State Bar of Michigan

Workers' Compensation Section Newsletter

Summer 2021

Contents

Upcoming Event

ANNUAL MEETING

August 6

Thorneapple Pointe
Grand Rapids

(Details on page 4)

In Memoriam

By Debbie Strain and Cynthia Kriger

Editor's Note: *Debbie and Cindy were very close friends with Rosa.*

Rosa Bava

From Debbie Strain

I'm not sure when I met Rosa Bava exactly, I started to practice workers compensation in 1992, so sometime after that I suppose. In 2007 I went to Giarmarco, Mullins & Horton, and met my now friend and then legal assistant Bunny Binno and a paralegal Marie Ault. At GMH, I remember Bunny asking me one day if I knew Rose Bava, and she told me that they were close friends. I wondered why she called her Rose, since I had only ever known her as Rosa. Her close family and friends called her Rose, and like the flower, she was beautiful and sometimes a little prickly. From that point forward, we began to get together every now and then, Bunny, Rose, Marie and I, we would have annual holiday gatherings, and many others where we would talk about life, and our families and work of course, and they were always joyous happy gatherings. That is when our real friendship started. Around 2015 or 2016, I attended my first NAACP Freedom Fund dinner at Cobo Hall in Detroit, with Rose and Marie. Hillary Clinton was the keynote speaker. Rose was the catalyst for that get together. That became an annual event for the three of us, and we made friends with other women there, because of course, if you know Rose, there can never be too many friends. So in early December 2016, Marie, Rose and I met for brunch at La Dolce Vita, and planned our involvement in what would become a historical event and forged the strongest bonds between us that remained through her passing. We drove to Washington D.C. on January 20, 2017, Rosa, myself, Marie and another friend. It's hard to describe the feelings we all had during that trip. The experience itself was so moving. When you spend 16+ hours together in a car, you really learn a lot about people. I learned that when Rosa came to the United States as a child, she didn't speak English. She had to learn it while she was in school. She really was the epitome of the American

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Dan J. Zolkowski, Newsletter Editor

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dream. She came here from Italy as a child with nothing and built a life of professional success and a huge circle of loving family and friends. During the drive, I learned how devoted she was to her family, and of course her friends. Her brother's eulogy comes to mind, when he said she was a fierce defender of her family, true, but if you were her friend, that extended to you as well. I admired her political activism, she encouraged and fostered that in me with the Freedom Fund dinners, Women's March, and other events that we attended together. Our circle of friendship grew larger over the years and Rosa was the common denominator for everyone who was in it.

We shared a love of animals, she was a dog mom too. She never minded my dogs jumping all over her whenever she came to my house. She knew, it's just part of the deal. She had a great sense of style, and she was quirky, and funny and kind and generous, never judgmental and always supportive as a friend. She was Italian through and through, whenever we gathered there was always plenty of food and wine, because food is love. Peter Woll told me she made delicious meat sticks. She survived breast cancer and came back as strong as ever. I remember, after she had been declared cancer free, she said she was going to have a big party, and she sure did, we celebrated her 60th birthday in style. When I learned she was ill recently, I just thought, well she will just kick this too. She didn't make it to our last friends get together at the beginning of April and I knew then that she needed us more than ever. We did all we could to support her during her last weeks, none of us knowing they would actually be her last weeks. She was a fighter and gave it her best.

Professionally, when I was a young lawyer, she was always helpful and insightful. A good lawyer and strong advocate. There were not many women in the practice when she started, and there still aren't that many to this day. There remains a great deal of sexism in this practice and Rosa found a way to handle it with style and grace. One example of that involves another wc attorney, whose name I will not use, if she were still with us, she would laughingly tell this story herself, but others recall she would fondly tell the story that a well-known male attorney always referred to her as his favorite Arab girl attorney, she would just laugh and say she was Italian. She would go on to nominate him for the WC Hall of Fame. She was a trailblazer. Through the end, she was always willing to offer help and guidance to anyone who wanted or needed it. She served the WC Section well, still doing the business of the section as the section chair from her hospital bed, she was that devoted. Clients we shared and her past and present co-workers have all shared with me how wonderful it was to work with her and how much they appreciated her lack of pretentiousness, strong advocacy and her zest for life.

She loved life and she lived it without hesitation or regrets. I will miss her sweeping into the Bureau with her infectious smile that lit up the room and her "Hey Girl" whenever she saw me. It won't be the same without her.

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From Cynthia Kriger

The Section was deeply saddened to learn of the passing of our dear colleague and friend, Rosa Bava-Valenti. Rosa was one of a kind, as the saying goes. Although she was petite in size, her wonderful personality lit up a room. She was witty, intelligent, kind, and a joy to be around. Rosa was a diligent and forceful advocate, respected for her work ethic, and for her honesty and integrity.

I was fortunate to know Rosa for many years, beginning in the mid-1980's when she worked for the City of Detroit Law Department. As young women attorneys beginning our careers, we mentored each other, shared the ups and downs

of work experiences, and became friends. In the past decade we renewed our friendship, and spent countless hours talking about everything from the worker's compensation practice to events in our personal lives. The beauty of a friendship with Rosa was that no matter how frustrating a situation might seem, at the end of a conversation with her the world looked brighter.

Rosa was born in San Giovanni in Fiore, Italy. She emigrated as a young girl with her parents and brother to the United States, settling in Detroit in 1961. After graduating from law school at Detroit College of Law (now Michigan State University), Rosa began a career of almost 40 years in worker's compensation. She worked as a trial attorney, a Magistrate, and very early in her career as a claims adjuster.

At the time of her death, Rosa was the Chairperson of the Section. After the pandemic related shut down ended traditional courtroom practice, Rosa worked diligently with her fellow Council members and Agency personnel to implement procedures that would allow practitioners to move cases forward. Her efforts in this regard were appreciated by many.

Rosa will be missed professionally and personally. We extend heartfelt condolences to her beloved family.

From the Acting Chair

Jayson Chizick

As the renewal of Spring continues, we leave behind a very hard long winter. In mentoring me as her vice-chair, Rosa Bava told me that the hardest part of being chairperson was writing e-blast obituary notices for section members. Writing one for Rosa was difficult, but as I wrote that notice, I fondly remembered the joy that she brought to so many, the challenge she gave to me to rise as an individual and the consummate professional that she always was. I miss Rosa. The many fine people that have been lost over the past year, whether they be colleagues, friends, family or adversaries are missed. My prayer is that their memories be a blessing to those that knew and loved them.

Our hard winter of 14-plus months of Covid-19 shutdown has dramatically changed the face of our practice. Many firms have dealt with loss of business, loss of staff and all of us (on both sides of the Bar) have had clients lose so much due to the lack of access to a courtroom. While there is plenty of work left to do, Spring brings with it much promise for recovery. Your Workers' Compensation Section Council has worked hard over the past 14 months, mostly in cooperation with, but sometimes in an oppositional fashion with the Workers' Disability Compensation Agency and the Board of Magistrates. Council has pressed the Administration to move things forward toward reopening of in-person hearings. Those hearings will look different, that much is for certain, but your Council has pressed the position that some semblance of an in person hearing is critical to resolving the cases that cannot be resolved by a zoom or phone discussion. Council expects that in person trials will commence in the foreseeable future, and will continue to work with the stakeholders to do whatever is necessary to make that possible. Director Nolish and Chief Magistrate McMurray have been regular participants in Council meetings. Their contributions to the dialogue are positive, and they have taken requests, suggestions and even a few demands into account as they make decisions impacting our practice. There is open and regular communication between Bar, Bench and Agency.

Our upcoming Annual Meeting is not what we had hoped for or planned for on Mackinac Island. Your Council took into account the significant financial risk when deciding to not go ahead with a large contract for the Island in the midst of a Covid-19 case surge. The hard work of your Council is producing an alternative site for our Annual Meeting as referenced later in this newsletter. At this meeting we will celebrate the excellence of four Hall of Fame inductees. All of these inductees have mentored dozens of practicing lawyers in the field of workers' compensation law. We are all better for having known and learned from them. We will also continue to celebrate the professionalism and excellence of Don Ducey with the honoring of Mary Lazar and Paul Lazar with the Don Ducey Award. Please consider attending this exciting event in Grand Rapids.

So forward we move, and there truly is no time to waste. I have enjoyed the opportunity to pause some aspects of my life and spend time in the company of my family. Time is flying by, and the last 14 months have taught me a lot about being a Dad, husband, lawyer and person. Mostly I have learned the value of seeing those I love every day and telling them how much I love them. I take less for granted. I am longer to anger. I appreciate more, and I am constantly working on mindfulness. I understand that Justice Oliver Wendell Holmes once quoted Virgil, "Death twitches my ear. 'Live,' he says, 'I am coming.'" I cannot wait to see you soon.

Notice of Annual General Meeting of the Worker's Compensation Section

August 6, 2021, 10:00, A.M.
Thorneapple Pointe, Grand Rapids

Revised Notice of Annual General Meeting of the Section

As a result of concerns regarding the potential impact of Covid-19 on our planned annual meeting at Mission Point Resort, the Workers' Compensation Section Council voted to change the location for our annual meeting to Thornapple Pointe 7211 48th Street SE, Grand Rapids, MI 49512

Notice is hereby provided that the Annual Meeting will be held on August 6, 2021, beginning at 10 a.m. Following the approximately 2-hour business meeting, members and guests will be able to enjoy a cocktail hour from 12 pm-1 pm, followed by a luncheon honoring our Hall of Fame inductees for the class of 2021 and the Donald Ducey Award recipients. We are honored to announce that inductees to the Hall of Fame include: Cameron McComb, Chuck Palmer, David Celello and Robert Steelman. The Donald Ducey Award is being presented to Mary Lazar and Paul Lazar. Stay tuned for a meeting link (to be sent via e-blast) for registration information.

Notice of Nominations to Section Council and Executive

A nominating committee has recommended, and council has confirmed the following individuals for council and executive positions for terms commencing August 6, 2021.

Council for terms ending 2024:

Danial Hebert

Samuel Larrabee

Ben Veldkamp

Council for term ending 2022 (replacing Rick Lovernick):

John Tomasik

Executive Council:

Jayson Chizick, Chair

Phillip Frame, Vice Chair

Matthew Conklin, Secretary

Rick Lovernick, Treasurer

Pursuant to the bylaws, nominations will be accepted from the floor at the Annual Meeting.

Director/Chief Magistrate Corner

Jack Nolish, Michigan Workers' Disability Compensation Agency Director and
Luke McMurray, Chair, Board of Magistrates

Hearing Sites Re-Opening

"The only constant is change."
—Heraclitus of Ephesus 535 BC-475 BC

"For the times, they are a changing."
—Bob Dylan of Minnesota, 1941-;
Nobel Prize, literature 2016

Many of you have seen the May 18, 2021 Memo that announced the limited access to the hearing sites for in-person trials starting with the docket scheduled for July 12. That announcement was predicated on a mix of the available information and the regulatory situation at that time. As Governor Whitmer has recently announced, things have changed. If you liked the news in that memo, try this mx: one part Heraclitus and a generous portion of Dylan. When the doors open July 12, with the exceptions enumerated here and assuming there is no change in the expected public health situation, the re-opening will be "business as usual." In the meantime do not wait for that date to continue conferring with opposing counsel and advising the assigned magistrate about the readiness of your cases for trial.

Exceptions:

1. Magistrates and staff will be working behind plastic shields until further notice.
2. Any individuals with COVID-19 symptoms, should not enter hearing sites. As provided in MDHHS Emergency Order 5/24/21, "Principal symptoms of COVID-19" means at least 1 of fever, uncontrolled cough, or typical new onset of shortness of breath, or at least 2 of the following not explained by a known physical condition: loss of taste or smell, muscle aches, sore throat, severe headache, diarrhea, vomiting, or abdominal pain. Per section 1(j) of 2020 PA 339, this definition represents the latest medical guidance, and serves as the controlling definition.
3. If anyone visiting the hearing sites develops any of the above symptoms within 2 days after attendance at a site, the information should be reported to the magistrate.
4. Social distancing should be maintained wherever possible and frequent hand washing should be practiced.
5. Individuals that are fully vaccinated (persons for whom at least 2 weeks have passed after receiving the final dose of an FDA-approved or authorized COVID-19 vaccine) will not be required to wear face masks.
6. Individuals not fully vaccinated will be required to wear face masks in the hearing sites except when they are:

a. medically unable to tolerate a face mask;

b. asked to temporarily remove a face mask for identification purposes; or

c. communicating with someone who is deaf, deafblind, or hard of hearing and whose ability to see the mouth is essential to communication.

7. The magistrates may apply different protocols for each of their hearing rooms.
8. The magistrates may adjourn any hearing at any point in the proceedings if there are any safety concerns.

Months ago, at various presentations to the bar and other groups, one of the slides quoted an old song about meeting again someday without knowing where or when. As of July 12, we can solve the dilemma. We will meet again July 12 at the hearing sites.

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.

Message from WDCAC Chair

Daryl Royal, Workers' Disability Compensation Appeals Commission Chair

Once again, greetings from me (and the dog) from my home office. I will keep this short, since there is a lot of news to cover in this issue.

The Commission has made some progress since my last report. As I write this in late May, we've had six new appeals this year, issued eight opinions and three dispositive orders, and have 36 pending appeals remaining. This means we have cleared the decks at least a bit, in anticipation of more appeals soon.

Our administrative rules continue to move forward. Our proposed rule set was approved by the Michigan Office of Administrative Hearings and Rules. The next step is a public hearing. You can review the proposed rules by clicking on this link and then typing "workers' compensation" in the "search" box: *https://ars.apps.lara.state.mi.us/*

And with that, I will sign off for now. I hope to see a few of you in person before long.

Case Law Update

By Michael Reinholm, Assistant General Counsel for AF Group

Since the last newsletter was published the Supreme Court has not issued any workers compensation order or opinions. The Court of Appeals has issued two workers compensation opinions, one published and one unpublished.

In ***Peterson v Oakwood Healthcare, Inc***, ___ Mich App ___ (CA No. 353314, 353353, released 03/11/2021), the Court issued a published opinion addressing the extent to which Medicaid has a lien against settlement proceeds. This was a liability case but the same rule should apply to a workers compensation case.

Plaintiff and defendant entered into a settlement agreement related to a medical malpractice claim. DHHS filed a motion to intervene asserting that it had a lien for medical services it had paid for through Medicaid.

An evidentiary hearing was held relative to the settlement. The parties stipulated to the total value of the plaintiff's case and the amount of her medical expenses. DHHS argued that because medical expenses amounted to 65% of the total, then 65% of the settlement should be allocated toward medical expenses. Plaintiff argued the plaintiff's *future* medical expenses encompass nearly all the total medical expenses, and that DHHS's lien for past medical expenses represented only 1% of the total. Plaintiff argued DHHS was entitled to 1% of the medical portion of the settlement.

The trial court determined the settlement represented 21.25% of the total value of plaintiff's claim, and therefore DHHS was entitled to 21.25% of its lien. DHHS appealed.

DHHS first argued the trial court erred when it limited the recovery to the portion of the settlement attributable to the plaintiff's past medical expenses. The Court disagreed. In part, the applicable Michigan statute, MCL 400.106, states that the "department and a contracted health plan shall recover the full cost of expenses paid under this act unless the department or the contracted health plan agrees to accept an amount less than the full amount." The Court concluded this language cannot be construed as permitting DHHS to recover from any portion of a settlement because the federal anti-lien statute, 42 USC 1396p(a)(1), preempts such a reading. Relying on a United State Supreme Court decision as previously construed by our court of appeals, the Court stated that there was no question but that the USSC "limited a state's right to recover Medicaid expenses to portions of a settlement attributable to medical expenses."

The Court then considered a question not previously addressed: does the Medicaid lien attached to all medical expenses provided by the settlement or only to the expenses awarded for past medical. The Court concluded that "due to the federal anti-lien statute, states are only entitled to recover settlement proceeds that have been allocated to past medical expenses."

DHHS had also disagreed with how the trial court had allocated the settlement proceeds. The trial court noted that plaintiff settled the case for 21.25% of the value of the claim, and therefore 21.25% of the past medical expenses were captured in the settlement. The Court found "no error in the trial court's approach because there is nothing preventing a court from using such a formula to determine how a settlement should be apportioned." The Court had previously held that at an evidentiary hearing the trial "court must determine that amount of the Medicaid lien that may be recovered from plaintiff settlement proceeds taking into consideration the true value of the case and plaintiff's claimed losses."

In ***Bolen v Marada Industries, Inc***, (CA No. 348765, released 02/18/2021)(unpublished), the Court addressed the exclusive remedy provision in the labor broker/customer scenario.

The exclusive remedy provision states that the "right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." MCL 418.131(1). The focus was on "*the*" employer.

The plaintiff argued that given the use of the definite article "the", only one employer entity is entitled to exclusive remedy protection. However, case law holds that more than one employer may be entitled to exclusive remedy protection. See *Farrell v Dearborn Manufacturing Co*, 416 Mich 267 (1982), and *Kidder v Miller-Davis Co*, 455 Mich 25 (1997). Whether an entity is considered an employer entitled to exclusive remedy protection is determined by applying the economic reality test. "Although the totality of the circumstances are considered, in applying the economic realities test, the courts generally consider the following four factors "(1) [the] control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal. No one factor is controlling."

Applying the economic reality test, the Court concluded that the defendant was entitled to exclusive remedy protection. The plaintiff was performing work in the defendant's factory on assignment from a labor broker.

Returning to the statutory language stating that the recovery of workers compensation benefits is an employee's exclusive remedy against "the employer," the Court stated that if it did not have to follow Supreme Court precedent, it would limit the application of the exclusive remedy provision to only one entity.

> The definite article "the" has a "'specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an ....'". Thus, under this approach to statutory interpretation, the Legislature's choice of the definite article "the" demonstrates an intent that there is only one employer entitled to immunity from suit under the exclusive remedy provision. Citing *Robinson v City of Detroit*, 462 Mich 439, 458-459 (2000).

A concurring judge wrote that "it is evident that the nature of some employment relationships has changed since the *Kidder* and *Farrell* decisions. The 'gig' economy has blurred the lines between employers, contractors, employees and labor brokers. If for no other reason than the need to consider whether and how to address these changes, the Supreme Court should grant leave to appeal."

The appellate commission dove deep into a case in which the plaintiff's benefits had been reduced because of a post-injury wage earning capacity. The case is ***Marks v General Motors Co***, 2021 ACO #4.

Plaintiff was injured on 09/03/2009 and was voluntarily paid benefits through 10/06/2013. Effective 10/07/2013 his benefits were reduced based on a post-injury wage earning capacity. The magistrate found that the proofs established that the plaintiff had no post-injury wage earning capacity through 12/31/2016 and his benefits should not have been reduced. However, the magistrate found the beginning in 2017 plaintiff's documented job search was insufficient to demonstrate an inability to earn wages and his benefits were reduced.

Plaintiff appealed. The appellate commission reversed the magistrate and awarded full benefits for all periods of time.

Because of the date of injury, the pre--2011 statute applied here. If partially disabled, plaintiff was entitled to the 80% of the difference between his after-tax average weekly wage before the personal injury and the after-tax average weekly wage "which the injured employee is able to earn after the personal injury." The magistrate cited *Lofton v AutoZone Inc*, 482 Mich 1005 (2008), for the proposition that if a plaintiff is found disabled, but that disability is only partial, the magistrate must compute wage loss benefits based upon what the plaintiff remains capable of earning. The magistrate also wrote that a plaintiff may rebut *Lofton* "by mounting a vigorous job search. If the claimant establishes diligent but unsuccessful attempts at finding work, he or she can demonstrate that the jobs were not reasonably available to exercise that ability to earn wages." The appellate commission agreed that this "analysis properly acknowledges that the existence of a job must be coupled with a realistic opportunity for plaintiff to obtain that job, before it may be considered in the benefit computation."

A vocational counselor was involved in plaintiff's claim from 2013-2015. In 2013 the vocational counselor determined that there were no jobs available that would have

paid plaintiff's maximum pre-injury wages, but various lesser paying jobs were identified as suitable and available. Plaintiff testified that he applied for all jobs, and all positions had already been filled.

In 2014 the vocational counselor updated his labor market survey. He again identified lesser paying jobs that were suitable and available. Plaintiff investigated these jobs and all but one was again filled. He applied for that job but did not get it.

The vocational counselor again updated his labor market survey in 2015. By the time the identified jobs were provided to the plaintiff, all but one had again been filled. Plaintiff testified that he applied for that job but did not receive it.

Plaintiff testified that he continued to look for work and did not limit his search to the sort of work he had performed for defendant. He submitted resumes to various online job placement websites. Plaintiff had in person and over the phone interviews. He said he applied for at least two or three jobs every day and would have accepted any job within his restrictions.

The magistrate found that plaintiff was a credible witness. The magistrate found that plaintiff's job search from 2013 through 2016 established that no work was available and he was entitled to benefits at the full rate. "However, his documented job search in 2017 is insufficient. . . . What happened in 2017 is not clear, but it does not demonstrate that jobs were not reasonably available for him to exercise the ability to earn wages."

Admitted as plaintiff's Exhibit 8 was his job search logs. The logs for 2013 through 2016 were printed in landscape format. The columns show the name of the business, the position applied for, the contact person, phone number, address, and result. The 2017 log was printed in portrait format and cut off the address and result columns.

The appellate commission concluded the basis of the magistrate's conclusion was that, unlike the 2013 through 2016 job logs, the 2017 job log, because it was printed in portrait mode, cut off the address of the prospective employer and the result of the job search. The appellate commission disagreed with that assessment of the evidence.

The appellate commission noted that the 2017 job logs were supplemented by plaintiff's testimony that he continued to apply for 2 or 3 jobs a day, no less than 10 per week in 2017 and through the date of hearing. Plaintiff also testified that he did not narrow his job search to jobs like those he had previously various types of jobs. The appellate commission stated that the testimony was consistent with plaintiff's 2017 job log, and demonstrated a continuation of the same diligent job search efforts in 2013 through 2016 that the magistrate found had rebutted the evidence that plaintiff had a post-injury wage earning capacity, and that the omission on the 2017 job log of the potential employers address and the result of plaintiff's contact with that potential employer should have led to the same conclusion regarding the 2017 job search as the magistrate had reached regarding the 2013-2016 job search.

Ultimately, the appellate commission concluded that the "magistrate did not sufficiently explain why plaintiff's job search efforts were any less laudatory in 2017 than prior years. Her focus solely upon the format of the 2017 log printout and not its substance, as well as her disregard of plaintiff's accompanying testimony regarding his ongoing job search, despite deeming it credible, leaves her conclusion without support by competent, material, and substantial evidence on the whole record.

The appellate commission also noted that the amount of plaintiff's 2017 post-injury wage earning capacity was based on the vocational expert's testimony from his 2015 labor market survey. He did not do a labor market survey in 2016 or 2017. At his deposition, the expert testified that a residual wage earning capacity figure is different depending on the dates a labor market surveys done. The expert agreed that a labor market survey is a snapshot of the labor market at a particular point in time. Simply, the plaintiff's 2017 post-injury wage earning capacity could not be determined by using the testimony that established what plaintiff's 2015 post-injury wage earning capacity was.

The magistrate's decision was reversed and plaintiff was awarded full benefits for all periods of time.

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