

Workers' Compensation Section Newsletter

Spring 2019



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From the Chair

By Dennis Flynn



Mentorship's Many Faces

This is my final message as chair of our section, and before I get on with that, allow me to thank all of you for the privilege of serving in this role. I also wish to thank my fellow council members for their hard work, collegiality and good humor.

As the readership must know by now, our esteemed editor is an impassioned proponent of mentorship. Jayson's views and commentary in this regard have caused me to review my own case. Looking back on the last 23 years, it is impossible not to conclude that, regarding the mentors that have appeared in my life, I am the luckiest guy I know.

Of course, I cannot begin this reverie without mentioning my dad. My brothers and I all have memories of him coming home from the office, pouring a beverage, and then talking to our mother about his day/cases, while he returned phone calls to clients, and we listened in. Without ever expressly stating so, he imparted the notion that the practice of law was a calling, and that the legal profession was a force for good. Moreover, when speaking of opposing counsel, it was clear that he respected and admired these men and women, claiming no ownership of the moral high ground (e.g. "the question is not who is right, but, rather, what is it worth?")

For the three months that preceded receiving my bar exam results, I had the incomparable experience of driving Tim Bott to depositions (at least two a day back then) and court appearances. As I would drive, Tim would talk about the case(s) up that day, his theory of causation and/or disability, and the significance of whatever medical record he happened to be reading. I learned more medical terminology, and more about the musculoskeletal system, in that three months than I have learned since. Eventually, I even learned to pronounce 'radiculopathy' and 'spondylolisthesis' well enough so as not to make Tim cringe.

Continued on next page

Workers' Compensation Law Section Council

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Term Expires June 2019
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Richard N. Lovernick, Ann Arbor
Dan Zolkowski, Lansing

Term Expires June 2020
John B. Combs, Grand Rapids
Jeffrey S. Kirschner, Southfield
Sean Shearer, Troy

Term Expires June 2021
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Christopher M. Westgate, Grand Rapids*

Tim Esper, Ex Officio

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Hon. Luke McMurray, Chief Magistrate, Board of Magistrates

George Wyatt, III, Michigan Compensation Appellate Commission

Michael Hohauser, Commissioner Liaison

* Currently serving 1-year term subject to election at next annual meeting.

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

Jayson A. Chizick, Newsletter Editor
Dan J. Zolkowski, Associate Newsletter Editor

Opinions expressed herein are those of the authors or the editor and do not necessarily reflect the opinions of the section council, the membership, or their employers

Material for publication should be sent to the editor at:

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From the Chair Continued from page 1

It was not too long after that that I came under the tutelage of Randy Grit. Leading by example, Randy demonstrated that, despite the long hours and moments of drudgery, the practice of law can be engaged with merry enthusiasm. Simply put, practicing law can, and should be, *fun*. Discovering damaging information on the plaintiff in an obscure medical record was *fun*. Explaining a client's exposure in a status report to an insurance carrier was *fun*. Having a bad day? Forget that, and let's go see what's in the mail, there's sure to be something *fun* in there.

There are also the countless others who provided mentorship without knowing it. I used to watch Tom Tasker (a 2019 HOF inductee) like a hawk—the words he used, the tone he took, the actions he undertook—to my great benefit. I once had Fred Bleakley, Sr. as a co-defendant on a lung exposure case, and had the pleasure of listening to him slowly (and without ever raising his voice or uttering an impolite word) barbeque plaintiff's expert witness on cross-examination. It was significantly less pleasurable, but no less edifying, to listen to J. Walter Brock or Themis Fotieo slow-roast my expert witnesses. If I try, I can summon the feeling of dread I once felt watching Glenn House walk into the office of a Chicago heart expert to pinch hit for the attorney of record, and cross-examine my expert. Sometimes the mentoring isn't exactly pleasant.

For me, Ed Welch's dedication to his father and Jerry McCroskey in our practice's most used treatise says it all, speaking not only to the gift that is mentorship, but to the institutional knowledge that it engenders. Jerry McCroskey's mentorship of Walt Brock and Tim Bott (among others) lives on in the practice of Chris Rabideau and me (among others), to give two examples among many throughout our state and section. I have heard the phrase 'throwing the skunk on the porch' to describe asking a controversial question of a witness by people who I know are too young to remember Al Russell (the originator as far as I know). I expect that it will be a long time before a good Fred Foster story goes out of style at the Gaylord Agency.

I hope the reader will forgive the rambling nature of this message. The point is simply this: mentoring has a ripple effect, and that effect can only be good for our section. If you can take the time to show an interest in the practice of a younger attorney, then do that. Also beware: if I'm watching, you will probably be mentoring me too.

See you on the trail.

In accordance with the section bylaws, the Workers' Compensation Section Council has voted to raise membership dues by \$5 for the next fiscal year. This matter will be taken up at our annual meeting on June 14, 2019, in Traverse City, Michigan.



From the Editor

By Jayson A. Chizick

"The great thing in this world is not so much where we stand, as in what direction we are moving."

—Oliver Wendell Holmes



We are moving forward. Under the leadership of Dennis Flynn, our section has and continues to move toward evermore inclusion and an open door for those young, old, retired and in-between. The upcoming annual meeting is going to be a fantastic celebration of who we have been, who we are and welcoming our new chairperson and council. I have mentioned many a time in the newsletter the importance of mentoring. The mentoring that I receive in my practice is a primary reason for my success. That being said, I also look to the example set by many of the fine individuals that are being honored by induction into the Hall of Fame and as part of the 50-year class of 2019. In addition, there are no less than a dozen different former section chairs that are active in practice today. Whether they be on the bench or opposing counsel, all of these fine people are emblematic of the professionalism and leadership that I aspire to. Your section council has decided to renew a process of honoring those who have come before us. One way of honoring those individuals will be with a 50-year member pin. If you run into one of these folks at an Agency, I would encourage you to speak with them about their experiences, learn from their stories and seek their mentorship.

Our membership is continuing a decline due to many factors. We have lost many of the giants of the workers' compensation world in the past year. To eulogize one to the exclusion of another would be unfair to the legacy of all. The memories of these individuals are a blessing to us all.

As we approach the summer, birds are chirping and allergies are flaring. Personally, the sunshine brings relief to the gray and cloudy daily travels, and the optimism of nights on the baseball diamond with my kids. Trips to Mackinac Island, Sleeping Bear Dunes, Holland, Detroit and many other great Michigan points are planned. I am fortunate to live a state with great outdoor activities, and to work in a profession that encourages the enjoyment of family and friends. I try to share that joy and optimism with those who do not know our section. Please try to do so in your office and professional circle.

Our annual meeting is coming up on June 13-14, 2019, in Traverse City. Dennis Flynn, Rick Lovernick and Dan Zolkowski have planned a fantastic reception, Hall of Fame induction ceremony, honoring of 50-year members for the class of 2019 and a Friday morning meeting with a speaker that sounds very interesting indeed. Dan is working to put together a golf outing. If you are interested in participating, please email him at dan.zolkowski@accidentfund.com. Mike and Deborah Brenton are hosting our section after-party. More details will follow about this party, along with location, at the Hall of Fame dinner. Mike and Deborah are also graciously putting together a wine tour sponsored by the section. Please contact Mike at mikebrenton@brentonlaw.com for more details. Space is going to fill up quickly, so please contact him right away if you wish to participate. There is much more information about the Hall of Fame honorees, our 50-year members for the class of 2019 and the upcoming Annual Meeting in the following pages. Please keep reading, and be sure to book your room and register for the annual meeting as soon as possible, as space is filling up quickly!

Beginning with the next issue, Dan Zolkowski will be taking over as your newsletter editor. Dan is a grammar expert, far better with prose than I will ever be, and also a fine human being. He is also what I would call an "iron man" so be prepared to be motivated! I sincerely appreciate the opportunity to write in these pages over the past several years, and I hope that my words have been useful. As we move forward together, let us move together with a goal to continue excellence in professionalism and advocacy. See you next month, down by the bay. ✨

—Jayson Chizick





WORKERS' COMPENSATION LAW SECTION

Registration

Register online at <https://www.eiseverywhere.com/wc061319>

Meeting Registration Deadline: June 8, 2019

Summer Annual Meeting ● June 13-14, 2019

Hotel Indigo ● Traverse City, Michigan

Cost

- Section Member - attending Annual Meeting (9a.m-Noon)FREE
- Section Member or Attorneys\$50
(Includes both Meetings, Cocktail Networking Reception (2 drink tickets), Hall of Fame Ceremony and Dinner, and Friday Breakfast Buffet)
- Guest of Attorney (registration for Hall of Fame Ceremony)\$40 x ____ = \$ ____
(Includes Cocktail Networking Reception (2 drink tickets), Hall of Fame Ceremony and Dinner, and Friday Breakfast Buffet)
- Children under 16 years of age attending Hall of Fame ceremony\$10 x ____ = \$ ____
(Includes HOF Ceremony & Dinner, and Friday Breakfast Buffet)

Total = \$ _____

Section Member Registration

P #: _____

Name: _____

E-mail Address: _____

Your Firm: _____

Address: _____

City: _____ State: ____ Zip: _____

Telephone: (____) _____

Hall of Fame Dinner Choice: Beef Chicken Vegetarian

Guest Registration

Adult Guest: _____ email: _____

Hall of Fame Dinner Choice: Beef Chicken Vegetarian

Child: _____

Hall of Fame Dinner Choice: Beef Chicken Vegetarian

Child: _____

Hall of Fame Dinner Choice: Beef Chicken Vegetarian

Enclosed is check # _____ for \$ _____

Please make check payable to: STATE BAR OF MICHIGAN

To pay by credit card visit <https://www.eiseverywhere.com/wc061319>

Register one of two ways

Online: <https://www.eiseverywhere.com/wc061319>

Mail your check with the completed registration form to:

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

Accommodations

Hotel reservations cannot be made by using this form. Use block code WRK for reservations, or contact Taylor Salonen at the Hotel Indigo at (231) 932-0500 (press 2 for sales, then 3 for Taylor). The cut-off date for obtaining a room at the group rate is May 16, 2019.

Questions

For additional information about this event contact:

Rick Lovernick, rlovernick@conklinbenham.com
Dan Zolkowski, dan.zolkowski@accidentfund.com
Dennis Flynn, dflynn@harveykruse.com

Cancellations: All cancellations must be received at least 72 business hours before the start of the event and registration refunds are subject to a \$20 cancellation fee. Cancellations must be received in writing by e-mail (tbelling@ichbar.org), fax (517-372-5921 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.) No refunds will be made for requests received after that time. Refunds will be issued in the same form payment was made. Please allow two weeks for processing. Registrants who cancel will not receive seminar materials.



WORKERS' COMPENSATION LAW SECTION

Summer Annual Meeting ● June 13-14, 2019

Hotel Indigo ● Traverse City, Michigan

Agenda

Thursday, June 13

- 4:00 p.m. Council Meeting (Hotel Indigo)
- 6:00 p.m. Cocktail Party (Hotel Indigo)
- 6:30 p.m. Dinner and Hall of Fame Induction Ceremony honoring Mark Robins, Mike Podein, David Cooper and Tom Tasker, and Celebration of 50-year members (Hotel Indigo)
- 9:00 p.m. After Party (Mike & Deborah Brenton, location TBA)

Friday, June 14

- 8:00 a.m. Breakfast (Hotel Indigo)
- 9:00 a.m. Annual Meeting (Hotel Indigo), Keynote Speaker is Dr. Brooke VanBuren-Hay, plus annual meeting business, election of officers and members
- 12:00 p.m. Wine Tour (information TBA) OR Section Golf Outing (TBA)

Optional Friday Afternoon Events:

- 12:00 p.m. Wine Tour, TBA (Contact Mike Brenton for more details at mikebrenton@brentonlaw.com or see page 9)
- 12:00 p.m. Section Golf Outing, TBA (Contact Dan Zolkowski for more details at dan.zolkowski@accidentfund.com)



Photo courtesy Hotel Indigo

Hall of Fame Nominees

David Cooper

David has been a workers' compensation for plaintiffs attorney for 47 years, originally beginning his practice at Cockrel, Cooper, Spearman & King in Detroit. In 1982, he moved his practice to Adrian, where I joined him in 1983 as a law clerk, and quickly learned that I had a mentor whose zeal and skill in representing injured workers is second to none. He is considered by many to be a lawyer's lawyer and a judge's lawyer as well.

Despite his zeal, David has always set an example of not taking unfair or unethical advantage of his colleagues in the defense bar. He has always emphasized the importance of "doing the right thing." While he sometimes presents a gruff exterior, beneath it is a mensch with a good heart. It has been my honor and privilege to have him as a mentor and partner, and I can now enjoy watching him mentor my son, Jacob.

David is truly one of the unforgettable workers' compensation practitioners, and he richly deserves to be inducted into the Workers' Compensation Hall of Fame.

Mike Podein

Mike began as an adjuster for Michigan Mutual. After passing the bar, he became house counsel for Michigan Mutual for a few years. He then took a position as an associate at a plaintiff's firm under the guidance of Tom Ryan.

Working with Mr. Ryan, he quickly became partner and expanded the firm. For the next 30 years (through a few different iterations) until he retired on December 31, 2015, he was president and managing partner of Ryan, Podein, Postema & Westgate, a plaintiff only firm in Grand Rapids.

Mike was integral in establishing the Workers' Compensation Section of the Grand Rapids Bar and is a past president of that organization. He has lectured at numerous events and participated in the radio program "Ask the lawyer" on several occasions. He has the heart of a teacher and willingly shared his knowledge without hesitation.

Through the years, Mike demonstrated a commitment to mentorship which has influenced countless legal careers. Mike always had paid law clerks (typically law school students) on staff to give them experience in the practice of law. He was generous with his time and took them to court, depositions, mediations, trials or even meetings with clients to see the real impact of our practice.

Mike's career has exemplified the canons of the Workers' Compensation Hall of Fame and he is honored to join the prestigious roster with his fellow colleagues.

Mark Robins

I am nominating the late Mark Robins for the Hall of Fame based on 35 years of observing this remarkable man and attorney. In all those years I never heard him utter a cross word or lose that special decorum for which he was known. In depositions he was a tough cross examiner, but never mean spirited in pursuit of his client's interest. He represented professionalism in a world often lacking this attribute. He was intelligent, kind, steadfast, and supportive. He deserves to be honored, recognized, and sorely missed. I am better for having known him.

Thomas R. Tasker

Mr. Tasker is currently retired and residing in Florida. Mr. Tasker was a partner and shareholder in the law firm of Smith Haughey Rice & Roegge, PC, in Grand Rapids. He practiced as a defense attorney in workers' compensation for over 40 years. For a time, he was chairperson of the Workers' Compensation Department at Smith Haughey.

I had the honor of working directly with Mr. Tasker as an associate attorney and fellow shareholder for 17 years at Smith Haughey. After leaving Smith Haughey, I routinely observed Mr. Tasker at hearing sites and in depositions.

Mr. Tasker demonstrated a commitment to fostering and furthering the objectives of the Workers' Compensation Section of the State Bar by serving on the section's council as a council member, treasurer, secretary, vice chairperson, and chairperson.

I suspect that virtually all lawyers, administrative law judges and magistrates with and before whom Mr. Tasker practiced would vouch that he had the highest professional qualifications, ethical standards, character, integrity, professional expertise, and leadership.

Mr. Tasker was one of my primary mentors and role models during my tenure at Smith Haughey. In fact, he encouraged me to become involved in the section, resulting in my service on the section council, eventually holding leadership positions up to and including chairperson.

By my observation, Mr. Tasker had the respect of the bench, opposing counsel, and the workers' compensation community. He always acted in a professional manner and maintained civility in adversarial relationships. Mr. Tasker had the gift of assisting attorneys and clients with differences of opinions to resolve their differences, achieve compromises, and/or settle cases.

Continued on next page

Mr. Tasker was a skilled examiner of expert and medical witnesses. He undertook to know the medicine and science as well as the practitioners.

I believe most practitioners who knew Mr. Tasker will agree that, although he was a skilled advocate for his clients, he

always comported himself as a gentleman and with integrity.

I respectfully urge the Hall of Fame Committee to accept this nomination and advance Mr. Tasker to membership in the Workers' Compensation Hall of Fame. ✖

Section Members Celebrating 50-years of being an Attorney

Robert L. Benham Jr.

Norman J. LeVasseur, LeVasseur & LeVasseur PC

Ronald S. Weiner, Sachs Waldman PC

Donald G. Ducey, Conklin Benham PC

Harvey Covensky, Harvey Covensky PC

Richard L. MacArthur, MacArthur MacArthur & Associates PC

Thomas G. Moher

Jerome H. Solomon

Kenneth L. Block

Charles E. Nebel, Nebel & Nebel

Thomas J. Veum, Thomas J. Veum PC

Charles E. Mann

Ronald D. Glotta, Glotta & Associates PC

James P. Hoffa, James P. Hoffa PC

William R. Listman

David A. Cuttner, David A. Cuttner PC

John J. Grech, John J. Grech & Associates PC

Jack F. Wheatley, MCAC Michigan Compensation Appellate Commission

Stephen L. Kinsley, Kluczynski Girtz Zamler & McCubbrey

Thomas M. Anderson, Law Offices of Thomas M. Anderson PC

Charles D. Dawson

Robert A. Canner, Robert A. Canner PC

Gerard P. Peplowski

James A. Reiter, Charfoos Reiter Hebert PC

John P. Baril

Glenn W. House Jr., Reamon Law PLC

Donald L. Petruilis

Mark E. Reizen

Edward M. Welch Jr.

Roy C. Hebert, Law Office of Roy C. Hebert

Dennis G. Vatsis, Dennis G. Vatsis PC



Our Summer Meeting Keynote Speaker

The 2019 summer meeting invited guest speaker is Dr. Brooke VanBuren-Hay, a clinical neuropsychologist from Lansing. Dr. VanBuren-Hay obtained her MA and PhD from Michigan State University and has been involved in the clinical practice of psychology for over twenty years, with the past fifteen years in the care and treatment of brain injuries working as a clinical neuropsychologist with PAR Rehabilitation, Hope Network, and Sparrow Health Systems. Along the way she took some time out to attend law school at Cooley Law School and obtained her JD in May 2011.

Dr. VanBuren-Hay will provide an in-depth look at the practice of neuropsychology and its use and value in the evaluation of traumatic brain injuries (TBI). She will cover the basic techniques used by those in her field in assessing the TBI for purposes of treatment and possible disability impact. The information she provides may be helpful to your practice, in evaluating TBI cases both from an employee and employer standpoint. ✕

Fore!

Section Summer Golf Outing

Friday, June 14, 2019

Contact Dan Zolkowski at
dan.zolkowski@accidentfund.com
for more information.

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.



WORKERS' COMPENSATION LAW SECTION

Old Mission Peninsula Wine Country Tour

Friday, June 14, 2019 at 12:15 p.m

For the fourth time, Mike and Deborah Brenton will be hosting a Wine Country Tour, to depart from the Hotel Indigo at 12:15 p.m. sharp on Friday after the seminar. Blue Lakes by the Bay Transportation will again provide luxury coach service. Mike, a level one sommelier, and formerly a wine writer and representative of public interests on the Michigan Grape and Wine Council, will lead wine country trivia questions during the bus portion of the tour, with plenty of prizes to go around.

The first stop will be Brys Estate Vineyard and Winery (www.brysestate.com), where veteran winemaker Coenraad Stassen will meet the group in the vineyard, then lead us through a tasting of Brys Estate wines.

The next stop is Bonobo Winery (www.bonobowinery.com) co-founded by Todd and Caroline Oosterhouse and HGTV's Carter Oosterhouse and actress-wife, Amy Smart Oosterhouse. There, we will be hosted by vineyard manager and head winemaker, Cornell Olivier, who some may remember was the founding winemaker at 2 Lads Winery, which the group visited four years ago.

The third stop will be at one of Michigan's newest and most spectacular wineries, Mari Vineyards (www.marivineyards.com), conceived and founded by Marty Lagina (History Channel's "The Curse of Oak Island"). The massive stone winery emulates an Italian chateau and estate. Winemaker Sean O'Keefe will lead the group through a tour of the underground caverns and experience "the oculus." This is a rare opportunity to tour the inner recesses of the winery.

As in the past, time on the bus will be devoted to Old Mission Peninsula wine country education, abundant trivia questions, fun prizes, snacks, and a beverage or two. Sandwich wraps and chips will be provided for a brown bag lunch on the bus.

Registration is strictly limited for this event, first come, first served (21 or older only). To register, please complete the Registration Form below and return to Brenton Law Group, P.C. with your check by Friday, May 31, 2019. It is anticipated that the bus will be full, so please call or email in advance to verify whether there is a waiting list.

REGISTRATION FORM

ATTENDEES

Section Member Name:	Cell Phone:
Section Member Email:	
Guest Name(s):	

PAYMENT

Total Number of Attendees:	@ \$75 per person	Total Amount Enclosed:
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No Refunds. Make check payable to: State Bar of Michigan

Mail payments by: Friday, May 31, 2019 to:

Michael Brenton
 Brenton Law Group, P.C.
 2500 Kerry Street, Suite 101
 Lansing, MI 48912

Board of Magistrates Update

By Hon. Luke McMurray, Chief Magistrate

In January 2019, Governor Whitmer made appointments and reappointments to the Board of Magistrates. I was reappointed for a new four-year term, and selected as Chair of the Board of Magistrates to serve at the pleasure of the Governor. Magistrates Slater, Ognisanti and Grunewald were also reappointed to new four-year terms. I am pleased to welcome the following to the Board:

David DeGraw, who is assigned to the Grand Rapids and Kalamazoo agencies; Michael Heck, assigned to the Detroit Agency; and Philip Della Santina, assigned to the

Pontiac Agency.

The Board of Magistrates regularly meets to discuss practice and procedure, and I plan to continue this practice. Any new or revised rules or local rules will be shared with the section as appropriate. At present, the director of MAHS has ordered that non-Agency/MAHS employees may not retrieve files. Please speak with agency staff to obtain any documents.

I look forward to continuing the positive relationship between the Board of Magistrates and the section. ✨

The Necessity (and Profitability) of Filing a Civil Action in Federal Court in Social Security Disability Appeals

By Josh McFarland

As this section is aware, workers' compensation (WC) practitioners typically encounter clients involved in SSDI and SSI appeals. Even if you do not handle your client's SSD case in-house, it is imperative that WC practitioners pay attention to these cases as prompt follow-up is often necessary to preserve their clients' rights. If you do handle SSD cases in addition to WC cases at your firm, the following article reprinted from the Social Security Section newsletter with the original writer's permission is worth reading.

If you are a Social Security Disability attorney, do you practice in federal court? If not, why? Every practitioner in 2019 should be asking himself that question and, if claimants care about their representation, they should be asking that question of their representatives as well. Simply stated, if you are not appealing SSD cases to federal court, you are doing yourselves and (more importantly) your clients a tremendous disservice and, in certain circumstances, you could be committing malpractice.

The Social Security Administration (SSA) publishes data on everything, including Appeals Council (AC) and federal court (FC) remand rates.¹ The numbers tell a compelling story. The AC remand rate as a percentage of all dispositions in FY 2017 was 10.41 percent. In FY 2018, the rate was 11.83 percent.² Federal court remand rates as a percentage

of new court cases filed show a tremendous difference. In FY 2017, the federal court remand rate was 48.65 percent and in FY 2018, that rate increased to 50.65 percent.³ It is clear from the data that you and your clients stand a much better chance at the federal court level than before the Appeals Council. Yet I encounter so many attorneys that say they do not do federal court work and simply give up after the AC predictably denies review. With the higher chance of success coupled with the ability to receive EAJA fees for federal court work, I often wonder why this is the case.

To illustrate my point, let me share a recent result I had. In 2011, I had a claimant come to me for assistance in filing a Social Security Disability appeal. She had recently been denied by the agency and was looking for representation. The claimant had significant severe impairments related to her cervical and lumbar spine as well as carpal tunnel syndrome. In fact, the claimant's cervical spine impairment was so severe that she required a cervical fusion surgery. The first hearing took place in 2012 and resulted in an unfavorable decision. After appealing to the AC, we secured a remand and had a new hearing in 2015 in front of the same ALJ. Following that hearing, we received yet another unfavorable decision and went to the AC once again. The AC subsequently denied review.

At that point, we were left with no other choice than to go to federal court since the claimant's date last insured (DLI) was 12/31/13. Because the most recent ALJ decision was after the claimant's DLI, starting the whole process over and filing a new application for benefits (a common tactic among some SSD attorneys) was out of the question. Moreover, because the claimant had a spouse who worked full time, the claimant was not eligible for SSI. In short, without a federal court filing or a return to work to regain her insured status, the claimant would essentially be forfeiting her claim to SSD benefits permanently.

If I was one of the attorneys mentioned earlier that did not do federal court work, the claimant would be left looking for a new attorney with only 60 days in which to file a civil action. While I don't have any exact data on this point, my suspicion is that many claimants in this situation do not find attorneys to handle the federal court action and are therefore forced to abandon their claim. In this writer's humble opinion, if you are an attorney that does not handle federal court work and are presented with this situation, it is potential malpractice if you fail to refer your client to an attorney who can file the federal court action on his or her behalf or to someone who can at least give an opinion as to whether a successful federal court filing is feasible.⁴

After review, the federal court found significant errors in the unfavorable ALJ decision requiring remand. These errors included critical Step 3 deficiencies as well as the weight given to various opinions in the file as to the claimant's level of functioning. Following a successful federal court appeal, I was awarded an EAJA fee of close to \$3,000 for my federal court work and the case was sent back down to the agency for a third hearing. Following that third hearing, the new ALJ found my client disabled. Because significant time had passed since the initial application, my client was not only awarded an open period of disability, but over \$100,000 in past due benefits. Once again, these are benefits that had we not sought federal court review, would have never been granted. Not only would the claimant have missed out on a

six-figure back pay award, but she would have also lost any chance at ongoing benefits as well. As noted earlier, this can be good for you as the attorney as well. Due to the use of a two-tiered fee agreement which allows an attorney to avoid the \$6,000 cap on attorney fees after the first administrative hearing, I have petitioned the agency for a fee of 25 percent of the back pay and the client enthusiastically and graciously agreed and signed off on it.

In conclusion, if you are not doing federal court work, you should ask yourself why and seriously considering dipping your toes into the federal judiciary waters. It can be rewarding for both you and your clients. The added focus on and development of the legal and factual issues required by such an appeal has the added benefit of making you a better advocate before the agency which will undoubtedly serve you well in the future. ✖

About the Author

Josh McFarland is an attorney at Jay Trucks & Associates in Clare, Michigan. Practicing primarily in the area of Social Security law, Mr. McFarland is an executive council member of the Social Security Law Section, and handles cases throughout the state of Michigan.

Endnotes

- 1 <https://www.ssa.gov/appeals/publicusefiles.html>
- 2 https://www.ssa.gov/appeals/DataSets/AC03_AC_Remands_All_Dispositions.html
- 3 https://www.ssa.gov/appeals/DataSets/AC05_Court_Remands_NCC_Filed.html
- 4 The Section's listserv is an excellent resource for not only finding attorneys who may be willing to look at the case, but also for assistance in filing one yourself. In fact, my first federal court filing was done with the assistance and input from numerous members of this section who graciously provided sample briefs and arguments that I could build off of.



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>

CaseLaw Update

By Martin L. Critchell

Since the last issue of the *Newsletter*, the Michigan Supreme Court has not released an opinion or order in a case involving workers' compensation.

The Michigan Court of Appeals released two opinions involving workers' compensation that are binding given that the release was "for publication." In *Allen v Charlevoix Abstract & Engineering Co*¹ the Court of Appeals ruled that neither the Workers' Compensation Board of Magistrates nor the Michigan Compensation Appellate Commission had any authority to modify any term in a voluntary payment agreement, even a clerical or arithmetic error. But the Court could. *Id.* at _____. ("There is no dispute that the [Voluntary Payment Agreement] constitutes a contract or that it contains a mathematical error. The [Michigan Compensation Appellate Commission] found that it lacked the equitable authority to reform the parties' contract. We hold that the [Commission's] determination was correct, but we choose to exercise our own equitable authority to reform the [Voluntary Payment Agreement.]")

While accurate, this decision is likely to be inconsequential in practice. Parties can still invoke the equity jurisdiction of a circuit court to vacate or amend an order that approved an agreement to redeem liability or a voluntary payment agreement as *Allen* could not affect *Solo v Chrysler Corp (On Rehearing)*² and that involves less time and expense and far more certainty than proceeding before the Board and then the Commission—which must deny the request per *Allen*—to reach the Court of Appeals, only to have the Court refuse the case for review given review is by leave, not right.³

The other decision that the Court of Appeals released "for publication" was *Reidenbach v City of Kalamazoo*,⁴ the first decision since *Corbett v Plymouth Twp*⁵ to consider coordination of weekly workers' compensation after the distribution from a pension plan financed by both the employer and employee.

One subject was the method for determining the after-tax amount of the pension that Reidenbach received given that the Weekly Benefit Tables that must be used include deductions for the payments that had been made by the terms of the Federal Insurance Contributions Act⁶ (FICA) and state income taxes that Reidenbach had never paid because he was exempt as an employee of the city. *Reidenbach* at _____. The Court of Appeals ruled that the amount of FICA and state income taxes were to be added after using the *Weekly Benefit Tables* to determine 80 percent of the after-tax amount of the pension benefit and multiplying by 1.25. *Id.* at _____. This ruling about FICA "add back" also extends in determining

the weekly compensation for city and state employees who are exempt from FICA. The FICA would be added after using the Weekly Benefit Table to determine 80 percent of the after-tax amount of an average weekly wage for employees who were exempt.

The other subject was the ratable amount of pension benefit that could be subtracted from the weekly workers' compensation by the terms of the first sentence of MCL 418.354(1)(e), as amended by 2011 PA 266. The rate or percentage depends on the amount of the *employer's contributions* compared to the *total contributions*. The Court of Appeals ruled that the *employer's contributions* included payments that had been made by the employer from the inception of the pension plan, not from the hiring of the employee receiving the pension. *Id.* at _____. And, relatedly, the *employer* had the obligation of proving this amount. *Id.* at _____.

Reconsideration of the case was requested by Reidenbach but later withdrawn. Any request for review by the Michigan Supreme Court cannot affect the binding authority of the opinion. MCR 7.215(C)(2), second sentence.

The Michigan Compensation Appellate Commission decided five cases of note. In deciding the case of *Perry v McDonald's Restaurants of Mich, Inc.*,⁷ the Appellate Commission recognized that the Health Insurance Portability and Accountability Act of 1996 (HIPPA) does not allow the custodian of the medical records of an employee to withhold any record that has been described by a subpoena that has been issued by the director of the Workers' Compensation Agency, the Workers' Compensation Board of Magistrates, an arbitrator, the Appellate Commission, or a lawyer for the employee or compensation insurer. *Id.* at 4-5. ("Pursuant to 45 CFR 164.15(e)(1)(i) and (ii), a covered entity may disclose protected health information in the course of any judicial or administrative proceeding in response to...a subpoena. MCL 418.853 specifically provides that a subpoena signed by an attorney of record has the force and effect of an order signed by a magistrate or arbitrator associated with the hearing. "[McDonalds] has a right to determine whether [Latosha Perry] has had previous injuries or other complaints involving [her] neck, right arm and right shoulder or other conditions involving aggravation and/or pre-existing conditions or bringing into play the 'significant manner' standard. To properly determine that question, [McDonald's] is entitled to **all** of [Perry's] medical records.") (Emphasis added).

While *Perry* involved a contested claim to workers' compensation, *Id.* at 1, the Appellate Commission recognized

that HIPPA did not allow a custodian to withhold records in an uncontested claim to workers' compensation. *Id.* at 2. ("45 CFR 164.512(1) also provides a covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation...")

Heestand v Cintas Corp No. 2⁸ involved an egg toss. An egg toss is a game in which two people pass a raw egg from a distance that is increased with each completed throw. The winner is declared when one does not catch the egg intact. It is not a sport having an organization that has promulgated official or standardized rules and administering play like baseball, football, and track and field. Gemma Heestand was injured during an egg toss when she collided with a sign while leaping to catch an egg thrown to her by another. This happened at Cintas where she worked as a custodian during her usual afternoon break (*Id.*) and had been invited to participate with other employees by the general manager. *Id.* at 5.

Heestand then claimed workers' compensation for her injuries. *Id.* at 1.

The Workers' Compensation Board of Magistrates (Magistrate McAREE) allowed the claim because "[Heestand's] decision to 'accept' the personal invitation showed her solidarity, her willingness to comply with the employer's request, which was in fact a reaffirmation of the employer's authority. Furthermore, she was still being paid..." *Id.* at 8.

On appeal, the Appellate Commission denied the claim with the decision that the major purpose of the egg toss was social and recreational, not occupational. Noteworthy, the Appellate Commission said that the place and pay were unimportant. *Id.* at 9. ("That [Heestand's] injury occurred on the employer's premises during her work day and at a time she was being paid are not controlling.") The crucial circumstance is the nature or character of the activity. *Id.* at 10 n 8. ("The statute [the second sentence of MCL 418.301(3)] directs the fact finder to consider whether, or not, the activity is social or recreational. If the nature of the activity meets that description, we must consider whether 'the major purpose' at the time of the injury retains that characteristic.") This means that the reason for the participation in the activity is not important and explains why there was no consideration or analysis of the motives of the employer in sponsoring the activity or the employee in participating.

The attention to the character of the activity when Heestand was injured instead of the place or remuneration at the time was consistent with the analysis by the Michigan Supreme Court in *Buitendorp v Swiss Valley, Inc.*⁹

In deciding the case of *Baxter v Gen Motors Corp*,¹⁰ the Appellate Commission ruled that listing the names of companies or websites was insufficient to establish that a job search has been conducted.

"we are unable to agree with the dissent that a mere list of companies and websites satisfies that requirement of a good faith job search."

And the Appellate Commission added that was needed to demonstrate that a real job search has been conducted. An injured employee should report

- the job that had been sought
- how the job had been sought
- when the application for work had been made
- the name of the person who had been contacted

and

- any follow-up after applying for work.¹¹

The decision was not unanimous. One of the three commissioners said that a list of companies that Baxter had contacted was enough because General Motors had not provided any evidence of bad faith. *Id.* at 5. ("In the absence of a specific ruling that [Baxter's] testimony on this issue is not credible coupled with the absence of any affirmative evidence that [his] job search was not in good faith I would reverse...")

Related to the validity of a search for employment while disabled by an injury sustained at work is the rate of weekly workers' compensation when the search is successful. That was the question propounded in the case of *McGaughy v Dep't of Corrections*¹² as James A. McGaughy said the rate was based on the actual earning of the new job while the Department of Corrections maintained that the rate was based on what might have been earned according to a vocational counselor. *Id.* at 4. *Terry v Dep't of State Police*, 2018 Mich ACO 47 at 1-2. The Appellate Commission ruled that the actual earnings were controlling. *Id.* at 4. ("The part-time, \$8.15 per hour job that [McGaughy] has obtained is prima facie evidence of his current wage earning ability.")

In addition to the agreement to redeem liability, many employees agree to resign from employment and forego any rights under the contract of employment or other law when settling a claim to workers' compensation. John S. Terry did. Terry agreed "not to apply or accept reemployment with the State [of Michigan]" when settling his claim to workers' compensation with the State Police. *Terry v Dep't of State Police*.¹³

Four years after agreeing to not resume work with the state, Terry applied for and was hired by the Office of the Racing Commissioner in the Department of Agriculture. But he was later fired when the agreement or release came to light. *Id.* at 2. Terry then filed an application for mediation or hearing with the Workers' Compensation Agency to "set aside the release." *Id.*

The Board of Magistrates dismissed the application for lack of jurisdiction to rescind or modify the release. *Id.* at 2.

“Magistrate Timmons had concluded that even though the Board of Magistrates may apply equitable principles, that expansion of powers beyond the explicit statutory authority does not include the power to rescind and/or reform the release in this case.”

The Appellate Commission agreed that the Board could not consider the claim by Terry but for a different reason: it rejected the claim by Terry for its tardiness. The Appellate Commission observed that the order approving the settlement was final having been entered years before. *Id.* at 3. (“[Terry’s] request to have the redemption reviewed and rescinded was submitted in the form of the 2016 application for mediation or hearing], which was filed over ten years past the fifteen-day limit established in [s]ection 837.”) There was no mention of *Solo v Chrysler Corp (On Reb)*¹⁴ in which the Supreme Court ruled that a circuit court had the authority to set aside an order approving a settlement for fraud, mutual mistake, or other grounds required in all fairness. ✖

About the Author

Mr. Critchell practices law at Conklin Benham and teaches at Western Michigan University Cooley School of Law. He is a contributing author to Employment Law for Michigan Employers (ICLE 2018) and Michigan Insurance Law and Practice (ICLE 2012). He is a member of the American Society of Writers on Legal Subjects (The Scribes), the Michigan Supreme Court Historical Society, the Michigan Supreme Court Advocates Guild, and the Federalist Society.

Endnotes

- 1 *Allen v Charlevoix Abstract & Engineering Co*, ___ Mich App ___; ___ NW2d ___ (2019).
- 2 *Solo v Chrysler Corp (On Rehearing)*, 408 Mich 345, 352; 292 NW2d 438 (1980).
- 3 *Holden v Ford Motor Co*, 439 Mich 257, 263; 484 NW2d 227 (1992).
- 4 *Reidenbach v City of Kalamazoo*, ___ Mich App ___; ___ NW2d ___ (2019).
- 5 *Corbett v Plymouth Twp*, 453 Mich 522; 556 NW2d 478 (1996).
- 6 26 USC § 3101 *et seq.*
- 7 *Perry v McDonald’s Restaurants of Mich, Inc*, 2018 Mich ACO 49.
- 8 *Heestand v Cintas Corp No 2*, 2018 Mich ACO 43. * (“When [Gemma Heestand] was stepping back and the egg was tossed, she had to step back further and jump in order to catch it. She did catch it but as she leapt to catch it, she collided with a sign behind her...”).
- 9 *Buitendorp v Swiss Valley, Inc*, 485 Mich 879, 880; 772 NW2d 50 (2009).
- 10 *Baxter v Gen Motors Corp*, 2018 Mich ACO 48 at 4.
- 11 *Id.* (“[an injured employee] would be well advised to provide the magistrate with information beyond a mere list of complaints and web sites. *** Suggested information would include the contact person at the business, date of contact, how contacted, position applied for, notation of whether an application was completed, or sent, and any follow up done.”).
- 12 *McGaughy v Dep’t of Corrections*, 2019 Mich ACO 1.
- 13 *Terry v Dep’t of State Police*, 2018 Mich ACO 47 at 1-2.
- 14 *Solo v Chrysler Corp (On Remand)*, 408 Mich 345, 349-350; 292 NW2d 438 (1979).

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



Appellate Commission Rules Subpoenas for Complete Medical Records are Enforcable

By Jerry Newman

In a case with immediate impact on both defendants and plaintiffs, the Appellate Commission has ruled a defendant has the right to subpoena and receive any and all medical records of a plaintiff, "...in order to determine if medical issues are present beyond the mere alleged injury which may impact plaintiff's right to Workers' Compensation benefits".

In *Perry v McDonald's Restaurants of Michigan, Inc.*, 2018 ACO #49, McDonald's issued a subpoena for the complete medical records of Dr. Aaron Smith, a Covenant Medical Center doctor. Covenant and Dr. Smith failed to obey the subpoena. McDonald's filed a motion, and the Magistrate found Covenant and Smith were in contempt of court for

failing to produce the complete medical chart and medical records. Covenant and Dr. Smith then filed a claim for review.

Covenant argued that it only was required to produce records pertaining to a specific injury date. It also argued HIPPA does not allow it to produce any other medical records.

In its Opinion, the Commission stated Covenant and Dr. Smith ignored the concept of aggravation and pre-existing conditions as interpreted by the Supreme Court in various opinions and affirmed the Magistrate's Order for production of the entire medical records. ✖

Words, Words, Words*

By Martin L. Critchell

An *appearance of impropriety* to disqualify someone from office started with Gaius Julius Caesar when divorcing his second wife, Pompeia, and ending her leadership of a religious cult on the grounds that "Caesar's wife must be beyond any suspicion." This was as disingenuous as it was novel given the circumstances.

A young patrician, Publius Clodius Pulcher was obsessed with Pompeia. And knowing that she was to lead a ceremony in her home with other women to honor a Roman goddess, he disguised himself as a woman and inveigled his way into the home to be near Pompeia. However, he was unmasked and driven out by the women in the cult.

None of this mattered. Caesar divorced Pompeia and had her removed from the cult even though she had done nothing and had been the victim of Pulcher.

The duplicity was compounded when Caesar gave Pulcher a coveted job in government. Plutarch, *Lives of the Noble Greeks and Romans*.

Perhaps an *appearance of impropriety* is less than a standard and more a political contrivance given its origin.

* "polonius: What do you read, my lord?"

HAMLET: Words, words, words."

HAMLET, Act 2, Scene 2.