State Bar of Michigan

Workers' Compensation Section Newsletter

Fall 2018

Contents

From the Chair

By Dennis Flynn

On Fumbled Snaps And Illusory Remedies

I remember where I was on the afternoon of October 17, 2015. We had led all game, but it never once felt safe. Even with just a handful of seconds left, it did not feel safe. 'Why are we punting?' I asked my equally concerned brother. 'Shouldn't we just snap it to Peppers, let him run around for five seconds and flop, thereby ending the game, along with the eight-year nightmare this matchup had become?' 'Coach knows what he's doing, right?' 'Right. Right?'

When the punter fumbled the snap, all I could do was look at my shoes. The joyful shrieking of my beloved Spartan bride told me all I needed to know about what was going on down on the field. To this day, I have not viewed a replay of this cruel (and unjust) result. The question of whether a grown man should be so emotionally invested in such a trivial event is legitimate, but it will not be addressed here.

While I've been feeling much better lately, the memory of the experience remains vivid. The remembered emotion that most endures is one of powerlessness. The result seemed so unfair, but no amount of rooting, praying or whining could possibly alter that result or confer any measure of power to me (or my 100,000 plus stunned and silent compatriots) to change it.

I was reminded of this sense of powerlessness last June when Governor Snyder signed into law legislation creating a work requirement for Medicaid recipients. While this legislation provides an exemption for persons deemed to be disabled, the exemption does not apply to those who claim to be disabled but have not yet had that claim adjudicated.

I am an unapologetic defense attorney. I believe that partially disabled individuals should be required to continuously seek work if they expect to receive wage loss benefits. I believe that any amount of work avoidance from a partially disabled individual should result in a forfeiture of those benefits.

Continued on next page

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

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Jayson@jtrucks.com

From the Chair Continued from page 1

I also believe, however, that the system of adjudication should be fair to all parties. As a defense attorney, when assessing the validity of a claim, the question of whether the claimant is seeking treatment, or has the support of a medical professional is primary. As we all know, many (if not most) workers' compensation claimants find themselves in dire financial circumstances. If these claimants are truly disabled, they cannot seek work, and are thereby precluded from receiving Medicaid benefits, and are thusly precluded from obtaining the medical treatment/support necessary to be deemed disabled. This scenario seems to confer an unfair measure of powerlessness upon these individuals and their advocates as they seek to obtain such adjudication. In the meantime, my fellow defense attorneys and I will be duty-bound to highlight and zealously proclaim the lack of medical support for the claimant as we advocate for our clients.

The Michigan Workers' Disability Compensation Act is remedial legislation. It is meant to provide legitimately injured and disabled workers a prompt remedy – especially to those workers who are rendered totally disabled and/or indigent by the injury. The Medicaid work requirement, as it relates to seriously injured and impoverished people, renders that remedy illusory.

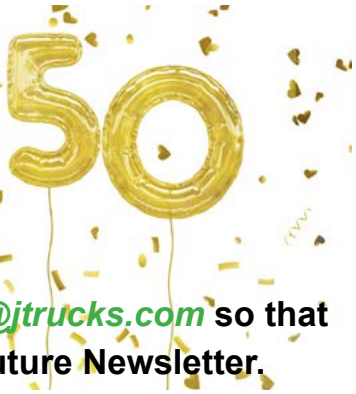
I have no solution or advice to offer regarding this conundrum. Driving down the value of claims, and vigorously defending my clients within the rules is something I truly enjoy (insert evil, Vincent Price-style laughter here). I'd simply prefer that the rules be fairer, and that a third way be found for people who find themselves with a need for treatment and no access to it. I hope that we, as a Section, continue to contemplate our present circumstances and how we might make the process fairer to all, regardless of which side of the "v" we find ourselves.

If you have read this much, maybe you will read some more… I hope to see you all at our Winter Meeting on December 7, 2018 at the Crown Plaza Lansing West. Our featured speaker is Patrick Noud, M.D., who specializes in shoulder replacements. I've always found the shoulder to be one of the more mysterious locations in the musculoskeletal system, and I look forward to Dr. Noud's insight. Please come bearing questions for the doctor!

For the umpteenth year in a row, Fred Bleakley has graciously agreed to plan and organize the Section's Winter Trip. This time the Section will travel to the Valentin Imperial Maya in Cancun, Mexico. This trip will take place from February 10, 2019 through February 17, 2019. Please see the 10/31/18 email blast to Section members for pricing details and deadlines. Thanks, Fred!

Our annual meeting will take place on June 13-14, 2019. We will be returning to the Hotel Indigo in Traverse City. Please save the dates and plan on attending!

Are you or is someone you know a 50-year member of the Workers' Compensation Section of the State Bar?



Please email the editor at *Jayson@jtrucks.com* so that the member can be honored in a future Newsletter.

From the Editor

By Jayson A. Chizick

"If you think about what you ought to do for other people, your character will take care of itself."

—President Woodrow Wilson

As your newsletter editor I have the luxury of writing at my leisure while others are provided deadlines for submission. My first several drafts of this article included mention of the winds of change, a brighter tomorrow and other thoughts of the opportunity for new government of either party to provide much needed change to our practice. Fortunately, the election has come and gone, and my thoughts on possibilities are now realities. I look at our new governor as a maker of change. Governor-elect Whitmer inherits a workers' compensation system that, in my view, requires fundamental change. Equity, balance and fairness must be restored to a 2011 revised law that has eaten away at the social contract of the past. Our section leaders have many ideas for improvement in the law, rules and procedure, and I am all the more hopeful for a receptive audience in the governor's office, the legislature and MAHS leadership. Consultation with practitioners in drafting legislation, rule-making and judicial appointments would move the system forward in a fundamentally positive fashion. This opinion is less about Democrat v. Republican, but instead about what works and what does not work.

On the issue of character, our section council will be looking for nominations to the Workers' Compensation Hall of Fame in the coming months. Now would be a good time to recall those who have provided of themselves to better the life of the section. If you have a semi-retired or retired member in mind, please consider drafting a recommendation to the nominating committee. The council is also looking to honor 50-year (or more) members of the section. Please notify me if you are aware of someone that has earned this honor.

Repeated mention of mentorship has been a goal of mine for writing on this page. The role of strong mentors has been vital to the formation of my practice. I am not shy about continuing to use the benefit of guidance in both law and life from those who I work for, with and against. The character of workers' compensation lawyers shines from how we (more often than not) treat each other. I recently had the chance to watch a new associate facilitate a case under the watchful eye of that lawyer's partner. The new associate did a fine job. What was interesting to me was that this event caused me to reflect that I have learned a great deal from his partner. Watching others display their character day in and day out provides a good example for self-reflection. Our roles in the courtroom are adversarial, but the way we handle our roles is so very important to a positive working relationship between bar and the bench. There are well-seasoned section members on both sides of the aisle that those with less experience can and should learn from. I certainly continue to watch and learn every day.

With Thanksgiving and holidays just around the corner, the hustle and bustle of closing files is about to begin (hopefully) for all. I hope that as I aim to think of how I can serve others by my practice and my behavior that I may improve my outward example to improve on my character. Best wishes to you and yours for a wonderful, safe and happy holiday season. 🛠

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.

STATE BAR OF MICHIGAN
WORKERS' COMPENSATION SECTION

Winter Meeting

December 7, 2018

(9:00 am – 12:00 pm)
Continental Breakfast and Registration will begin at 8:15 am

CROWNE PLAZA LANSING WEST

925 S. Creyts Road, Lansing MI 48917
crowneplaza.com/lansingwest
(517) 391-1295

Introduction: Dennis Flynn, Chairperson

Agenda

9:00 – 10:15 am **General Business**

Chairperson's Report – Dennis Flynn
Secretary's Report – Rosa Bava
Treasurer's Report – Jayson Chizick
Director's Report – Mark Long
MCAC Chair's Report – George Wyatt, III
Chief Magistrate Report – Chief Magistrate Lisa Klaeren

10:15 – 10:30 am **Break**

10:30 – 11:45 am **Total Shoulder Replacement Techniques, Clinical Indications, Operative Types, and Post-Operative Care and Disability Prognosis**

Speaker – Patrick Noud, MD

11:45 – 12:00 pm **Appellate Update**

Speaker – Daryl Royal, Esq.

Board of Magistrates Update

By Hon. Lisa Klaeren, Chief Magistrate

As everyone is aware, Medicare issues continue to be of significant importance in the resolution of claims before the Board of Magistrates. In December of 2017, the Workers' Compensation Agency, Board of Magistrates and members of the Section developed a new attachment to the Redemption Agreement addressing the developing considerations for Medicare in every case (in addition to Medicaid and Friend of the Court issues). That attachment became required in every redemption beginning in March 2018. It has assisted all parties in ensuring Medicare's interests are always considered, and identifying how those interests are being taken into consideration.

As everyone is also aware, Medicare has continued to be a moving target. Just as we resolve one issue, another arises to take its' place. Earlier this year, in a decision by the Social Security Administration, our attention was drawn to the issue of allocation of redemption proceeds, and whether or not the Social Security Administration was accepting our life expectancy allocations on the Redemption Orders. Investigation of that issue has assisted all of us in becoming better informed on how the Administration is considering our allocations. The Board of Magistrates is working with the Workers' Compensation Agency in reviewing the current language on the Redemption Orders, and in the Affidavit in Support of Redemption, to better reflect our allocations and the uncertainty of the Social Security Administration's acceptance of that allocation.

Another issue that has recently arisen is the concern about protection of the set-asides from a claimant's creditors. I know of one instance where a claimant's set-aside trust account was seized to satisfy a judgement, unrelated to medical treatment for a work-related injury. In larger set-asides, this could be addressed by establishing a special needs trust, but this may not be practicable in most cases. Perhaps the solution is as easy as naming the set-aside trust account in a specific manner. Perhaps the Social Security Administration needs to exclude such trusts from collectors. Investigation as to the best way to address this issue needs to be ongoing for everyone.

Issues regarding the disbursement of funds from the set-aside accounts have started to be looked at more closely, according to multiple national providers of set-aside services. Director Long recently attended a national conference that included an update on Medicare issues in workers' compensation. The providers indicated that over the last eighteen months, there has been an increase in review of how the funds in the set-aside accounts are being spent. This issue is something that needs to be of primary concern for everyone.

In addition to the continuing Medicare issues, there are a couple of issues in the next few months affecting the Board of Magistrates. First, on January 26, 2019 seven of the fourteen Board members' terms expire. With a new governor being sworn in on January 1, 2019, it is currently uncertain how or what the appointment/reappointment process may look like. The Executive Director of the Michigan Administrative Hearing System (MAHS) is aware of the need to work quickly with the Governor's office to make decisions as quickly as possible, to avoid any interruption of services provided by the Board.

Secondly, MAHS, including the Board of Magistrates, is looking at amendments to the Administrative Hearing Rules. This will likely include changes to the General Rules as well as the Board of Magistrate Rules. Drafts of these rules will be distributed as soon as they are complete, and hopefully well in advance of any hearings.

As always, if anyone has any questions, concerns or comments which might be of assistance in keeping things running smoothly, we are always looking for helpful feedback.

Invite someone you know to join the fun.

Invite someone to join the section.

Section membership forms can be found at http://www.michbar.org/sections

RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
WORKERS' COMPENSATION AGENCY
MARK C. LONG, DIRECTOR

SHELLY EDGERTON
DIRECTOR

MEMORANDUM

DATE: September 4, 2018

TO: All Interested Parties

FROM: Mark C. Long, WCA Director

SUBJECT: Request for Workers' Compensation Records

Please be advised, in accordance with section 6 of the Freedom of Information Act (FOIA), MCL 15236, the Department of Licensing and Regulatory Affairs (LARA) has appointed a FOIA Coordinator. As part of the implementation, all requests for Workers' Compensation Agency documents will now be directed to the central LARA FOIA Office for processing.

This model centralizes the LARA's FOIA responsibilities enhancing efficiency through a single point of entry for customer requests and provides resource efficiency by relieving the agency of several FOIA compliance tasks. This process improvement will further allow the agency to focus their resources on research, retrieval, and review/redacting of potentially responsive public records.

Thus, we are advising that as a result of the procedural changes noted above, and to ensure our continued compliance with FOIA guidelines, customers may notice an adjustment in responsive determinations to their requests.

Finally, it should be noted that subpoenas will continue to be processed directly by the Workers' Compensation Agency.

Should you have any questions regarding this announcement please do not hesitate to contact me directly at (517) 284-8901 or by email at longm1@michigan.gov.

Any questions related to the LARA FOIA procedures should be directed to the following:

Website: www.michigan.gov/larafoia
Email: LARAFOIAInfo@michigan.gov
Mail: State of Michigan Department of Licensing and Regulatory Affairs
c/o FOIA Office
Ottawa Bldg., 4th Floor
P.O. Box 30004
Lansing, MI 48909
Phone: 517-335-3327
Fax: 517-335-4037

Michigan Compensation Appellate Commission

By George Wyatt, Commissioner

The Gongwer news service has reported more details about appointments to the MCAC. Lester Owczarski and George Wyatt have been reappointed to four year terms expiring July 31, 2022. Jack Wheatley has been appointed to a term expiring July 31, 2021. William Runco of Dearborn is also appointed to a term expiring July 31, 2022. Appointments are subject to advice and consent of the Senate.

By the week ending October 26, 2018, the MCAC issued decisions number 39 through 41 for the calendar year 2018. This compares with a total of 43 decisions for the full 2017 calendar year. With two dispositive orders issued this week and three new appeals received, the total of pending appeals at the MCAC stands at 67. Roughly ten other appeals have decisions and/or dispositive orders circulating with respect to them at the MCAC in some state of preparation.

The MCAC has met or exceeded the Federal forty day benchmark for average case age of pending unemployment appeals each month since May and anticipates meeting that metric for October. The MCAC has been released from corrective action plan oversight with respect to this benchmark. Approximately 450 unemployment appeals currently pend before the MCAC.

10th Annual National Association of Workers Compensation Judiciary College

By Hon. J.W. Housefield

Magistrate Williams and I were given the opportunity by MAHS, to attend the 10th annual National Association of Workers Compensation Judiciary College (NAWCJ), which was held at The World Center Marriott in Orlando, Florida. The Judiciary Conference was held in conjunction with the 73rd annual Worker's Compensation Educational Conference and 30th annual Safety and Health Conference August 19-22, 2018.

The total attendance at the combined convention was estimated to be more than 8000 adjusters, actuaries, brokers, physicians, office managers, safety managers, attorneys and judges. There were approximately 105 Administrative Law Judges/Magistrates that attended the NAWCJ. Jurisdictions represented included California, Arizona, Nevada, Washington, South Dakota, Texas, Minnesota Illinois, Maine, Rhode Island, Pennsylvania, Virginia, South Carolina, Louisiana, Georgia, Kentucky, Kansas, Maryland, Mississippi, Nebraska, New Mexico, Oklahoma, Tennessee, Wisconsin and Florida.

Our first scheduled meeting concerned "Evidence for Adjudicators" the panel consisted of three judges and a law school professor from Florida State University. The panel discussed questions including weighing evidence, the distinctions between competent and substantial evidence versus clear and convincing evidence? Also, a very relevant topic discussed was the admissibility of social media evidence. Posts on such platforms as Facebook, Instagram, etc. were analyzed.

The entire convention over four days was well organized and quite informative. Most days started with a meeting at 7:30 or 8:00 in the morning and concluded by 5 p.m. There were numerous breakout sessions available to any person in attendance. We slipped away at 7:30 one morning to watch a live surgery being performed by a podiatrist with an orthopedic surgeon on stage fielding questions from the audience. The banter between the two physicians was educational and fast paced.

Other panel topics included "Writing the Order for Appellate Scrutiny" and "Dealing with Difficult Litigants." The first day concluded with "Judicial Ethics Conundrums and Humdrums." Dave and I elected to attend the SAWCA (Southern Association of Workers' Compensation Administrators), regulator roundtable. This was a discussion by regulators and administrators from across the country. Participants included Directors and top Administrators of the State's Workers' Compensation agency. Hot topics included marijuana and Medicare.

It was not all work and no play. We attended a NAWCJ reception Monday evening prior to the WCI reception and entertainment. The main entertainment consisted of the B-52's, which in my opinion, were way past their prime! Nonetheless, the "heavy hors d'oeuvres" were delicious and worth the price of admission. The reception is included in the conference fee. In addition, the Expo Hall has between 100 to 150 "vendors" marketing themselves with free gifts. Many also provide bags which are useful to haul away the "goods". Pens, bracelets that light up, Chapstick, candy, mugs, insulated thermos, did I mention pens? I now have a lifetime supply of pens! All the items containing LED lights were on display Monday night at the reception and concert.

As mentioned earlier, the second day started with live surgery being performed at a local hospital. Panel topic discussions the second day included "What You Should Know and Do about Court-Related Violence, Advanced Judicial Writing," and "What Judges Should Know in the Age of Uber & Lyft: Employee or Independent Contractor." This last subject matter was especially interesting. We should all familiarize ourselves with the phrase "Gig Workforce." This is defined as a workforce that is 100% dependent on the Internet, hence the shortened form of the word gigabyte. The state of Pennsylvania estimated that in 2013, 18.7% of adults worked in this non-standard arrangement. Many of these can be classified as temporary or staffing employment. When considering true gig work only the largest enterprises are included such as Uber and Lyft (transportation networking companies). There is Handy and TaskRabbit (home services) and Post Mates (food and merchandise delivery). Another app-based enterprise, Grubhub (restaurant food delivery) has become well known in the legal community considering a 2018 Federal Court decision in which one of its drivers was unsuccessful in proving that he was an employee. He was instead, held to be an independent contractor. Lawson v Grubhub, Inc. (US District Court N.D. California 2018). As it turns out Dave and I used Uber from the airport to the hotel and on our return trip. Of course, I knew the first question Dave would ask the driver. Did he consider himself an employee or independent contractor? Without hesitation he stated an independent contractor. He starts his day at 5 AM every morning and turns off his app-based employment at noon. He works the days he wants and the time he wants. He can even turn down a request from Uber or Lyft to pick up a customer. We were surprised to learn that he works for both Uber and Lyft. If he is transporting or going to pick up an Uber customer, he must turn off the Lyft application. During the panel discussion it was estimated that by the year 2020 approximately 40% of the American workforce will be classified as gig employees.

The third day included such relevant topics as "Medicare Set Asides at Settlements" and "TEChnology in the Courtroom." According to information provided during the discussion, CMS will be making MSA's mandatory nationwide for all types of liability cases no later than the year 2020.

I felt the conference was well planned and well worth my time. Without question, the conference was geared toward employers and the insurance industry. Nonetheless, I believe it is an excellent opportunity for networking. I saw several individuals that I recognized from the state of Michigan. As a magistrate, it appears more and more out-of-state insurance companies are writing business in Michigan. I always thought it was beneficial to put a face with a name if possible. For plaintiff's bar, contacts can be made with individuals that may make settlement easier in the future and possibly a higher settlement amount for their clients. For those attorneys licensed in other states, the continuing educational credits available are significant. Did I mention the pens?

Next year the conference will be held August 11-14, 2019. *www.WCi360.com*

2018 NAWCJ Conference – Judicial College

Part II – The Rest of the Story

By Hon. David Williams

This article supplements Magistrate Housefield's summary concerning our attendance at the NAWCJ Conference in August. As noted by Bill, we were only a fairly small group out of a few thousand attendees at Workers' Compensation Institute's (WCI) annual Educational Conference. Although we could have attended numerous other presentations or "break-out" sessions beyond those specifically geared towards Hearing Officers the agenda was already full and occupied virtually all 3 work-days. That being the case there were few opportunities to venture off and take in sessions relating to a myriad of other workers' comp-related subjects which included things such as: ongoing development of various new medical treatment options, vocational rehab, addressing chronic pain, adequacy-inadequacy of benefits, self-insured

guarantee funds and bankruptcies, workplace safety, etc. One which I think would have been relevant and of some benefit to how much of our time is used these days was the Professional Mediation Conference. Alas, not only did it conflict with times of our sessions, it also involved a 'separate registration' which probably didn't come free.

In addition to those addressed in Bill's synopsis there were a few other topics included as part of the NAWCJ Judicial College which were not mentioned. First was "Turning the Churn: A Vision for Workers' Recovery." This session primarily focused on terminology and perception being an important factor (or at least argued as such) in the overall scheme of most workers' compensation systems in general. The gist was that maybe the term "compensation" should be dropped from the lexicon and replaced by an alternative word which more appropriately conveys the ultimate intent and goal of these programs, being "recovery." It was hashed over by two individuals who come from different perspectives, one a representative from a medical-rehab provider and Robert Wilson of "WorkersCompensation.com" fame (a gentleman who Chief Magistrate Klaeren often cites and tags articles from as being informative and most times rather humorous). Haggling over whether "impairment" becomes "disability", depending on perceptions resulting from the words used, seems to be a rather tenuous foundation for renaming an entire statutory system. In follow-up to this segment and discussion over lunch I chided Mr. Wilson that the practical effect of changing the name from a workers' "compensation" to workers' "recovery" system seemed to be quite a stretch in an effort to re-brand the purpose of these laws - to reduce the financial connotation - since both terms sometimes are used interchangeably. As seen through the eyes of an injured worker this certainly might be their take on the word rather than what appears intended, being the physical or emotional recovery from an injury. I question whether renaming any of the state systems to "workers' recovery" programs would have much if any positive effect upon an injured employee's speedy reentry into the active labor pool and possibly just the opposite given that "recovery" can be and also is often used in a legal-financial context.

An additional subject was entitled "Advanced Judicial Writing."The speaker was Professor Wayne C. Schiess, Director of the Beck Center for Legal Research, Writing and Appellate Advocacy at the University Of Texas School Of Law. As you might expect, Bill strenuously encouraged me to attend this event, requesting that I pay particular attention to the portion directed towards brevity, being succinct and to the point. This was even before knowing that these items were going to be specifically covered in the session. Coincidentally, it started out by addressing "Brevity vs. Concision." Now not that I think it necessary to significantly modify my writing style and use of language mind you 😉, there were a good many things taken away from this seminar. I'll just say that many of us could use a few pointers here and there. This goes for both bench and bar alike. While skipping most of the details I'll mention a few core ingredients cited by this speaker. First is that the best test for content 'digestibility' (that word itself already violating this cardinal rule) is to gear it towards a mid-to upper level high school reader. This, he argues, goes for almost anything, even legal writing. And here I thought the "dumbing down" process primarily applied to lower levels on the educational spectrum, not those with advanced degrees such as a J.D.! Second, there is an optimal number of words to use (and notice here I could instead have employed the word 'utilize' but went for a simpler term, so must have learned something) in a sentence. It's less than 25 and preferably no more than 20, with a max of 45. Also, "plain English matters" so try to avoid "big fancy words" and get back to basics. He also suggested less formal writing being preferred. The importance of editing was stressed, with another pointer being to "draft freely and edit later" along with allowing some time to pass between the two. So, for those of you who appear before me, especially the 'usual suspects' in Pontiac and Detroit, I'll certainly try to incorporate these tips when drafting Opinions and Orders but make no guarantees in that regard.

There were also a couple of other noteworthy subjects. As Bill mentioned, one was "**E**thics Conundrums and Humdrums." A large part of this dealt with the 21st century mode of communication called "social media" and how we as adjudicators fit into, or don't, this entire arena. This especially pertains to Apps like Facebook, Instagram, LinkedIn and the like. Suffice to say that one who occupies the position of an ALJ, Magistrate or the equivalent need be cautious about not only registering on one or more of these sites, even more so an active participant (even if in the "private" mode). Nevertheless, counter to this is the fact that we all have our own lives and cannot become hermits having no outside connection to the rest of the community, not only within the legal profession, but especially in other areas which are generally considered beneficial to society, such as charities, philanthropic organizations, etc. The other subject, not previously mentioned, was "Diagnosis of Psychological Injuries" which mainly provided an informative update on the current state of one of the most significant and evolving areas of potentially disabling conditions stemming from a work-related injury, the Traumatic Brain Injury or "TBI" (and either its alternative name or a similar condition, Closed Head Injury), as well as Post-Concussion Syndrome. On this general topic the proper use, or in some instances the overuse, of a primarily psychosocial class type of condition, Post-Traumatic Stress Disorder ("PTSD") was also covered (along with other phenomena such as somatization and malingering). It was unfortunate that time constraints limited these last 3 areas from any in-depth analysis.

Finally, some fun stuff. There were a few opportunities to talk with fellow judges from various geographic regions of the country who function in a similar capacity but under somewhat different "systems" intended to address the same issue. One such occasion was at the luncheon on Monday and which compelled participants to mingle per the organizer's "table assignments." At that meal I met with judges from Florida, Virginia, Louisiana and Kentucky. Interestingly, one from Virginia spent a couple of years early in his legal career in what is now Cadillac Place (for those of you unfamiliar with the Detroit WC Agency/Board hearing site) way back when it was GM Headquarters in the late 70's or early 80's. Our discussion included what's changed in 'the D' over the last 35-40 years, especially most recently since all of the downtown re-development has taken off.

A further chance to relate with others came the next evening, first over dinner at Smokey Bones, then later back at the Caribe Royale. I was lucky enough to get 'Ubered' (is that technically even a word?) by the outgoing NAWCJ President, Hon. Jennifer Hopens (Texas), along with 3 others who occupy like positions in their respective jurisdictions, to the restaurant and enjoyed great BBQ with them and a couple more ALJs. One topic of discussion included exactly how each of us came to be in our respective positions, whether by appointment and if so, under what governmental branch, matters of tenure and things peculiar to their respective states' administrative law and hearing systems. One fact, more in the nature of trivia, learned from Judge Melodie Belcher (Georgia) was that the location of one of the sites where she regularly presides has some cinematic significance: It is THE courtroom used during filming of *My Cousin Vinnie.* An interesting work-related discussion with ALJ Rachel Bayless (New Mexico) involved litigation in her state which pertained to Medicare in its effort to enforce recovery of payments it made to medical providers despite an ongoing issue of coverage between New Mexico's Uninsured Employer Fund (which pays in certain circumstances) and what was later found to be the proper insurer (big surprise, certain forms didn't get filed timely) which ultimately, but much later, acknowledged liability. Apparently because the necessary forms had either not been or were yet to be filed in the proper order, the Feds still maintained that the State was liable. It was so much so that certain "block grant" money (applicable to totally unrelated matters – police and emergency response funding) was withheld to satisfy the claimed obligation! As I understand it there still is ongoing litigation over this, but it sure looks like CMS is pursuing recovery on behalf of Medicare even more vigorously as time goes on. My take on this, as emphasized at the next morning's "*Primer on Medicare Set Asides at Settlement*', is thus; whoever or whatever entity potentially had any contact or possible association with funds paid by Medicare for treatment of a work injury beware, you could be next to appear on its radar screen.

The last opportunity for some informal interaction with the group came after returning from Smokey's and heading to my room with all good intention of calling it an early night. In the process I came upon the "Night Court" caucus ensconced (darn, there I go again using one of those $.25 words) on the patio outside the entrance of Tower II. They were sampling some fine cigars and early in the process of imbibing a variety of top-shelf "adult beverages" for which the middle of the good 'ole USA is famous. After declining one of the first genre, being a reformed smoker, I was nonetheless "advised" to secure a drinking vessel and join them for a while. A little over 3 hours and much of the contents from numerous bottles of Kentucky's finest having disappeared (it does evaporate you know), a wide range of issues beyond just the work comp arena having been explored and with the evening's docket completed, NAWCJ President-Elect, Hon. Bruce Moore (Kansas), called for a vote on adjourning proceedings until next year. Not without some reluctance it was unanimously adopted by the rest of the group, including Treasurer Hon. Robert Cohen (Florida), Chairman Hon. Michael Alvey (Kentucky) – thus no wonder who provided most of the libations - along with other Board Members Hon. Scott Beck (S. Carolina) and Hon. Wesley "Wes" Marshall (Virginia WC Commission), along with yours truly, albeit I'm not sure how much if at all my vote counted! A side note in relation to Wes is that after I commented on his taste in head gear (a traditional red 'Mount Gay Rum' Regatta cap) much of our conversation had nothing to do with workers' compensation or other pressing matters, but rather our mutual interest in sailing, sailboat racing and cruising both the "unsalted" waters of my home state and his region, being Chesapeake Bay.

All in all it was well worth the time spent from both a professional and personal standpoint, one which certainly warrants doing again, regardless of the annual location being in Orlando Florida in August – you just aren't outside much; but heaven forbid the AC quits. I made a number of new acquaintances and would like to continue participation in the Association for the duration of my tenure on the Michigan WC Board of Magistrates which at this point extends to late January 2021 and hopefully beyond. Further, a more active role in this group by members of our Board would likely benefit Michigan's workers' compensation system in general, bench and bar. Plus, as the song by the late Aretha goes, it seems to me that all of us involved in the litigation aspect of the process, both within and beyond Michigan's border, just might end up getting a little more "r-e-s-p-e-c-t" if this were the case.

And no, I didn't get even one pen, let alone the lifetime supply obtained by Mag. Housefield! 🛠

Words, Words, Words*

By Martin L. Critchell

A party may present employment, medical, and other records at a hearing before the Workers' Compensation Board of Magistrates on the condition that all of the other parties had been given the records and notice of the intention to present the records at least 42 days earlier. Mich Admin Code, R 792.11305(1). ("Not less than 42 days before a hearing, the party intending to introduce a record, memorandum, report, or data compilation shall furnish copies and a notice of intent to all parties, for which a proof of service shall be completed and retained by the noticing party.")

The other party might agree to the Board considering the records. Or the other party might oppose any consideration of the records by the Board for any reason that had been given to the sponsor within the 21 days after receiving the notification. Rule 11305(2), first sentence. ("Any party objecting to an exhibit under this rule shall provide written objection to all parties not more than 21 days after receipt of the notice of intent…") And in addition, the lawyer for an objecting party may issue a subpoena for the person who prepared the record to appear before the Board for cross-examination. *Id.*, second sentence. ("An objecting party may schedule cross-examination in response to the record, memorandum, report, or data compilation sought to be admitted under this rule.") MCL 418.853, third sentence. ("A subpoena signed by an attorney of record in the action has the force and effect of an order signed by the worker's compensation magistrate…")[1]

Issuing a subpoena for the cross-examination of the preparer of a record or report should suspend any consideration by the Board because the interrogation might establish that the records are incomplete or actually prepared by someone else.

There are consequences should a subpoenaed preparer fail to appear for cross-examination. *Sakas v Savoie*.[2] ("It is incumbent upon the proponent to take all reasonable steps to enforce the subpoena. A mere request, even if by the court, is insufficient.")

The Board can exclude the records and reports from all consideration. *Heath v Waters*.[3] ("The benefit of cross-examination is an essential condition to the reception of direct testimony.") *People v Bigge*.[4] ("In order to render testimony admissible, it must appear the party against whom it is to be used had an opportunity to cross-examine. [citation omitted] So strict has been the rule that if a witness dies after direct examination and before cross-examination all the testimony of such witness is excluded. [citation omitted]"). 🛠

About the Author

Mr. Critchell *has practiced law at Conklin Benham since 1976 emphasizing cases before the Michigan Compensation Appellate Commission, Court of Appeals, and Supreme Court of Michigan. He has taught at Western Michigan University Cooley School of Law since 2012. And he has been a contributing author to the Institute for Continuing Legal Education and the Wayne State University Law Review.*

Endnotes

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

HAMLET: Words, words, words."

HAMLET, Act 2, Scene 2.

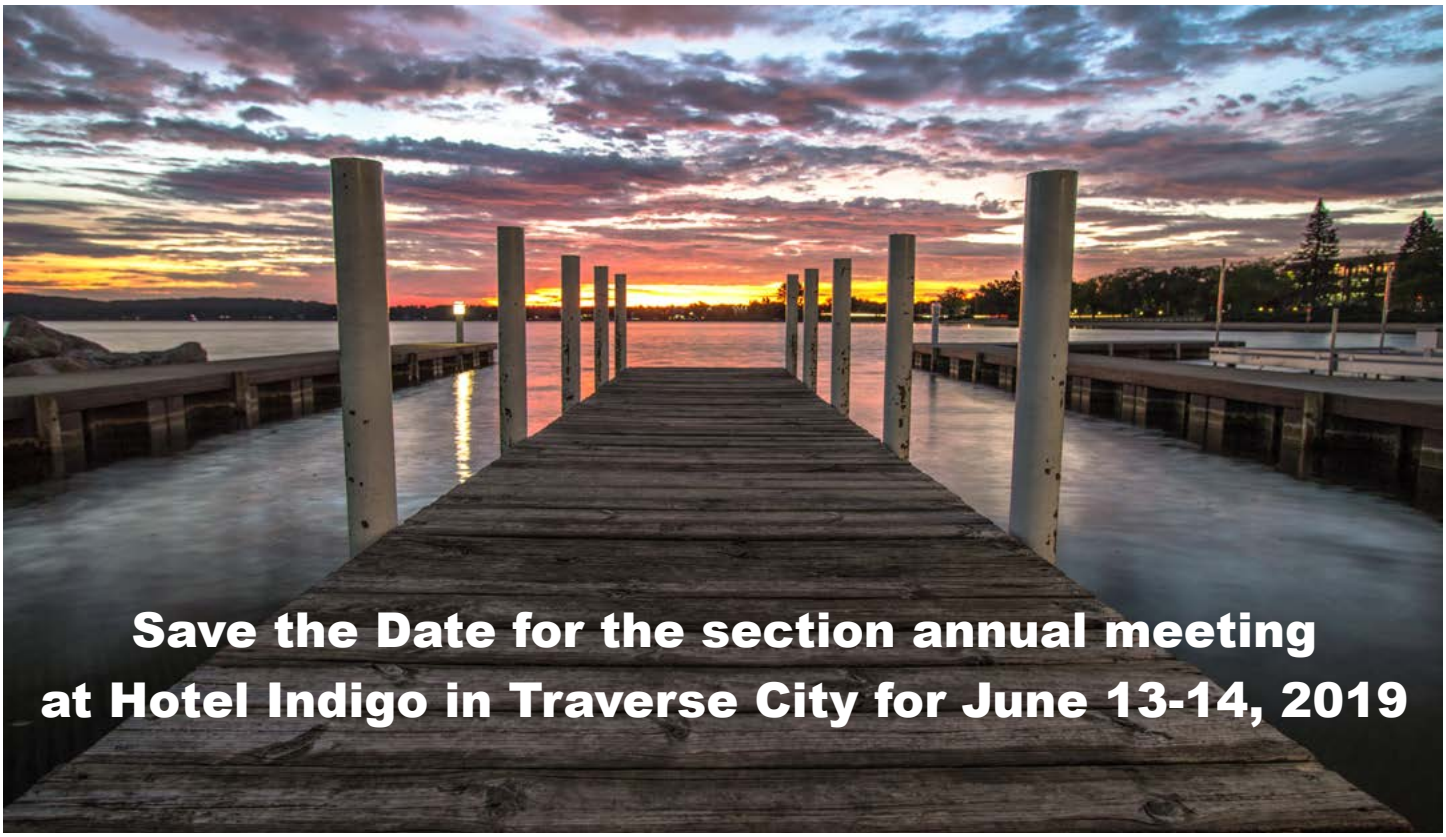
1 Only when an employee sustained a personal injury from work after December 18, 2011. MCL 418.891(4).

2 *Sakas v Savoie*, 58 Mich App 158, 160; 218 NW2d 853 (1974).

3 *Heath v Waters*, 40 Mich 457, 471 (1879).

4 *People v Bigge*, 288 Mich 417, 424; 285 NW 5 (1939).

Are you interested in becoming a member of the State Bar Workers' Compensation Section Council? Contact Chairperson Flynn or any council member to express your interest.



Caselaw Update

By Martin L. Critchell

The first sentence of MCL 418.171(4) allows an employee to sue for damages from a personal injury sustained at work when encouraged to pose as a contractor. ("Principals willfully acting to circumvent the provisions of this section or section 611 by using coercion, intimidation, deceit, or other means to encourage persons who would otherwise be considered employees within the meaning of this act to pose as contractors for the purpose of evading this section or the requirements of section 611 shall be liable subject to the provisions of section 641.")

The Michigan Supreme Court established when this statute applied in deciding *McQueer v Perfect Fence Co*.[1],[2] The Court ruled that the first sentence of § 171(4) could apply only when there were two contracts, a contract of employment between an employee and an employer that was not subject to workers' disability compensation or subject but without workers' compensation insurance, *and* a contract between that employer and another employer. *Id*. at ___. ("§ 171(4) provides a civil remedy to an employee of a contractor engaged by a principal.")

The basis for the decision was the whole-text canon. *Id*. at ___. ("courts must construe the text as a whole. Read as a whole, it is clear that § 171 is not applicable in this matter. Subsection (1) statutorily imposes an employment relationship between the contractor's uninsured employees for purposes of providing workers' compensation benefits. * * * Subsection (3) explicitly sets forth when the statutory employer provision is applicable, stating that 'this *section* shall apply to a principal and contractor *only if* the contractor engages persons to work other than persons who would not be considered employees. * * * In other words, if the requirements under Subsection (3) are not met, then an injured employee cannot seek the civil remedy under Subsection (4).") (emphasis by the Court)

The ruling precluded the lawsuit by David J. McQueer. There was only the one contract of employment between McQueer and Perfect Fence Company. There was no contract between that employer, Perfect Fence, and another employer. *Id*. at ___. ("There is no dispute that [Perfect Fence] was [McQueer's] direct employer. [Perfect Fence] had not con-

tracted with a contractor with inadequate workers' compensation [insurance] coverage.")

The Court did allow McQueer to amend the lawsuit to claim damages from Perfect Fence for intentionally injuring him by deferring review of that question which had been propounded. *Id*. at ___. ("We reserve the Court of Appeals judgement as to MCL 418.171 and deny leave as to any remaining issues presented in the application because of majority of the Court does not believe the remaining issues are noteworthy of review.") Unlike the ruling about when the first sentence of § 171(4) applies, this was not authoritative. A denial of leave to appeal is not an expression of the opinion of the Court about the validity of the analysis or conclusion by the Court of Appeals. *Frishett v State Farm Mut Auto Ins Co*.[3] And the opinion by the Court of Appeals cannot be cited having not been released for publication. MCR 7.215(C)(1), first and second sentences. ("An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority.")

Since the last issue of the *Newsletter*, the Michigan Court of Appeals released no opinion for publication that involved workers' compensation. The Court of Appeals has yet to decide the request for plenary review of the decision by the Michigan Compensation Appellate Commission in *Fisher v State of Michigan*, *Kalamazoo Reg Psychiatric Hosp*[4] involving the bar to recovering an overpayment of benefits that were made under a voluntary payment agreement.

The Michigan Compensation Appellate Commission decided two cases involving a claim to payment of an attorney fee for recovering the costs of medical care. In *Rempp v Tradesmen Int'l, Inc*,[5] AdvisaCare provided medical services to David A. Rempp for the injury that he had sustained working for Tradesmen International, mainly attendant care.[6] AdvisaCare sued Tradesmen International for payment of the costs of providing the care *and* the total of the hourly fee AdvisaCare had paid its lawyer in pursuing the case.[7]

The Workers' Compensation Board of Magistrates (Magistrate Ognisanti) allowed the claim by AdvisaCare for payment of the costs of medical care provided to Rempp but denied the claim for payment of its lawyer's bill.[8]

The Michigan Compensation Appellate Commission affirmed the decision by the Board of Magistrates denying the claim for payment of the fee that was paid by AdvisaCare to its lawyer saying, "The denial of AdvisaCare's request for attorney fees is within the discretion of the [Board of Magistrates] and finding no abuse of that discretion, the denial is affirmed."[9]

The ruling that assessing an attorney fee in addition to the cost of medical care was discretionary was based on the assessment of the opinions issued in *Petersen v Magna Corp*[10] as the Commission – accurately – reported that "Although the opinion in *Petersen* 484 Mich 300 is deeply divided on several issues, all the Justices agree that [the Board of Magistrates] has discretion when deciding whether to award attorney fees."[11]

And the denial was within the principled outcomes given that the claim was not "the contingent fee rate paid by the employee" allowed by the last sentence of MCL 418.315(1) (a percentage of the cost of the medical services) but instead, the total fee that was charged for the time of the lawyer.

In the case of *McKenzie v Dept of Natural Resources*,[12],[13] the lawyer hired by McKenzie, sought a fee based on the amount of the medical bills from the provider, the University of Michigan Medical Center, not the employer of McKenzie, the Department of Natural Resources.[14] The basis for the claim was the so-called common fund doctrine, alleging both McKenzie and the U of M should pay a share of the fee of the lawyer having benefitted from the services of the lawyer.

The Appellate Commission declined to apply this doctrine from equity jurisprudence saying that "[attorney] also requests that the Commission expand the law or create some new equitable power for ourselves or the Board of Magistrates by adopting the equitable principles of the common fund doctrine. We decline…"[15]

The basis for the decision by the Commission was *Petersen* as the Commission said "we are compelled to follow the mandates of higher authority. In this case, that means the mandates of *Petersen v Magna Corp*…"[16]

This pronouncement was apt given that a majority of the Court decided that *prorate* in the last sentence of MCL 418.315(1) allowed dividing the fee of the lawyer hired by an injured employee between an employer and workers' compensation insurer, not between the injured employee and a provider of medical care. *Petersen*.[17] ("In § 315(1), the term 'prorate' could reasonably apply to employers, their insurance carriers, health care providers, employees seeking workers' compensation benefits, or to any combination of them. * * * I agree with the Court of Appeals conclusion that the final sentence of § 315(1) applies ***only to*** employers and their insurance carriers. * * * 'prorate' in the final sentence of § 315(1), when read with the remainder of the statute, applies to the parties who might contest the payment of medical benefits: employers and their insurance carriers.") The idea advanced by counsel that the provider should pay a portion of the fee having benefited was the idea of the dissent in *Petersen*.[18] ("the better interpretation of § 315(1)'s final sentence is that [the Board of Magistrates] can apportion an amount of the employee's attorney fees from an employer's payment to the medical care providers.") 🛠

About the Author

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

Endnotes

1 *McQueer v Perfect Fence Co*, ___ Mich ___ NW2d ___ (2018).

2 Martin L. Critchell represented amicus curiae Michigan Self-Insurers Association and the Inland Press.

3 *Frishett v State Farm Mut Auto Ins Co*, 378 Mich 733, 734 (1966).

4 *Fisher v State of Michigan, Kalamazoo Reg Psychiatric Hosp*, 2018 Mich ACO 6.

5 *Rempp v Tradesmen Int'l, Inc*, 2018 Mich ACO 33.

6 *Id.* at 1-2.

7 *Id.* at 2.

8 *Id.*

9 *Id.* at 20.

10 *Petersen v Magna* Corp, 484 Mich 300, 773 NW2d 564 (2009).

11 *Rempp* at 19.

12 *McKenzie v Dept of Natural Resources*, 2018 Mich ACO 35.

13 Martin L. Critchell represented the University of Michigan Medical Center.

14 *McKenzie* at 2.

15 *Id.* at 4.

16 *Id.*

17 *Petersen v Magna Corp*, 484 Mich 300, 308, 309; 773 NW2d 564 (2009) (KELLY, C.J., lead opinion).

18 *Id.* at 353 (MARKMAN, J., dissenting).