCMSA Reference Guide version 3.6 is now available in the Download section of the Workers' Compensation Medicare Set Aside Arrangements page on CMS.gov.

Please review section 1.1 for a summary of changes in this version of the guide.

Although I have not conducted a detailed differential analysis of all the pages of the revised guide comparing it to the older version, the summary of changes are described in section 1.1 which directs attention to language added to section 4.3:

Notes: This official policy shall apply to all notifications of settlement that include the use of a non-CMS-approved product received on, or after, January 11, 2022; however, flags in the Common Working

File for notifications received prior to that date will be set to ensure Medicare does not make payment during the spend-down period.

CMS does not intend for this policy to affect any settlement that would not otherwise meet review thresholds. This comment does not relieve the settling parties of an obligation to consider Medicare's interests as part of the settlement; however, CMS does not expect notification or submission where thresholds are not met. ✖

Message from WDCAC Chair

Daryl Royal, Workers' Disability Compensation Appeals Commission Chair

We've now settled into our new home at Woodlake Circle in Okemos and, starting May 1 (absent any more viral surges), we should be in the office there at least two days a week. We'll continue to work remotely the rest of the week, in accordance with LEO post-pandemic policies permitting a "hybrid" work schedule. We've learned to be quite efficient working out of our home offices, and that will continue part-time.

During the pandemic and even before, the nature of appeals before the Appeals Commission has been changing. Instead of simple, fact-based substantial evidence arguments, we're seeing more appeals involving legal issues of first impression or questions we don't often see. This may be a function of the lack of hearings during the pandemic, during which it was difficult to assemble a factual record. In any event, and at least for the time being, we've got some difficult issues to grapple with, which often take significant time to resolve. That's especially the case when each of us are involved

in each and every case, except in cases where one of us has to recuse himself.

We've also seen a number of appeals from unrepresented claimants whose claims were dismissed during the pandemic. We've often asked magistrates to provide written explanations for these dismissals, since communication was not optimal during the pandemic. In addition, we have remanded several cases to magistrates for further analysis. We generally prefer to have the magistrates make initial factual findings, to preserve a party's opportunity for an appeal from those findings. If we were to exercise our limited fact finding authority, the only appeal left would be one to the Court of Appeals, where the review standard is significantly more limited than our own standard.

As I write this article, we have 31 pending appeals. We hope to steadily chip away at the backlog going forward, and to reduce appeal times accordingly. ✖

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

Chief Magistrate's Thoughts

Luke McMurray, Chair, Board of Magistrates

As most of you know, the LEO mask requirements were rescinded effective March 3, 2022. It was initially my feeling that any particular magistrate having control of his/her courtroom, could require a mask be worn if the magistrate, given the situation, thought it was warranted. That feeling was incorrect, and paragraph three of the recent LEO announcement, reprinted here, made that clear:

Employees should determine if they want to continue to wear a mask or not based upon their own personal comfort level. All employees are expected to be respectful of individual choices that are made, either by co-workers or the public, and no service can be refused to someone not wearing a mask. Signage at our work locations will be removed or updated once this change goes into effect.

Rather, LEO has put forth a "Visitors Covid Screening" document, set forth at right, that is to be posted at each hearing site.

Also, as you know, the UIA has been refusing to comply with our subpoenas for unemployment records. Many of the magistrates, including myself, have been granting Defendants' Motions to Compel the UIA to comply with the subpoena, and additionally, holding the UIA in contempt for failure to do so. These orders granting the motions and holding the UIA in contempt will be, en masse, certified over to Circuit Court for sanctions. ✂



VISITOR ALERT!

If you have any of the following COVID-19 symptoms at the time of your visit, or if any of the screening statements below are not true, please do not enter this building. Please plan your visit for another time.

Congestion	Difficulty breathing	Loss of taste or smell	Runny nose
Cough	Fatigue	Muscle/body aches	Shortness of breath
Diarrhea	Fever/chills	Nausea	Sore throat

- **I have not tested positive for COVID-19 in the past 10 days.**
- **I meet one or more of the following additional screening requirements.**
 - I have been fully vaccinated against COVID-19 OR
 - I have recovered from a documented COVID-19 infection in the last 3 months; OR
 - I have NOT been fully vaccinated against COVID-19 or prefer not to disclose my vaccination status, however, I affirm that the following statements are true:
 - I am not currently waiting on the results of a COVID-19 test
 - I have not travelled internationally in the past 10 days
 - I have not been in close physical contact in the last 10 days with:
 - anyone who has been laboratory-confirmed as COVID-19 positive
 - anyone who currently has any symptoms consistent with COVID-19

If the above statements are true, you are approved to enter this facility.

If any of the above statements are NOT true, please do not enter this facility.

Case Law Update

By Jacob Bender, Attorney at Cooper, Bender & Bender, PC

Lewis v. Leximar Corp. MI Supreme Court, Case # 162692

Plaintiff, a tool worker, was approached by his employer's HR director about enrolling in a specific program at the local community college. The employer wanted to use plaintiff as a test case for providing vocational education for its employees.

On the date of injury, plaintiff clocked out of work at 8:00 a.m. He texted his wife he was going to class. While driving from work to class, he crossed the centerline of the road and was killed by a semi-truck going the other way.

Both the Magistrate and the MCAC found the death compensable, but the Court of Appeals did not. The Supreme Court reversed the Court of Appeals decision and reinstated the MCAC's order.

The Supreme Court's rationale was that while injuries occurring during a commute are generally not compensable, they can be if "the employer derives a special benefit from the employee's activity at the time of the injury." Noting that the record showed that the employer was using plaintiff as a test case, it derived a special benefit from his pursuit of his education. Therefore, plaintiff was entitled to compensation under the Act.

Continued on next page

Mathis v. Auto Owners Insurance

Court of Appeals, WL 5225925

Approved for publication, citation not yet available

A truck driver was exiting his vehicle when he was injured. His workers' compensation carrier, Guaranty Insurance, began paying his claim. However, Guaranty Insurance became insolvent, and the claim was taken over by the Michigan Property & Casualty Guaranty Association (MPCGA). The MPCGA was created to function as "an insurer of last resort" for individuals with insolvent insurance carriers.

However, the MPCGA refused to pay benefits, arguing that Home-Owners, the injured truck driver's no-fault insurance carrier, had priority under MCL 500.7931. Home-Owners disagreed, stating that it did not have priority under MCL 500.3106(2)(b). The MPCGA prevailed on this question in circuit court. Home-Owners appealed to the Michigan Court of Appeals.

The Michigan Court of Appeals upheld the lower court's ruling. The Court of Appeals reasoned that as the MPCGA is the "insurer of last resort." It was not responsible for payment of the truck driver's workers compensation claim as he could also pursue benefits from his no-fault carrier. The Court of Appeals made it clear that the MPCGA does not owe any workers' compensation benefits that could also be paid to the truck driver under the No-Fault Act, and that it could not be the first priority insurer (even though the insolvent workers' compensation carrier was).

Roring v. Ford Motor Co.

2021 ACO #11

Plaintiff received an open award in January 2018 for a 2002 injury. In May 2018, he was conditionally offered a job by his employer (assuming he passed a drug-screen and pre-employment physical). The drug screen came back positive for THC, consistent with plaintiff's medical marijuana prescription as well as his use of a lotion containing THC.

Defendant then fired plaintiff and filed an application to stop benefits, stating he was terminated for fault, had voluntarily removed himself from the workforce, and that he refused a reasonable offer of employment without good or

reasonable cause. The magistrate denied defendant's application, noting that:

1. Defendant was the moving party and had the burden of proof, but did not submit any testimony or other evidence interpreting the raw data from the drug test; and
2. Plaintiff had engaged in a good faith job search since his termination.

The WDCAC affirmed, noting that the employer never actually made the job available (instead conditioning the job offer on plaintiff passing a drug test then withdrawing the offer when he didn't).

Belcher v. Ford Motor Co.

2021 ACO #14

Applying a 2020 Court of Appeals Order, the WDCAC held that massage therapy is not compensable under the Act unless it is:

1. Prescribed by a healthcare professional; and
2. Performed by either a physical therapist or a physical therapy assistant (who is under the supervision of a licensed physical therapist).

Schweininger v. Advanced Technology Solutions

2021 ACO #12

MCL 418.385, provides only for "an examination by a physician or surgeon authorized to practice medicine under the laws of the state."

Since neuropsychologists are not surgeons or physicians, a worker cannot be required to be examined by one under the Act.

Reidenbach v. City of Kalamazoo

2021 ACO # 13

When an employer recoups overpaid benefits from a plaintiff, they have no right to also try to collect interest on those overpaid benefits (for "loss of use" or otherwise). ✖



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