State Bar of Michigan

Workers' Compensation Section Newsletter

Early Spring 2020

Contents

Upcoming Section Events

June 18-20

Spring meeting, Grand Rapids. Hotel accommodations at Embassy Suites with additional information to follow.

Friday, June 19, 2020

2020 GR Brewery Bus Tour

This year put down your wine glasses and grab your stein! The WC section is taking you around Beer City in a Coach to three area breweries for a tasting tour of some of Grand Rapids best brews. The itinerary is:

12:30 p.m. Depart Embassy Suites to The Mitten Brewing Company. There we will have a private room and bar for lunch and beers. Two drink tickets and lunch provided with the tour.

2:45 p.m. Depart the Mitten for Brewery Vivant. Two drink tickets included and you will be able to walk across the street to Leon & Sons if you wish to check out Themis Fotieo's sons wine shop.

5:00 p.m. Depart Brewery Vivant for last stop at Founders Brewing Co. Where we will have a designated area but are on our own for food/drinks/hotel return.

Cost is $60 per person and the coach fits 55 total. Please contact Chris Westgate (616) 318-9423 cell or chris@rppwlaw.com for reservation and payment. Looking forward to a great day exploring the GR brewery scene. ⚒

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

Dan J. Zolkwoski, 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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From the Chair

By Andrea L. Hamm

This new position: Chairperson is bittersweet. I was appointed and voted onto the council in June of 2010. I had been practicing for less than nine years. At the end of my tenure as Chairperson I will have spent more than half of my career on this council. What am I going to do with my time? I can hardly remember life without monthly council meetings. Remember the old days when we had actual physical meetings at the Detroit Agency. Then we actually became technically advanced with the help of individuals such as Matt Conklin. I have served with wonderful people and have great memories of my time on this council. For those who have served with me on the council, you know my biggest responsibility has been arranging the winter meetings year after year. To prepare for my departure, Phil Frame took over completely arranging for the winter meeting this year with the assistance of Rosa Bava and Sam Larrabee.

Our Annual meeting this year will take place in Grand Rapids on June 18th and 19th. In a nod to Matt Conklin who graciously resigned from the council so I could become chair. Plus the fact that Grand Rapids has really good beer! On the 19th, Chris Westgate is arranging a beer tour. Not only will we be recognizing a hall of a famer and those celebrating 50 years as part of the Annual meeting but we will be unveiling the Rosa Bava's Donald Ducey Civility Award. Before you start nominating individuals for this award, be advised the first year it will go to Don Ducey himself! I have very much enjoyed working with Don Ducey regardless of how angry and frustrated Walter Noeske makes me! I hope all of you will join me to celebrate all of these accomplished individuals.

When I graduated from Law School, I had taken every labor law class available to me and was looking forward to NLRB's, TRO's, contract negotiations, and picket lines. Unfortunately, I could not find a job other than working for Barry Adler. Despite all of his faults, Barry Adler introduced me to a world I did not know existed, an area of law where attorneys treated each other with respect and enjoyed each other's company. I am happy I was introduced to this practice and am looking forward to getting my 50-year pin! Thanks to all of you who have been in my life for the last 18 years! I look forward to more. 🛠

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.

Scenes from the Annual Meeting and Hall of Fame Banquet

Magistrate Sims and guest

Hall of Fame Inductees

- David Cooper
- Mike Podein
- Mark Robins
- Tom Tasker

Magistrate Housefield and spouse Mary

50-year member honorees

Jim Geroux and Debra Robins for Hall of Fame inductee Mark Robins, posthumously

Len Hickey and Jane Hofmeyer inducting Tom Tasker

Mike Podein, HOF inductee

David Cooper HOF inductee

Message from WDCAC Chair

Daryl Royal, Workers' Disability Compensation Appeals Commission Chair

How times have changed! In the Spring 2010 Newsletter, then-Chairperson Murray Gorchow wrote, "During 2009, the commission received 235 new claims (for review)." Ten years later in 2019, the commission received just 35 new claims for review. However/interestingly, after several years of almost uniformly denying leave to appeal, the appellate courts have begun showing renewed interest in workers' compensation cases. The Court of Appeals has agreed to consider appeals in approximately a dozen workers' compensation cases. Will this renewed interest by appellate courts translate to more appeals in general? Time will tell…

In the meantime, the Commission is changing as well. We are now the Workers' Disability Compensation Appeals Commission. That's right – no more Appellate Commission. We are the *Appeals* Commission, created by Executive Order 2019-13 which took effect last August.

Some things haven't changed. We have the same address, phone number, fax number, and email address:

Workers' Disability Compensation Appeals Commission
P.O. Box 30468
Lansing, MI 48909
Phone: 800-738-6372 or 517-284-9300
Fax: 517-284-5391
mcacinfo@michigan.gov

However, the commissioners *have* changed. There are three commissioners, and they each serve on the panel in all cases in which they have no conflicts. The three are me, Daryl Royal, the chairperson, and Commissioners Granner S. Ries and Duncan A. McMillan. Between the three of us, we have more years of workers' compensation appellate practice than we care to admit.

At the time I write this, we have 51 appeals pending. You can keep current with future opinions by going to Michigan.gov/wca, scrolling to the bottom, and clicking on "Connect with Us."

With the preliminaries out of the way, I have a request for anyone who may be redeeming a case that is pending on appeal – PLEASE LET US KNOW! We are happy to send files back to the hearing site for a redemption, if we receive a request for all the parties to the case in question, either with letters signed by attorneys for each party or by stipulation signed by all. Once we receive notice, we will promptly start the process of getting the file to the hearing site for your hearing. I'm sure the parties would not be thrilled to see an opinion arrive just prior to the redemption (or at least the losing party might not be thrilled) or, perhaps worse, getting the decision after the redemption but during the 15-day appeal period. We can avoid this type of problem if you notify the Commission that a case is to be redeemed.

Thanks for reading, and I and my fellow commissioners look forward to serving everyone in our work on the "new" Commission. 🛠

Annual Meeting

June 18–19, 2020

Embassy Suites—
Downtown Grand Rapids
710 Monroe Ave NW, Grand Rapids

Please save the date for the Workers' Compensation Law Section's Annual Meeting taking place in Grand Rapids at the Embassy Suites Grand Rapids Downtown on June 18–19.

Please be advised that there is a limited block of rooms available at a reduced rate. Please use this specialized link to book your room or call (616) 512-5700 and mention you are part of the Workers' Compensation Section to obtain the discounted rate. The group rate will only be available through May 19, 2020.

CaseLaw Update

By Michael Reinholm, Assistant General Counsel for AF Group

Since the last edition of the Newsletter was issued, we still have a Supreme Court and Court of Appeals, but as of August 11, 2019 we no longer have the Michigan Compensation Appellate Commission. We now have the Workers Disability Compensation Appeals Commission. This Commission has three members appointed by the governor and approved by the senate. If a tie results because a commissioner cannot hear a case for any reason, the tie will be broken by the chairperson of the Board of Magistrates. Most importantly, among other things, the new commissioners must discharge "his or her duties in a nonpartisan manner." At last, politics vanquished from Michigan worker's compensation.

The change in commissions is the result of Executive Order 2019-13, which amended Executive Order 2014-6, which amended Executive Order 2011-6, which amended Executive Order 2009-53, which amended Executive Order 2003-18, which amended Executive Order 2002-1, which amended Executive Order 1996-2, which . . .

Since the last edition of the newsletter the Supreme Court has not released an opinion or order in a workers compensation case. The Court of Appeals issued two decisions.

In *Fisher v Kalamazoo Regional Psychiatric Hospital,* ___ Mich App _____ (CA No. 343283, released 09/10/2019), the Court of Appeals addressed a question regarding recouping benefits voluntarily overpaid.

The plaintiff suffered an injury at work and benefits were voluntarily paid, but they were paid at an incorrect rate for about three months, creating an overpayment. Defendants filed a petition to recoup. The magistrate denied the request, noting that in multiple cases the Commission had held that when benefits were mistakenly, but voluntarily, overpaid the defendant could not recoup any benefits without proving that the overpayment resulted from the employee's fraud. Defendants appealed to the Commission, which affirmed citing *Whirley v JC Penny Co,* 1997 ACO #247. Defendants appealed to the Court of Appeals, which granted leave. On appeal the Court reversed the Commission and magistrate.

The applicable statute, §833(2), states that when "an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period which is more than one year prior to the date of taking such action." To state the obvious, to the extent of benefits can be voluntarily or involuntarily overpaid, the statute permits either to be recouped. The Court observed that the Commission had limited the right to reimbursement "to cases where the employee engaged in a fraud to obtain the overpayment. Yet, nowhere in the act is there a requirement that an employer or carrier show that the employee engaged in fraud before seeking reimbursement of an overpayment. Nor was the rule adopted by formal rulemaking under delegated authority pursuant to the Administrative Procedures Act."

The Court noted that in *Whirley* the Commission, instead of relying on statutory authority "created the fraud requirements out of whole cloth." In doing so the Commission "exceeded its statutory authority. As explained by our Supreme Court on several occasions, 'the power and authority to be exercised by boards or Commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist." Neither the statute nor any promulgated administrative rule "entrusted the Commission with crafting an employee-fraud requirement to a recoupment action."

The second Court of Appeals case is *Kuhlgert v Michigan State University,* ___ Mich App ___ (CA Nos. 332442, 338363, 344533, released 05/21/2019). The first question was whether plaintiff was an employee of MSU. The second question involved whether the plaintiff's injury occurred in the course of her employment.

The plaintiff, a foreign national, work for MSU in a project funded through a grant from the Advanced Research Projects Agency for the Department of Energy. She was in the United States on a J-1 Visa as a participant in an exchange visitor program (EVP) as authorized under the Mutual Educational and Cultural Exchange Act (MECEA), 22 USC 2451 *et seq.* Section 161(1)(b) of the WDCA states that "[n]ationals of foreign countries employed pursuant to section 102(a)(1) of the mutual educational and cultural exchange act of 1961" shall not be considered employees.

The applicable federal statute allows the Director of the United States Information Agency, an agency within the State Department, to strengthen international relations for educational exchanges "by financing studies, research, instruction, and other educational activities." 22 USC 2452(a)(1). A defendant argued that the plaintiff was an employee because MSU, not the State Department, paid her salary. The Court of Appeals rejected that argument, observing that the federal statute does not require the State Department to directly finance employees, including it may also indirectly finances. Continuing, the Court agreed with the Commission that the federal statute was broad enough to encourage another entity "such as a university, to pay, on behalf of the State Department, expenses of the participant, including wages and benefits" and that an entity "is, by contract with a federal

government grant recipient, entitled to seek reimbursement from federal grant funds for compensation and expenses it pays the foreign national." So, the plaintiff was not considered an employee under the Act because she was working at MSU pursuant to section 102(a)(1) of the mutual educational and cultural exchange act of 1961 and her position was indirectly financed by the State Department.

The Court also looked at §301(3) of the Act. The statute in part states that an "employee going to or from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment."

The facts were described as undisputed. The plaintiff was five to ten minutes and at least 900 feet away from the laboratory where she worked. She was walking to where she had parked her car, which was on campus. The work day was over. The Court agreed the plaintiff was not in the course of her employment, focusing on the premises "*where the employee's work is to be performed*" language. The Court stated that the "large and contiguous nature of MSU's main campus weighs against looking to MSU's premises generally, and instead favors focusing more specifically on [plaintiff's] actual workplace within the premises of the Biology Laboratories Building. See *Hills v Blair*, 182 Mich 20, 27 (1914) (noting that a worker injured on "a railway stretching endless miles across the country ... might be on the premises of his owner and yet far removed from where his contract of labor called him").

This raises a question in future cases regarding how large a workplace needs to be before we focus on a specific part of the premises instead of the premises generally. Imagine the size of the premises of two employers, one a small factory with two entrances and parking for 50 employees compared to an automobile manufacturing facility with 100 entrances and parking for 1,500 employees. Both trip and fall in the parking lot. It is one injury compensable and the other not?

The former Commission issued several interesting decisions.

In *Parshall v Worden & Company*, 2019 ACO #29, the Commission addressed an independent contractor question. The magistrate applied the 20 factor test set forth in MCL 418.161(1)(n) and the added to the Act via 2011 PA 266.

The Commission held that this is the proper test to determine whether a claimant is an independent contractor and not an employee, at least after January 1, 2013. The statute states that on "and after January 1, 2013, services are employment if the services are performed by an individual whom the Michigan administrative hearing system determines to be in an employer-employee relationship using the 20-factor test announced by the internal revenue service." Somewhat ironically, the Commission proceeded to conclude that the magistrate's finding that the claimant was an independent contractor and not an employee was not supported by substantial evidence.

In *Punturo v Parkshore Resort*, 2019 ACO #15, the defendants refused to pay for certain medical treatment, filing a notice of dispute. The plaintiff filed an application to litigate the issue. The magistrate ordered the defendants to pay the full amount of the outstanding medical bills. Defendant appealed.

On appeal the defendants argued that the payment of medical should have been governed by the last sentence of section 315(2), which states that a "health facility or health care provider shall be paid either his usual and customary charge for the treatment or attendance, service, devices, apparatus, or medicine, or the maximum charge established under the rules, whichever is less." That is, the healthcare cost-containment rules should apply.

The Commission disagreed. The Commission held that if a defendant fails, refuses, or neglects to pay for medical treatment, then §315(1) [last sentence] applies and "precludes the defendants from taking advantage of the cost-containment limitations found in §315(2).

In *Pezzati v General Motors Co,* 2019 ACO #28, the plaintiff was injured before the Acts 2011 amendments. The evidence showed that post-injury the plaintiff could earn only a fraction of what he could earn pre-injury. Despite evidence showing that such jobs were available, the plaintiff did not conduct a good faith job search. The magistrate awarded partial wage loss benefits. Defendant and plaintiff appealed.

Plaintiff argued that under the former §361(1) benefits could not be reduced based on a retained but unexercised wage earning capacity were partial disability was found. The Commission rejected that argument, relying on the *Sobotka-Lofton-Harder* of cases. "We detect (in previous panels of this Commission have detected) no deficiencies in the orders that would bring into question their validity under the 1963 Michigan Constitution."

Defendants argued that plaintiff should be disqualified from even partial benefits because of the absence of a good faith job search. A Commission majority rejected that argument. "In advancing this novel argument defendant cites no specific authority in statute or common law supporting this draconian proposition. Therefore, we affirm the magistrate's application of *Stokes* and award of reduced wage loss benefits."

The dissenting Commissioner would have denied the plaintiff any benefits because of his failure to make a good faith job search. He noted that the Court of Appeals, in an unpublished decision, has recently affirmed a denial of benefits to a partially disabled worker who failed to make a good-faith job search. See *Bell v City of Saginaw,* unpublished per curiam opinion of the Court of Appeals, issued May 21, 2019 (Docket No. 341858).

The Commission issued two decisions addressing whether injuries arose out of and in the course of employment.

In *Huey v Valley Electrical Contractors, Inc,* 2019 ACO #22, the Commission looked at the interplay between the coming and going and the social and recreational activity doctrines.

The plaintiff was injured in a car accident. During the day he received two paid 15 minute breaks. Plaintiff testified that during one of these breaks he and two others used a company van and left the premises. The plaintiff testified that on some breaks they would stop and buy something at a convenience store, and other times they would just drive around in order to get away from the worksite. The magistrate found as fact that on this occasion they were simply driving around in order to leave the worksite for their break.

The magistrate analyzed this as a coming to and going from case and looked at the four factor test utilized in *Forgach v George Koch & Sons Co,* 167 Mich App 50 (1988). That test examines whether: the employer paid for or furnished employee transportation; whether the injury occurred during or between working hours; whether the employer derived a special benefit from the employee's activities at the time of the injury; and whether the employment subjected the employee to excessive exposure to traffic risks.

The Commission, however, concluded that the claim should be analyzed under the social and recreational provision of §301(3), which states that "an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act." The Commission utilized a dictionary to define recreation as "refreshment of body or mind, as after work, by some sort of play, amusement, or relaxation."

Applying that test, the Commission concluded the major purpose of the plaintiff's activity at the time of the injury was purely recreational: "plaintiff and his two co-workers were on an off premises joyride simply to achieve some small respite from the confines of the Dow plant. While we do not intend to deprive employees of a meaningful break, we are compelled to advise of the risks associated with the current status of the law pertaining to recreational activities while on break."

The Commission addressed another arising out of and in the course of employment question in *Hamady v Shermeta, Adams & Von Allmen,* 2019 ACO #24. The plaintiff, an attorney, was struck by a car while crossing a street on her way to court. The plaintiff had parked her car in a parking lot not owned, maintained, or leased by her employer. She was paid mileage for the trip to court. The plaintiff testified that her employer considered her to be working from the time she left her house to go to court.

The magistrate looked at this as a coming and going case, applied the four-part test followed in *Forgach v George Koch & Sons Co,* 167 Mich App 50 (1988), and rejected plaintiff's claim. The Commission felt compelled to analyze this as a "work as the occasion for the injury" case citing *Whetro v Awkerman,* 383 Mich 235 (1970). The Commission also felt the need to declare that its decision was in conformance with *Simkins v General Motors Corp (After Remand),* 453 Mission 703 (1996), a worker injured while coming from a nonemployer owned parking lot to work.

The Commission never reviewed the magistrate's findings and conclusion. It concluded that the plaintiff's claim was compensable under either *Whetro* or *Simkins* because the plaintiff "was actually performing her employer directed task at the time of the injury." This was in part based on the fact that after she was struck the plaintiff "continued to execute her employer's mission and ensuring that her client's case got before" the judge she "was actually performing her employer directed tasking at the time of the injury." In contrast Simkins "was not yet at work, and not undertaken any duties attendant to her work."

The Commission also noted the credible and unrebutted testimony "that while the employer did not own the parking lot in the instant matter, it did, in a real sense direct the plaintiff to park where she did. Plaintiff testified that the lot she utilized was the least expensive of those in the area

around the courthouse. She further testified that her employer directed her to choose the least expensive parking option available as it was reimbursing her parking expense."

This decision illustrates a problem with our case law. By statute, the only question to ask about an injury's work connectedness is whether the injury arose out of and in the course of employment. MCL 418.301(1). The same test should be used to decide all cases where the work connection is questions. What if the facts of this case demonstrated that the employer in no way owned, controlled, or maintained the parking lot where the plaintiff parked nor told plaintiff where to park. The claim could still be compensable under *Whetro,* but not compensable under *Simkins.* This could not happen if the question whether an injury arose out of and in the course of employment was resolved by determining whether an injury arose out of and in the course of employment.

In *Kaitting v Charter Communications LLC,* 2019 ACO #26, the Commission looked at an obscure issue, whether the director's decision *not* to hold a compliance hearing may be appealed to the board of magistrates. Rule 408.35(2) states that if an allegation of noncompliance with the Act is brought to the agency's attention, the director or his or her authorized representative "shall review the evidence of noncompliance with the act that is presented and, after making inquiries or investigations that he or she deems appropriate, determine if a hearing in accordance with this rule is necessary." Subsection (3) addresses the scheduling of a hearing. Subsection (4) states the director shall issue an order on the hearing. And subsection (5) states that any order of the director under this rule may be appealed to the board of magistrates within 15 days.

In this case the plaintiff brought to the director's attention a matter of noncompliance. The director reviewed the evidence and determined that a hearing was not necessary. The director put that in a letter mailed to the plaintiff's attorney. The plaintiff appealed that to the board of magistrates. The magistrate determined he had no subject matter jurisdiction to entertain such an appeal. The Commission affirmed.

The gist of the decision is that while a magistrate may entertain an appeal from the director's decision *following* a Rule 5 hearing, the board of magistrates has no jurisdiction, no statutory authority, to review the director's determination not to hold the hearing.

In *Dixon v General Motors Corp,* 2019 ACO #3, the magistrate addressed whether particular medical treatment, certain injections, was reasonable and necessary. The magistrate found that "until March 2012, injections were a reasonable effort to find ways to improve plaintiff's pain control. However, at that point and thereafter, the medical evidence is clear that such injections did not do any good for plaintiff, based on her own report to her doctors. Plaintiff testified at trial that the injections have helped to control her pain, but the treatment notes make it clear that there was no correlation between the injections and improvement. It is not reasonable to require payment for treatment that never provided measurable results, even subjectively, on the theory that the next time might do the trick."

The Commission emphasized the last sentence, saying that statement was not supported by Michigan law. The Commission said that if it adopted the magistrate's reasoning "it would put plaintiffs in the precarious position of having to extract from their physician some sort of guarantee that the recommended course of treatment would have 'measurable results' lest they risk the employer denying the medical bill. Such a requirement is not in the statute. Thus, we find the injections reasonable and necessary given the plaintiff testified that she received some relief from the injections and defendant brought forth no evidence in rebuttal."

The magistrate's precise ruling is unclear. But given the facts the magistrate found, the magistrate and Commission may have both erred. The magistrate erred if he concluded that the defendants had to pay for no injections; the Commission erred if it concluded that defendants had to pay for all the injections. Depending on the medical testimony, defendants should have paid for the treatment during a reasonable trial period to see if the treatment was effective, defendants should not have had to pay for the treatment following a reasonable trial period if the treatment proved to be ineffective.

In *Jordan v State of Michigan,* ACO #17, the magistrate denied the plaintiff's claim for wage loss benefits on the basis that her loss of wage earning capacity was not related to her work injury but to her opioid dependency. Plaintiff was unable to work because of opioid addiction. Citing *Staggs v Genesee District Library,* 197 Mich App 571 (1992), the Commission reversed.

In *Staggs* the evidence established that the claimant was disabled as a result of a myelogram. The myelogram was ordered to attempt to diagnose the cause of persistent symptoms following a fall at work. The Court of Appeals held that where reasonable treatment of a work injury results in a disability, the disability is compensable.

The plaintiff's "opioid use was occasioned by prescriptions from her various treating physicians and several pain clinics." Both vocational experts testified that the plaintiff's opioid use precluded her from working. "Because the opioid use is directly traceable to ameliorating the well documented symptoms incurred from the work incident" the plaintiff was entitled to benefits.

About the Author

Mr. Reinholm practices law at AF Group. He taught workers compensation at Western Michigan University Thomas Cooley Law School from 2006 to 2015.