State Bar of Michigan

Workers' Compensation Section Newsletter

Summer 2026

Contents

From the Acting Chair

Dan Zolkowski

Welcome to the 2026 State Bar of Michigan, Workers' Compensation newsletter. This is my first venture at composing a column. I hope you find it interesting and worthwhile.

Initially, I want to extend congratulations to our newly appointed magistrates, Marilyn Daubenmyer and Sean Shearer. Magistrate Daubenmyer comes to the Board of Magistrates after several years of practicing Workers' Compensation law on behalf of plaintiffs and defendants. Magistrate Shearer has several years of practice representing injured employees before the agency.

I also want to extend thanks to Magistrate Shearer for his many years of service on the Workers' Compensation council. His exemplary service and dedication led him through the Council's leadership ranks, ultimately serving as Chair before resigning to accept his appointment to the Board of Magistrates.

A few months ago, after I became acting chairperson, I was approached by a magistrate who suggested to me that my first column could involve civility in the practice of law. I have thought a great deal about this over the past few months. Following are my thoughts regarding this topic.

Workers' Compensation practice in Michigan is, by its nature, an adversarial enterprise. Attorneys on both sides of the bar are paid to advocate zealously-for injured workers seeking benefits, or for employers and carriers seeking to contain legitimate claims. The tension is healthy and at times necessary. What is neither healthy nor necessary is the incivility that often accompanies it.

Our own State Bar actively promotes professionalism and civility. In 2022, the State Bar's Board of Commissioners formed a special committee on professionalism incivility. The committee's work reflects a growing recognition that the culture of practice matters-not just outcomes.

On December 16, 2020, the Michigan Supreme Court adopted 12 Principles of Professionalism, which when combined with comments, provide guidance to lawyers and judges on how to conduct themselves professionally. Among some of those principles are the following: treating people in the justice system with courtesy and respect; do not engage in or tolerate rude, threatening, or obstructive conduct; and we should not use gratuitously hostile or demeaning language in our written and oral communications. These concepts should be the baseline in our day-to-day interactions.

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Jessica Super, 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:

Jessica Super superj@michigan.gov

From the Acting Chair

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Our practice is unique in that the same attorneys regularly appear before the same magistrates in the same hearing rooms, often for many years. As a result, professional relationships naturally develop, even when we find ourselves advocating on opposite sides of a dispute. While our roles may be adversarial, our conduct should never be unprofessional. We should treat one another with courtesy and respect, regardless of the positions we are called upon to advance on behalf of our clients. In a practice as close-knit as ours, we have both the opportunity and the responsibility to model professionalism for others. Zealous advocacy and civil conduct are not mutually exclusive; indeed, the best lawyers demonstrate both.

In closing, I hope that these thoughts force us all to look in the mirror and question our own actions, and whether we are civil and professional in our day-to-day interactions. Reflection on our conduct can be a good thing. We can always do better in our relationships.

See you at Crystal Mountain. 🛠

Wage-Earning-Capacity Under Michigan Workers' Compensation Law

By Jerry Marcinkoski, Of Counsel, Lacey & Jones

I write to offer a response to the article in the last Section newsletter entitled "Labor Advocates Continue to Demand Reform of Michigan's Comp Act" by Robert MacDonald. While I appreciate Mr. MacDonald's contribution to the discussion, I respectfully disagree with several of the article's characterizations of the current statutory framework governing disability and wage-earning capacity.

The article argues that reform is necessary because current disability analysis is "based on a hypothetical wage-earning capacity in jobs that…are not actually available." It further maintains that change is necessary in calculating partial disability rates because the current system allows for a "reduction in benefits for phantom/hypothetical wages a worker is not able to obtain." In my view, these statements do not accurately reflect the current statutory framework.

Contrary to the article's characterization, the current statute defines—and limits—the disability inquiry to jobs "reasonably available to that employee." MCL 418.301(4)(b). Accordingly, it is inaccurate to suggest that the statute is based on jobs that are not actually available. Likewise, when it comes to setting a partial disability rate, the statute requires payment at the full rate when an employee "establishes a good-faith effort to procure work but cannot obtain work." MCL 418.301(4)(c). Current law in fact explicitly says: "A partially disabled employee who establishes a good-faith effort to procure work but cannot obtain work" receives the full rate "as if totally disabled." MCL 418.301(4) (c).[1]

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Wage-Earning-Capacity ...

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The practical effect of the proposed legislation would be to redefine "wage earning capacity" in a manner that differs from its longstanding interpretation under Michigan law. The reform proposals would limit wage-earning capacity to wages actually earned and would disregard other relevant considerations as merely "hypothetical." Historically, however, wage-earning capacity has never been defined so narrowly.

Among the many cases recognizing this principle are *Hood v Wyandotte Oil & Fat Co*, 272 Mich 190, 191 (1935) ("What is meant by the term 'wage earning capacity after the injury?' It is not limited to wages actually earned"); *Babcock v General Motors Corp*, 340 Mich 58, 65 (1954) ("It will be noted the proviso in question refers to 'wage earning capacity.' Obviously such expression does not necessarily have reference to wages actually received"); *Juneac v ITT Hancock Industries*, 181 Mich App 636, 641 (1989) ("It includes not only wages actually earned after the injury, but also any the employee has the capacity to earn"); and *Sanchez v Wal-Mart*, 2025 ACO #10, slip op at 35 ("Case law has defined it as the amount one has the capacity to earn ... but it is not limited to actual earnings")

Whether one agrees with the proposed reforms as a matter of policy is a legitimate subject for debate. However, it is important to recognize that the proposals seek more than a modification of the current statute. They would alter a foundational principle of Michigan workers' compensation law that has existed for more than a century. To date, the Legislature has declined to adopt other proposals.

The terminology used in this debate also deserves discussion. The phrase "phantom wages" suggests that the jobs at issue do not exist. Yet jobs shown to be "reasonably available to that employee," for which an employee may make a good-faith effort to obtain, are not phantom jobs. They are real jobs in the "real world." *Braddock v Bellrose Inc*, 1994 WCACO 2319, 2338; 1994 Mich ACO #525. Using Agency decisions often refer to this concept as Post-Injury Wage Earning Capacity (PIWEC) or residual wage-earning capacity. *Haske*, supra at 1, 656; *Sobotka v Chrysler Corp*, 447 Mich 1, 18 (1994); *Wagonschutz v General Motors*, 2025 ACO #6, slip op at 5. Similar concepts appear in other areas of law, including child-support and Social Security disability determinations.

In sum, any discussion should begin with a clear understanding of existing law. Michigan workers' compensation law has long distinguished wage-earning capacity from wages actually earned, and that distinction remains a foundational principle of the system today. Whether that principle should be changed is ultimately a policy question for the Legislature. 🛠

Endnote

1 The article also alludes to "restoring the definition of disability to one more akin to *Haske*." Even *Haske*, however, recognized that employers may assert an avoiding-available-work defense, which is less demanding than the firm-offer-of-favored-work (or "reasonable employment") defense set forth in MCL 418.301(11). See *Haske v Transport Leasing, Inc,* 455 Mich 628, 658–660 (1997), overruled by *Sington v Chrysler Corp,* 467 Mich 144, 161 (2002).

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.

WDCAC Update

By Daryl Royal, Chairperson

The Appeals Commission continues to face growing challenges associated with the increasing number of appeals filed by unrepresented claimants.

Although plaintiffs and defendants appeal at similar rates, the nature of plaintiff appeals warrants particular attention. Of the currently pending plaintiff appeals, 69% were filed without legal representation. Overall, self-represented plaintiffs account for 19% of our docket. Excluding appeals involving unemployment subpoenas, however, that figure increases to 31%, and the trend continues to rise.

Although they represent a minority of cases, unrepresented claimants consume a disproportionate share of Commission resources. We estimate that approximately 95% of incoming calls come from unrepresented parties, and our clerical staff spends considerable time explaining appellate procedures. Email inquiries add further demands on staff resources.

While workers' compensation cases are intended to be summary proceedings, their complexity often makes self-representation difficult. The rise of AI chatbots has led some claimants to believe they can successfully navigate the process without legal counsel; however, professional guidance remains invaluable.

Many self-represented claimants may have valid claims, but a lack of familiarity with hearing and appellate procedures can prevent them from effectively presenting their cases. As a result, appeals are frequently dismissed because of procedural errors—an outcome that benefits no one and often generates additional litigation.

The Commission welcomes suggestions from Section members regarding practical solutions to this growing challenge. Working together, we can help ensure that the appellate process remains both accessible and efficient for all participants. 🛠

Memo from the Director

By Jack A. Nolish

Artificial Intelligence Floods Court Dockets with Home-Brewed Lawsuits

For years, courts have welcomed cases brought by self-represented litigants. Now those plaintiffs have artificial intelligence, and their filings are consuming increasing amounts of judicial resources. *New York Times*, Schwartz & Montague, May 26, 2026

The above referenced article notes that court systems across the country have experienced a significant rise in the number of self-represented (pro se) litigants filing a wide variety of legal claims. The lack of representation may result from a litigant's choice or an inability to secure counsel. Combined with the growing availability of artificial intelligence tools, this trend has created a tsunami of filings that is overwhelming both trial and appellate dockets.

Unfortunately, the Workers' Disability Compensation Agency (WDCA) and its adjudicative processes—including the Board of Magistrates, the Appellate Commission, and the Director's Office—have not been exempt from these challenges. One magistrate's docket has been inundated with more than 40 motions filed by a single pro se plaintiff. In addition, nearly 300 cases currently pending before the magistrates involve plaintiffs without identified legal representation. WDCAC Chair Daryl Royal discusses the impact of this trend on the appeals process in his article elsewhere in this newsletter.

It is understandable that attorneys must carefully evaluate which cases they can responsibly undertake. The complexity and cost of proving a contested workers' disability compensation claim can be substantial, and the risks associated with trial are significant. While the sentiment of "not my client, not my problem" may be technically correct, the resulting burden on the system and on other litigants is considerable collateral damage.

Even in cases where counsel is retained, attorneys increasingly report that clients reject professional advice in favor of

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unrealistic or inaccurate AI-generated analyses. This phenomenon has also complicated the facilitation process.

The effects are evident throughout the system. On any given trial day, hearings may be delayed while a magistrate patiently attempts to move a matter forward, only to be met with loud confrontations or threats from a self-represented litigant. In some instances, security personnel must escort individuals from both the courtroom and the building. The need for enhanced security measures has, in turn, complicated public access to agency facilities.

Defendants face mounting costs as they respond to repeated filings and refilings of claims that are often without merit. Good-faith efforts to resolve disputes are frequently met with hostility and distrust. Defense counsel are subjected to verbal and written abuse, bar complaints, threats of litigation, and, in some cases, threats of criminal prosecution.

At the same time, we must recognize the difficult circumstances many of these individuals face. They are often injured, unemployed, financially strained, and attempting to navigate a legal system that was not designed to be particularly user-friendly for self-represented litigants.

In the coming weeks, the agency, the bench, and the bar must work together to identify practical, common-sense solutions. Some states have developed "do-it-yourself" legal resources. Others have implemented ombudsman programs or designated advocates to assist unrepresented plaintiffs. Rule changes may also warrant consideration.

What we cannot do is simply close the courthouse doors to self-represented claimants.

Your ideas, assistance, and constructive suggestions will be greatly appreciated as we work together to address these challenges. 🛠