State Bar of Michigan

Workers' Compensation Section Newsletter

Spring 2023

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From the Chair

Where do we stand? The honorable position we hold.

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

My favorite movie that involves lawyers trying a case and representing a client in court is *My Cousin Vinnie.* Not because it was funny, which it was, or because it had Herman Munster in a famous role as a judge, or not even because Joe Pesci aka Vinnie was cast to play the loveable goofball, the same role that he plays in virtually every movie. I like it because Vinnie is honest with himself and his clients. He is true to himself. He self-reflects on his shortcomings and character flaws.

Vinnie tells his clients up front that he failed the bar exam 5 times before he passed it. He tells his clients he had never tried a criminal case, much less a civil case. He tells his clients they can go with the public defender if they want but is confident that he "can do it". Because of his honesty with his clients and his self-confidence he did do it. He did his job. He represented his totally innocent clients, and they received justice.

As a government lawyer for 34 years, I followed the Vinnie mantra and was brutally honest with my clients at all times. Because of this, clients trusted me, my legal skills and abilities were used effectively, and it generally resulted in positive outcomes for my clients and they received justice. This is how it is supposed to be in the practice of law. Regardless of the area of law you practice.

Ask yourself this question: Are you being brutally honest with your clients at all times? Do you shade the truth for their benefit? Do you think they can't "handle the truth"? Does it serve your best interest to shade the truth or worse yet lie to your clients? If you find yourself asking these questions, you may have chosen to take a dangerous path.

The very best lawyers I have encountered in this business are the brutally honest lawyers. The lawyers that tell their clients the truth, the judges the truth, and the opposing attorneys the truth. This is the lawyer to be emulated in this practice. This is the lawyer to be admired. This is the lawyer that adheres to the oath of office we all took many years ago. This lawyer is the one that brings credence and honor to our profession.

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The Evolving Nature of Our Practice

In 1986 when I was sworn into practice, our practice was in transition. ALJ's were no longer. It is again in transition. In 1986 we had no mediation of cases. Magistrates had trials or redemptions. Settlement came about because the lawyers on both sides of the cases talked honestly about their cases, the flaws, and strengths. Like Vinnie, they self-reflected on the strengths and weaknesses. When that occurred settlement was more likely. When that broke down, trials were inevitable.

I am not preening or lacking in self-awareness here. I, as well as many other lawyers, were guilty of this practice. Extreme self-confidence is toxic for a lawyer, and it casts a veil over your eyes, and often unexpected results occur. Many cases were tried and lost because of lack of self-awareness and failure to see the "forest for the trees". There are small and imperceptible nuances in every case scenario that could swing a neutral factfinder for or against your case. Failure to see these nuances invariably results in unexpected results.

A case involving a longstanding psychiatric illness that was dormant until triggered by a work environment can be a compensable case and should be under the law. If the lawyer defending this case fails to appreciate the significance that a hostile work environment may have on an emotionally fragile person (i.e., the eggshell plaintiff), and gets lost in the long-term nature of the emotional baggage as being the cause of the current condition, an unexpected result will happen, and it did.

Way too many workers' compensation cases were tried over the many years because of lack of self-reflection. I was guilty of this, and it may have served my clients well at times, but on many instances, settlement might have been preferred.

The Success of Facilitation

As much as the numbers tell the story of stagnating redemption "values" over the last 10 years, settling cases via facilitation has had the effect of resolving cases without trials and appeal. Careful and thoughtful analysis of the declining number of magistrate and appellate decisions issued over the last 5 years tells the story that settlements are being achieved via facilitation. This fact cannot be denied.

In 1986 there was no formal facilitation process being utilized to settle cases that could be resolved. Lawyers could feel confident that they were "right about their position" on any case and demand a trial. Trial would occur. Good or bad, appeals were likely. Often the losing party felt aggrieved by the magistrate's decision and appellate affirmation, but without any self-awareness of what the cause was of the adverse result, they might be tempted to make the same mistakes.

Now with facilitation, we have a magistrate shining a light on our cases. A trained mediator, that is not vested in the outcome of the case, and who might give the parties an honest reflection on the likely result of a trial. If we do not agree with this assessment, that is our right, and we can act accordingly.

However, honest self-reflection should be triggered, if we are really doing our job, and upon that awakening we might see the wisdom of the magistrate's careful and well thought out suggestion. Too often in the past, if we heard a third party tell us what is wrong with our approach, we would get defensive and say "hey they don't know what I know. "

So, we can complain about the evolution of the practice, we can grieve the declining numbers, we can howl about the injustices here and there, but are we as

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a practice serving our clients well? Think about this, reflect upon it. Your answer will depend on your ability to honestly assess your own professional performance.

Are We Carrying Out the Statutory Mission?

As a group, we must ask ourselves many difficult questions: are we providing fealty to the statue? Do we resolve cases with efficiency and without protracted litigation? Are the cases being delayed for 2-3 years or more really unresolvable cases? If we as a group cannot take the time to resolve them, who will? Is it a matter of time or will power?

The director has a chart that describes the vast number of pending cases that have a shelf life longer than 24 months. It is a long list. Do you see your cases on that list? What steps have you taken to shine a light on those cases, so that resolution can be made possible?

Ask yourself this question: is your client well served by the lengthy delay? Do a self-appraisal of your role in this delay. Do not blame the docket, and please do not blame the magistrate. He or she did not delay the case because they are unwilling to hear the case or have it facilitated. That has not been my experience.

It my personal belief that lengthy delay is neither good for the system nor the parties thereto. The Act was created in 1912 based on the fundamental premise of efficiency in the administration of claims, in exchange for numerous possible soft damages available in tort law. That was the "Grand Bargain" and tradeoff. Are we as a group serving that fundamental premise?

We have a very long and honorable tradition of being a collegial practice group. I think we can continue that tradition in the future by serving our clients with honesty, integrity, and self-awareness.

Best wishes. 🛠

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.

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

State Bar of Michigan

Workers' Compensation Section

Summer Meeting

June 22-23, 2023

At City Flats Hotel, Holland MI

Thursday

6-7 pm Happy Hour at CitySen Lounge (hotel main floor)

7:30 pm Dinner/Reception at CityVu (hotel top floor)

8:15 pm Hall of Fame Induction Ceremony

Live band, The Swingin' Ds, 9 pm until they shut us down!

Friday (all at CityVu, on the top floor of the hotel)

8:30 am Light Breakfast

9 am General Meeting

10:45 am Break

11 am Speaker TBA

➡ Rooms at City Flats are limited, so reserve early!

➡ Rooms also available at the Courtyard Marriott, about a 3-minute walk from CityFlats.

➡ Watch the section website, https://connect.michbar.org/workerscomp/home, for more details and registration information.

Update from the Director

Jack Nolish, Michigan Workers' Disability Compensation Agency Director

The movie ***Star Wars*** "opening crawl" text begins: **"A long time ago in a galaxy far, far away...."** That line describes when I went to Wayne State University Law School. The Obi-Wan Kenobi of my days as a first year student was my contracts professor, long time Detroit labor law attorney Boaz Siegal. Fast forward a few decades, during my first stint as Workers' Disability Compensation Agency director, I came across Professor Siegel's name when I was putting together the seminar commemorating the 100th Anniversary of the act. The only detailed history of the 1912 passage of the Michigan act that I could locate was the 1940 thesis he wrote for his master's degree in history entitled *History of the Enactment of the Workmen's Compensation Law in the State of Michigan* in which he said:

Workmen's Compensation legislation is a result of the operation of two forces: one, the Industrial Revolution and the changes it brought in the lives of workers at work; the other, the inability of the existing legal organization and rules to keep up with these changes and *offer the worker a satisfactory means of obtaining compensation for injuries suffered by him while being employed* (emphasis added).

A little over three quarters of century after that thesis, in 2015, the US Department of Labor undertook a review of the workers' compensation situation across the country. The 2015 report by the US Department of Labor, Executive Summary, page 1, opens with the following that describes the present day situation in Michigan:

> State-based workers' compensation programs provide critical support to workers who are injured or made sick by their jobs. These programs are a key component of the country's social benefit structure and of occupational safety policy, and the only major component of the social safety net with no federal oversight or minimum national standards. ***This Report provides an introduction to these programs, but it also sounds an alarm: working people are at great risk of falling into poverty as a result of workplace injuries and the failure of state workers' compensation systems to provide them with adequate benefits.*** (emphasis added)

The report then quotes President Barack Obama: "If you work hard in America, you have the right to a safe workplace. And if you get hurt on the job, or become disabled or unemployed, you should still be able to keep food on the table." Contrary to that fundamental workers' right identified by the President, the DOL report found:

> Recent years have seen significant changes to the workers' compensation laws, procedures, and policies in numerous states, which have limited benefits, reduced the likelihood of successful application for workers' compensation, and/or discouraged injured workers from applying for benefits. These include changes that have resulted in the denial of claims that were previously compensated, a decrease in the adequacy of cash benefits to those awarded compensation, imposition of restrictions regarding the medical care provided to injured workers, and the institution of new procedural and evidentiary rules that create barriers for injured workers who file claims…

In July, 2022, the US Department of Labor, held a panel discussion: "50 Years after the National Commission: Is the Workers' Compensation System Serving Injured Workers?" which included the department's Office of Workers' Compensation Programs Director Chris Godfrey; Rutgers University Law School Professor John F. Burton Jr. who served as the Chairman of that 1973 National Commission on State Workmen's Compensation Laws; Northeastern University School of Law Professor Emily Spieler; and workers compensation attorney Alan Pierce. It should be noted that, Professor John F. Burton Jr. is no stranger to Michigan WDC. He was one of the co-authors of the 1985 companion report to the more well-known 1984 "St. Antoine Report" which was done for a committee convened by Governor James Blanchard. Burton's report was entitled "Workers' Compensation Benefits in Michigan and the Other Great Lakes States." He also was a principal speaker at our 100th Anniversary seminar. Prior to appearing on the panel described in the DOL report, Burton was interviewed in 2018: "In fact, the overwhelming movement of the last 20 years has been, it's been to make it workers' compensation less supportive, less adequate, less equitable, and I must say it is my own feeling. I'm kind of back to where I was in 1960…" Remember, the Michigan statute still in effect is from the Public Acts of 1969 although it has been amended many times.

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The 2022 DOL panel discussion was opened with these remarks:

> In the 50 years after the National Commission, we've seen a period of initial expansion, then a race to the bottom in most state workers' compensation systems," said Office of Workers' Compensation Programs Director Chris Godfrey. "Millions of working people injured in the workplace are at great risk of falling into poverty because of the failure of state workers' compensation systems to provide them with adequate benefits..."

Soon we will be publishing the 2023 WDCA Annual Report. Tragically for Michigan workers, it will show how judicial and legislative actions have moved our compensation system away from the historical worker protection goal described by Professor Siegal to one of poverty described by Director Godfrey. There will be more discussion of our annual report findings in the coming section bulletins. Until then, I close with the opening verse of *The Work Comp Blues* composed by a Detroit area plaintiff attorney, Gary Busch (Grant, Busch and Kirchner in Southfield) who left us way to young (1956-2004). The song was performed by him and his blues band, The Willies. Although his firm lives on, the song does describe the situation at the time:

Well, the comp act's in a tangle, everybody sing along.

The magistrate's just over yonder, and we ain't gonna' be here long.

That's why I'm gonna close down my office, 'cause there's nothing left to do,

When the Legislature's done with us, there'll be no one left to sue.

With the new 2023 legislature, the song could have a different ending. 🛠

Chief Magistrate's Thoughts

Luke McMurray, Chair, Board of Magistrates

A couple of issues have arisen recently involving disqualification of a magistrate. This issue is handled by Workers' Compensation Board of Magistrates Rule 418.86 which provides:

R 418.86 Disqualification of magistrate.
Rule 6

(1) A party may raise the issue of a magistrate's disqualification by motion or a magistrate may raise the issue.

(2) A magistrate is disqualified when the magistrate cannot impartially hear a case, including a proceeding in which the magistrate is involved in any of the following ways, or for any other reason is disqualified by law:

(a) Is interested as a party.
(b) Is personally biased or prejudiced for or against a party or attorney.
(c) Has been consulted or employed as counsel.
(d) Was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding 2 years.
(e) Is within the third degree (civil law) of consanguinity or affinity to a person acting as an attorney or within the sixth degree (civil law) to a party.
(f) Owns or his or her spouse or minor child owns, a stock, bond, security, or other legal or equitable interest of a corporation that is a party. This subdivision does not apply to any of the following:
(i) Investments in securities traded on a securities exchange registered as a national securities exchange under the securities exchange act of 1934, 15 U.S.C. §78 et seq.
(ii) Shares in an investment company registered under the investment company act of 1940, 15 U.S.C. §80a-1 et seq.

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(iii) Securities of a public utility holding company registered under the public utility holding company act of 1934, 15 U.S.C. §79 et seq.

(3) A motion to disqualify shall be filed within 30 days after the case has been assigned to a magistrate or within 10 days after the party discovers, or with reasonable diligence could have discovered, the information that is the basis of the motion, whichever is later.

(4) The motion of disqualification shall be stated positively and shall set forth with particularity the factors that would be admissible as evidence to establish the grounds stated in the motion. An affidavit shall accompany a motion.

(5) The challenged magistrate shall decide the motion. If the challenged magistrate denies the motion, then the challenging party may ask that the motion be referred for decision to another magistrate assigned by the chairperson, except as stated in subrule (6) of this rule.

(6) If the motion is made after the trial has commenced, then the challenged magistrate shall rule upon the motion. If the motion is denied, then the trial shall be continued by the trial magistrate.

(7) When a magistrate is disqualified, the chairperson shall assign another magistrate to hear the case.

Pursuant to R 418.86 subsection 2(b), a magistrate was disqualified from a certain firm's cases due to feelings and animosity between the magistrate and that firm. Disqualification for animosity between the magistrate and counsel is clearly provided for in the rule set forth above. 🛠

Case Law Update

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

Supreme Court Cases

Helen Jordan v. Department of Health and Human Services
(2022 WL 3007975)

This was a significant case involving whether *Staggs v. Genesee Dist. Library*, 197 Mich. App. 571 (which held that secondary injuries arising from treatment for the original work injury are compensable) is still good law.

The Court of Appeals eroded it in a published decision, and the MI Supreme Court voted unanimously to vacate and remand the decision for further administrative proceedings. However, the basis for vacating the Court of Appeals decision was that there was "inadequate factual development." There were 3 separate concurring opinions. It essentially returned matters to the *status quo ante*, and *Staggs* is still good law. This case was subsequently redeemed, so there will be no further decisions on it.

Lewis v. Leximar Corp.
(MI Supreme Court, 509 Mich. 916)

Plaintiff was a tool worker. The employer's HR director approached him 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 clocks out of work at 8:00 a.m. and texts his wife he is going to class. While driving from work to class, he crosses the centerline of the road and is 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. However, the Supreme Court reversed the Court of Appeals 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

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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's dependents were entitled to compensation under the Act.

WDCAC Cases

Daniels v. STMC Corp.
(2022 ACO #2)

This is a pre-2011 injury case (the date of injury is actually 1987). Defendants filed a petition to stop Plaintiff's open award, and raised several arguments which failed as they could not prove a sufficient change in Plaintiff's condition.

The original magistrate found Plaintiff developed bilateral carpal tunnel syndrome and aggravation of her post-polio syndrome as a result of her employment. He issued an open award. When Defendant filed its petition to stop, they relied on an IME opinion that there were other causes of Plaintiff's disability to try to challenge the finding that the aggravation of her post-polio syndrome was a result of her employment. However, because this issue was not timely appealed in 1991 when the open award was issued, Defendant could not challenge it decades later due to *res judicata*.

Markle v. Nexteer Automotive
(2022 ACO #5)

Plaintiff was injured at work, and eventually was terminated under the employer's "no-fault" points system (where points were assigned for absences, regardless of cause). Defendant argued that Plaintiff was not entitled to wage loss benefits because she had been terminated for cause.

However, in this case, Plaintiff went to doctors who described the extent of her medical impairments, she saw a vocational expert who indicated that work might be available, and then she searched for work and proved that no work was available to her. The WDCAC held that in doing so, she met her burden under the Act (regardless of the circumstances of her termination) and upheld the magistrate's award of wage loss benefits.

Bradley v. Colonial Mold
(2022 ACO #7)

Plaintiff subpoenaed the financials of an IME doctor who was hired through the vendor ExamWorks. ExamWorks did not provide any of the requested financial records, nor did they ever file a motion to quash the subpoena with the Court (instead sending the Plaintiff's attorney a letter explaining that they would not comply with the subpoena). Plaintiff filed a motion to hold ExamWorks in contempt, and this was denied by the magistrate.

Noting that Board of Magistrate Rule 1306(6) requires that disputes about subpoenas "shall be brought by motion", the Commission held that failure to file a motion with the Court objecting to the subpoena results in waiving the right to object to the subpoena.

Footnote 28 of the opinion makes it clear the WDCAC is not setting a deadline by which a party must file a motion to quash or modify a subpoena.

Of note, the WDCAC also held that "the bias of a potential witness in the process of crafting an opinion is surely fair game for 'the interest or bias of a witness has never been regarded as irrelevant.'" (quoting *Geary v. The People*, 22 Mich 219, 222 (1871). While the analysis makes clear that financial records are relevant, they stopped short of making a *per se* rule that they must always be handed over (leaving it up to the magistrate to weigh the interests of the parties).

Parshall v. Worden & Company
(2022 ACO #9)

Plaintiff was a highly experienced truck mechanic and was paid via 1099 given he was on both VA and Social Security Disability benefits. He was paid only $10/hr, viewed his work as "therapeutic", and wanted to be paid in one lump sum at an agreed upon time. He worked using his own tools, set his pace and hours, and decided the priority of work to be done. He only showed when he was notified there was work to be done, and was generally driven to and from work by a co-worker. He did not hold himself out as available to work for others, nor did he have his own employees. He was injured when one of the Defendant's trucks ran him over. Defendant then asserted he was an independent contractor, and the Magistrate agreed.

This was reversed on appeal, applying the IRS test. The Commission noted that of the factors pointing towards a finding that he was an independent contractor, these were reflective of Plaintiff's high level of training. He didn't need to be trained, and there was no one to "direct" him since he knew what he was doing. Mechanics also typically provide their own tools. The WDCAC held, when the facts were viewed in their totality, that Plaintiff was an employee.

Of note, the WDCAC relied heavily in its analysis on IRS Rev. Ruling 87-41, which provides the IRS interpretation of how its test is to be applied.

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This was recently appealed to the Court of Appeals.

Belliveau v. Tomco et al.
(2022 ACO#11)

The WDCAC held that Unemployment Insurance Agency (UIA) had to turn over records in response to subpoenas from "interested parties." The WDCAC held that:

1. Affirming its holding in *Bradley* (2022 ACO#7), it is not enough to send an objection to the attorney that sent the subpoena, one must file an objection with the Court or the objection is waived; and
2. "'Anyone whose statutory rights or obligations might be affected by the outcome' of the unemployment claim are 'interested parties'" and are thus entitled to records. (Quoting R. 421.201).
3. The UIA can be held in contempt of court for its "willful noncompliance with both the subpoena and the administrative rule."

Razo v. G M & Sons
(2022 ACO #13)

Plaintiff worked for a cement company, and was traditionally off work from December to March and would draw unemployment. He was hurt at work and Defendant was ordered to pay medical benefits and lost wages. However, Defendant appealed that they had to do so during the winter off-season, citing MCL 418.301(4)(c) ("The employee shall establish a connection between the disability and reduced wages in establishing the wage loss.").

This was appealed previously to the WDCAC, who remanded it with instructions to consider that argument. On remand, the magistrate wrote a very concise opinion adopting the earlier (and now retired) magistrate's opinion and issued an open award.

It was again appealed to the WDCAC on this issue, and they held that seasonal employment doesn't necessarily preclude payment of wage loss in those off months. Instead, they held that "wage loss may be established by demonstrating a good-faith effort to obtain work which is unsuccessful in procuring work available to plaintiff that he is able to perform and there is 'a connection' between the disability and the reduction in wages attendant to the lack of success." However, they still remanded due to factual error in the magistrate's analysis.

Dunn v. General Motors
(2022 ACO#15)

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

Notably, the WDCAC also held *Turner v. USF* (2016 ACO#4) was wrongly decided, as the third and fourth steps of the *Stokes* test only applied to jobs paying maximum wages. Therefore, for someone unable to earn their maximum wages (like Plaintiff), the fourth step of *Stokes* (job search) never becomes operative. Thus, Plaintiff's failure to prove a good faith job search did not categorically bar her from receiving wage loss benefits.

There was an overpayment of wage loss benefits in this case, which Defendant opted to recoup from Plaintiff's pension benefits as opposed to her wage loss benefits. The WDCAC held that it lacked jurisdiction to decide whether Defendant was permitted to recoup overpaid wage loss benefits from Plaintiff's pension payments.

Of note, this case was appealed by Plaintiff to the Court of Appeals on January 11, 2023.

Cases to Watch

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

This is a case before the MI Supreme Court regarding whether the *Martin* test should continue to be used or whether it violates the Act. Oral arguments have already been held and we are awaiting a decision.

Join your fellow section members for the 2023 Workers' Compensation Section Summer Meeting in Holland, Michigan on June 22 and 23, 2023. Register here and reserve your rooms now at Tulyp Hotel (Formerly City Flats Hotel) online or by phone at 1-844-382-7378 (A block of rooms have been reserved. Use code "MI Work Comp") or at the nearby Courtyard Marriott!