

STATE BAR OF MICHIGAN

Workers' Compensation Section Newsletter

Spring 2018



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From the Chair

By Tim Esper



Hello again. Funny how our best laid plans can be derailed by something as mundane as the weather, in this case, the biggest snowstorm of the year to hit the Detroit area. For our west-side members, this is old hat. For me, it turned my Thursday grandkid babysitting gig into a 3 day visit. Not that I'm complaining—I love those kids. The derailed plans included long-delayed file work, and writing this article. Life goes on.

February finds me on the downhill side of my term as section chair. The first major event of the term, the Winter Meeting, is now behind us. We had a very successful meeting, with the largest turnout in years, thanks to the hard work of Andrea Hamm and Phil Frame. Their novel ideas of a hot breakfast, and having the section cover the cost of hotel rooms for members north of Clare certainly helped. Thanks to Dan Zolkowski for bringing in our up north contingent. Our guest speaker, Kathleen Wyeth, was most informative, scarily so, regarding recent changes in the handling of Medicare conditional payments.

Annual Meeting

The homestretch of my term will be taken up with the biggest event on our calendar, the Annual Summer Meeting, June 14-15, at Hotel Indigo in Traverse City. Elsewhere in this newsletter you can find a Notice regarding the Annual Meeting, and a Registration Form to reserve your hotel room. As you might have heard, the section will cover the cost of member and spouse for the Thursday afternoon cocktail party, the Hall of Fame dinner and breakfast on Friday for all attendees, and members' meeting expense. The section will sponsor an after-party Thursday evening, and a variety of events Friday afternoon and evening. We're pulling out all the stops to make this a memorable event. Hope to see you there.

Continued on next page

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Term Expires June 19, 2018

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Daniel J. Hebert, Farmington Hills
Christopher Westgate, Grand Rapids

Term Expires June 2019

Phillip I. Frame, Lansing
Richard N. Lovernick, Ann Arbo
Dan Zolkowski, Lansing

Term Expires June 2020

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Lisa Klaeren, Chief Magistrate, Michigan Workers' Compensation Agency

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Jayson A. Chizick, Newsletter Editor

Opinions expressed herein are those of the authors or the editor and do not necessarily reflect the opinions of the section council, the membership, or their employers

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From the Chair Continued from page 1

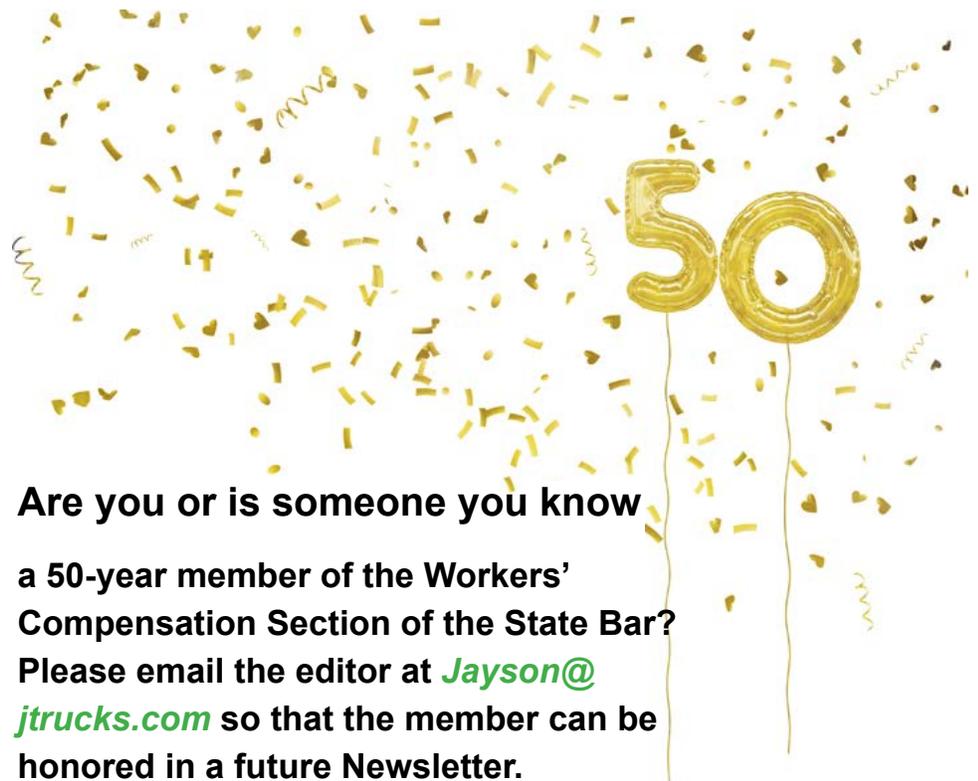
Hall Of Fame Nominations

One of the highlights of the Annual Summer Meeting each year is the Hall of Fame Dinner and induction ceremony. We invite all section members to submit written nominations of candidates whose careers in the workers' comp community meet the criteria for HOF induction. Elsewhere in this newsletter you can find those criteria. When you nominate someone, include your written comments on how your nominee satisfies these criteria. This year's Hall of Fame nominating committee includes Chris Rabideau, Ella Parker, Dennis Flynn and Tim Esper. Submit your nominations by May 11 to a committee member, or to any council member.

Recent Deaths

For anyone who follows the section e-mail blasts, you already know of the recent deaths of Dick Skutt, Larry Nobach, and Greg Rapp. Here is a link for Larry Nobach's obituary which was not available at the time of the e-blast: <https://www.oxleyheard.com/larry-nobach/>. Here are two links about Dick Skutt: his *obituary* and a *Detroit Free Press article*. To read Greg's Rapp's obituary: <http://obits.mlive.com/obituaries/grandrapids/obituary.aspx?n=gregory-james-rapp&pid=188237926>. In their own quite different ways, all three served as prominent members of the workers' comp legal community. All three were several years removed from their active years in practice in the section. All will be missed.

—*Tim Esper*, Chairperson



**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

Like all great travelers, I have seen more than I remember, and remember more than I have seen.

—Benjamin Disraeli



As the weather starts to brighten across Michigan and our travels are somewhat less precarious, it seems appropriate to consider the coming seasons. With holidays now feeling long past, our section looks forward to Hall of Fame nominations, our annual meeting and a fantastic wine tour. It is hard to imagine the sunshine reflecting off of Grand Traverse Bay when it barely peeks out at this time of year. This newsletter is filled with information regarding our annual meeting, nominations for the Hall of Fame, present litigation related documents and the promise of things to come. The pages of this newsletter also reflects on the untimely passing of section members and a genuine Hall of Famer.

Our section abounds with members of multiple generations. It is not uncommon to encounter lawyers from their 20's to 80's in any given day. Nearly every lawyer of this section has encountered significant travel requirements associated with his or her job. Our membership has the uncommon opportunity to travel from Kalamazoo to Gaylord, Detroit to Escanaba, etc., etc. I have often thought about the benefit of stopping in these different places, all too often to determine the best donut in Michigan. (Feel free to ask my opinion if you see me in court.) I also often take the opportunity to speak with people at local establishments, ask

questions about local happenings, good times to visit the area with family and other pieces of information. It is a fascinating experience to learn how different, yet how similar, people across this state truly are.

War stories in our business are really quite fascinating. I have heard from a Grand Rapids attorney that turned the tables on an employer representative at trial with a subpoena and some crafty cross-examination. I was told stories about one lawyer and 20 redemptions in a day. I have heard of magistrates (or ALJ's) who were perceived to be friendly to one side or the other. There are some great stories of the "good old days" that include monumental battles of wit and grit in court and out of court. I welcome any member reading this article to consider submitting his or her story or memory for publication.

The upcoming annual meeting is an opportune time to visit with Hall of Fame members, your section council and fellow section members. This meeting is also an opportunity to celebrate new members of the Hall of Fame, who are to be honored for their contribution to the section and this practice. The induction speeches are always enjoyable, and typically include some of the best stories of days gone by. I encourage you to attend the coming annual meeting in Traverse City and make some great memories along the way.

See you down by the bay.

Jayson Chizick. ✂

In Memoriam

Gregory James Rapp • February 27, 1951 – February 19, 2018

I just returned from the memorial service honoring the late Gregory Rapp. I have known Greg since 1995 when I joined Kluczynski Girtz & Vogelzang. Greg was a partner at KGV for over 30 years. Prior to working for KGV, Greg worked for Travelers Insurance Company as staff counsel. Greg was a kind, diligent, thoughtful partner and practitioner, however, Greg was much more than a lawyer. He was a devoted husband to his wife Gail and a loving father to their three children, Ryan, Adam and Julianne. His generosity of spirit and time was evident in the testimonials by family and friends at his memorial service. Clearly, his life touched many people, both family and friends, on a profound level. If success in life is measured by the fact that you have left the world a better place than you found it, Greg achieved success by virtue of the three outstanding adult children he and Gail raised. Although his time on earth is at an end, his impact will live on through his children as they clearly have learned the lessons he taught them: to always do the right thing, to be kind, to be thoughtful, to be caring and to be devoted to family. He left us too soon and will be missed by all who knew him.

—Mike Kosta



WORKERS' COMPENSATION LAW SECTION

Annual Summer Meeting

June 14-15, 2018

Hotel Indigo, 263 W. Grandview Parkway Traverse City, MI 49684



Thursday, June 14

- 4:00 Council Meeting
- 5:30 Cocktail Party followed by Hall of Fame Dinner & Induction Ceremony
- After-Party (details below)

Friday June 15

- 8:00 – 10:00 Breakfast
- 9:00 – 12:00 Business Meeting
- 12:15 Wine Tour (details below)
- 1:00 Family Trip to Platte Lake (details below)
- 7:00 Dinner—venue to be determined (member expense)

WATCH for an email blast in the next few weeks with the conference registration form.

Contact Dan Zolkowski danz@accidentfund.com to suggest other Friday activities like a TART trail bike tour, golf outing, Sleeping Bear dunes, etc.

Hotel Reservations (See page 6)

Attendees at this year's Summer Meeting should not delay in making their hotel reservations. Traverse City is among our most popular meeting locations, and the Hotel Indigo is a new and exciting venue for us. **For the first time ever, the section has made this a free meeting--no charge to members or families for the 5:30 cocktail party (2 drinks/person), HOF Dinner, Friday breakfast and meeting.** In the past, the cost for these events for member and spouse usually ran \$90 and up. By making this a free meeting, we expect to keep members' cost below that of past meetings, even with somewhat higher room charges at Hotel Indigo. Please note that on-site parking only available by valet (including unlimited in/out) at \$12/day. **The nightly room cost at Hotel Indigo is \$199/night (king/2 queens), plus tax.**

Thursday Evening After-Party

Following the Hall of Fame Awards Dinner Thursday, the section will sponsor an after-party, hosted by Mike and Deborah Brenton on their fourth floor rooftop garden deck overlooking downtown Traverse City, the Boardman River, and Grand Traverse Bay. There will be a hosted bar serving a variety of wines, beers, and soft drinks, light snacks, music, and a fire pit if the evening is cool. In the event of inclement weather, the party can adjourn indoors. The address is 160 Uptown Court, a 3-4 minute walk directly south of the hotel (cross the bridge, walk one block south on Pine Street and you are there).

Leelanau Wine Country Tour Friday 12:15 PM

For the third time, Mike and Deborah Brenton will be hosting a Wine Country Tour, to **depart from the Hotel Indigo** at 12:15 p.m. sharp on Friday after the seminar. Blue Lakes by the Bay Transportation will again provide luxury coach service. Mike is a level one sommelier, a former wine writer, and represents public interests on the 12-member Michigan Grape and Wine Industry

Counsel. Mike and Deborah are also minority partners in Blustone Vineyards (www.blustonevineyards.com), which will be one of our stops on the tour. There, the group will be greeted and led through a tasting by Blustone founder and managing partner Tom Knighton.

A visit to Shady Lane Cellars (www.shadyLANECeLLars.com) is also confirmed. Winemaker Kasey Wierzba will lead the group on a vineyard walk and winery tour, then finish at the tasting room. One or two other wineries are to be determined, with hosting by proprietors or winemakers. As in the past, time on the bus will be devoted to Leelanau Wine Country education, lots of trivia questions, fun prizes, snacks, and a beverage or two.

Registration is strictly limited for this event, first come, first served (age 21 or older only). To register, please complete the Registration Form below and return to Brenton Law Group P.C. with your check by Friday, June 1, 2018.

Leelanau Wine Country Tour Registration Form

ATTENDEES		
Section Member Name:	Cell Phone:	
Section Member Email:		
Guest Name(s):		
PAYMENT		
Total Number of Attendees:	@ \$25 per person	Total Amount Enclosed:
Make check payable to: Brenton Law Group PC	Mail payments by Friday, June 1 to: Michael Brenton Brenton Law Group, P.C. 2500 Kerry Street, Suite 101 Lansing, MI 48912	

Friday Afternoon Family Trip to Platte Lake

Rick and Kathy Lovernick have invited section members and their families to the Lovernicks' cottage on Platte Lake Friday afternoon. Their address is 4875 Wonderland, Beulah. 31.7 miles from Hotel Indigo, drive time about 45 minutes. Easy to find—just off M-22--google the address for directions. The menu will include hot dogs, hamburgers, chips, cold salads and pop for the kids. Just bring your swimsuit and towel.

Rick and Kathy will provide water toys, rafts, pontoon boat rides etc. To give them an idea of how much food to get, please send Rick an e-mail at least a week before the event to indicate how many in your family will be attending. rlovernick@conklinbenham.com

Visitors are welcome starting at 1:00 PM, with no particular end time. For those who stay into the evening, there will be a bonfire and marshmallows. ✂



Hotel Indigo Reservation Form

Workers' Comp Section Annual Meeting June 14-15

Room Reservations

Group Code WCL

Personal and Billing Information	
Guest Name	
E-mail Address	
Daytime Phone Number	
Evening Phone Number	
Guest Address	
Billing address	
Credit Card Type	<input type="checkbox"/> Visa <input type="checkbox"/> MasterCard <input type="checkbox"/> Discover <input type="checkbox"/> American Express
Credit Card Number	
Credit Card Expiration Date	
Travel Information	
Arrival Date	
Departure Date	
Number of Adults In Room Name of Share	
Number of Children In Room	
Lodging Information	
IHG Rewards Club Number	
Room Preference (King bed, two queens, etc.)	
Special Requests (Hotel Is 100% Non-Smoking)	

You may make your reservations online, by calling 231-932-0500 or by using this form.

Please email the completed form to Roz Howe, Sales + Services Coordinator
roz@hotelindigotvc.com

If you have questions or need assistance with your reservation, you may call Roz directly at 231-932-0500. Press '2' for Sales, then '3' for Roz.

Hotel Indigo Traverse City

263 W. Grandview Parkway, Traverse City, MI 49684

www.hotelindigo.com/traversecitymi

Board of Magistrates Update

By Hon. Lisa Klaeren, Chief Magistrate

In January 2018, the Board of Magistrates welcomed a new appointee to the Board; attorney John Sims of Marshall. Magistrate Sims has worked in workers' compensation for forty years, and comes to the Board with a wide range of experience from both the plaintiff's and defendant's perspective. He received his Bachelor's degree from the University of Michigan, and his law degree from Wayne State University Law School. He will be handling the Upper Peninsula docket, with an additional three weeks handling an Okemos docket.

As everyone should be aware by now, the Board of Magistrates has begun to utilize the new Medicare/Medicaid/Friend of the Court form, which is located on the Agency website under Litigation Forms. It is identified as Form 556A, as an attachment to the Agreement to Redeem Liability. Beginning March 1, 2018, this form will be a required document with all redemptions.

As we have introduced this document, there are several areas where issues have arisen that I wanted to point out to all practitioners:

First, the plaintiff must initial the first paragraph on the form. This confirms for the magistrates that the plaintiff understands that he/she must consider Medicare's interests in *every* settlement, regardless of the amount. In addition, it advises the plaintiff that he/she is never required to seek formal approval of any set-aside, and that an informal set-aside can be voluntarily established.

Second, we continue to be questioned about the requirement to consider Medicare's interests when a settlement is

below \$25,000. The CMS Guidelines clearly indicate that Medicare's interests must be considered in *all* settlements. There is absolutely no mention of any monetary limits to avoid this consideration. The only area where the \$25,000 threshold comes into play is when the parties choose to submit a set-aside for formal CMS approval. In that situation, the guidelines indicate that CMS will not formally review a set-aside when the total settlement is less than \$25,000.

Third, the parties are often neglecting to complete the section regarding Medicare conditional payments. If a defendant is responsible for taking care of conditional payments, the word "defendant" must be circled and defendant must initial that section. If plaintiff is responsible for conditional payments, the word "plaintiff" must be circled, and plaintiff must initial that section. This makes it clear to the magistrate that the responsible party is aware and acknowledges its' responsibility for reimbursement to Medicare.

Also, be sure that you are using the correct copy of Form 556A. The draft copy that was distributed at the December Section Meeting is not the final document. The final document can be found on the Agency website (www.michigan.gov/wca) by clicking Litigation, and then Litigation Forms, and scrolling down to Form 556A. It is in a fillable format on the website.

As we transition to the use of Form 556A, there may be other issues that arise. If you have questions, concerns or recommendations be sure to let a Section member know, or contact the Director of the Agency, or contact me directly. ✕



The Workers' Compensation Agency has drastically revised the workers' compensation calculator. The new web-based format allows for easy calculations and even mobile/tablet use. Please check out the calculator at <https://w2.lara.state.mi.us/WORCS/BenCalc/CalculationOptions>

Thank you to Director Long and the Agency for this useful tool.



From the Michigan Compensation Appellate Commission:

As of March 5, 2018,
the fax number for the Commission will change to 517-284-5391.

**MEDICARE-MEDICAID-FRIEND OF THE COURT
Addendum to Agreement to Redeem Liability**

Print

_____ vs _____
 Plaintiff Defendant

Medicare Secondary Payer Interests:

I acknowledge that I must consider Medicare's interests in any redemption/commutation; that I am not required to seek formal approval of any redemption set-aside arrangement from Medicare; and that I may consider Medicare's interests by creating and maintaining a reasonable voluntary Medicare set-aside account and that I have been advised how to do this. **Plaintiff's Initials:** _____

Medicare's Interests are Considered as Follows (Check all that Apply):

- Medicare has waived its interests.
- I have fully recovered from my work-related injury.
- My doctor has certified in writing that I no longer require any Medicare-covered treatments related to this claim.
- Any medical treatments I currently receive are for non-work-related conditions.
- I am _____ years old. Based on my current condition, I will not become a Medicare beneficiary for _____ years. I have no reasonable expectation of requiring medical treatment for a compensable work injury when I become eligible for Medicare benefits.
- I have chosen to create and fund a voluntary Medicare Set-Aside account in the amount of \$ _____ (see Redemption Order). In doing so, I have considered whether Medicare entitlement is based on age or disability or both; the type and severity of my injury or illness; whether full or partial recovery is expected; the projected time frame for recovery; whether my current impairment is stable; whether my impairment is expected to shorten my life span; whether my disability is permanent total or permanent partial; the amount of medical expenses paid in the year or two after my condition stabilized; the total amount of the redemption; whether I am living at home or receiving assisted living care; and whether my redemption has compromise aspects resulting from the employer/carrier disputing my claim from the outset.
- A Center for Medicare and Medicaid Services approved set-aside (CMS Set-Aside) in the amount of \$ _____ has been established (see Redemption Order).

Medicare Conditional Payments (If Applicable):

- Defendant/Plaintiff (circle one) is responsible to obtain and pay all final conditional payments for dates of service through the date of redemption. _____ **Defendant's Initials** _____ **Plaintiff's Initials**

Medicaid's Interests (Check all that Apply):

- Medicaid has waived its interests.
- I have not received Medicaid benefits directly or through a program or plan for a work-related condition.
- I have received Medicaid benefits directly or through a program or plan for a work-related condition and am reimbursing Medicaid with the proceeds from this redemption.

Friend of the Court Interests:

- I have no current outstanding Friend of the Court obligations.
- I have outstanding Friend of the Court obligations and I am satisfying my statutory obligations from the proceeds of this redemption.

 Date Plaintiff/Petitioner signature
 WC-556A (12/17)

LARA is an equal opportunity employer/program. Auxiliary aids, services and other reasonable accommodations are available upon request to individuals with disabilities.

Hall of Fame Nominations

It is time to scratch your heads and come up with deserving nominees for the State Bar Workers' Compensation Section Hall of Fame. Each year, we honor one or two inductees to the HOF at our Annual Summer Meeting in June. The event is well attended and is an opportunity for us to show our support for those who have shaped our practice and made valuable contributions to the workers' comp community.

If you know someone who you think is deserving of this honor, please provide a written recommendation to a member of the Hall of Fame nominating committee, or any member of the Council. The HOF nominating committee this year consists of Chris Rabideau, Ella Parker, Dennis Flynn and Tim Esper.

In your *written recommendation*, please provide an explanation of how that individual exemplifies the spirit of the following criteria, and how they have contributed to establishing our section as superior in the professional courtesy and consideration we show each other.

- Must be retired or semi-retired from practicing Workers' Compensation.
- Must have at least 20 years of proven experience in the field of Workers' Compensation Law and be a licensed attorney.
- Possess the highest professional qualifications, ethical standards, character, integrity, professional expertise and leadership.
- Demonstrate a commitment to fostering and furthering the objectives of the Workers' Compensation Section of the State Bar.
- Provide exceptionally high quality professional services to clients, magistrates and the public.
- Provide significant evidence of scholarship, teaching, lecturing and/or distinguished published work in the field of Workers' Compensation.
- Stand out to newer attorneys as model of professionalism in deportment and advocacy; a person who should be emulated.
- Have earned the respect of the bench, opposing counsel and the Workers' Compensation community.
- Display civility in an adversarial relationship.
- Avoid allowing the ideology differences to affect civility in negotiations, litigation and other aspects of law practice.
- Demonstrate an active interest in resolving issues.
- Have a thirst for knowledge in all areas of the law that affects their representation of their clients in Workers' Compensation and actively participates in the Workers' Compensation Section.
- Have a reputation as an individual with broad knowledge and involvement in all aspects of Workers' Compensation law.

Please note that many people may be nominated, but a maximum of two will be elected. The Committee will narrow down the nominations to the top four candidates. The Council will have the final vote on the two selected and they will advise the candidates of their selection. ✂

Hall of Fame Members (As of June 2017)

Adams, Ralph
 Anderson, Richard A - 2009
 Baril, John - 2010
 Barney, Michael - 2008
 Baxter, James
 Benham, Robert Jr.
 Calkins, Gary - 1998
 Callie, Albert - 2002
 Cardew, Ray - 2010
 Carothers, Clarence
 Charfoos, Myron - 2015
 Charfoos, Samuel
 Charters, John - 2014
 Child, Libby - 1999
 Chuhran, Thomas -
 Cohen, Norton - 2000
 Conklin, S. Gerard
 Cooke, Molly
 Cypher, Thomas - 2015
 Czyrka, Bruno - 2002
 Day, Nancy - 2009
 Ducey, Donald - 1998
 Feldman, Murray - 2017
 Flynn, Michael - 2013
 Ganos, George
 Griffin, Bruce
 Gilman, Michael - 2002
 Groesser, Terrence L. - 2016
 Hodges, Robert C. - 1998
 Hogle, Mark - 2002
 Hughes, Timothy - 1999
 Jaaskelainen, Gordon
 Kelman, Jerome - 1998
 Knapp, Donald
 Korth, Nadine - 1999
 Lacey, Ralph
 Lazar, Paul - 2014
 Levasseur, Norman - 2000
 Loria, Donald
 Listman, William - 2008
 MacDonald, Robert J. - 2000
 Marcus, Benjamin
 McCroskey, Jerry S.
 McNally, Thomas - 2012
 Millender, Robert
 Miron, John P.
 Mitseff, Carl - 2000
 Munroe, Peter
 Nunn, Jeanne
 Perkins, William
 Powell, Eleanor - 2001
 Poxson, Elijah
 Rapp, Gregory - 2017
 Rappaport, Roger - 2008
 Rappaport, Raymond
 Reamon, William G. - 2001
 Richardson, Gerald - 2012
 Ryan, Theodore
 Ryan, James - 2008
 Salisbury, Daryle - 2016
 Schmidt, Richard
 Skutt, Richard - 1999
 Storie, H. Delbert
 Stromaier, Alan
 Tennis, Darrell
 Timmer, James - 2011
 Tomasi, Paul - 2009
 Trucks, Jay F. - 2011
 Vahratian, Ervin
 Welch, Edward - 1999
 Wilcox, Joseph - 2001
 Will, Rodger - 2002
 Woll, Arthur - 2009
 Zielesch, Eileen Z

Caselaw Update

By Martin L. Critchell

The Michigan Supreme Court will decide the availability of two statutes in the workers' compensation act that allow an employee to sue an employer for damages as well as for workers' compensation in the case of *McQueer v Perfect Fence Co* (Docket no. 153829). One is the first sentence of MCL 418.171(4),¹ which the Court of Appeals said applied given that "[Perfect Fence] employed [David J. McQueer] on the condition that his employment would be 'off the books.'" Further, according to [McQueer], while he was being transported to the hospital following the accident, he was told by Peterson [his supervisor] to *not* tell the hospital that he was employed by [Perfect Fence] and that there was no workers' compensation coverage for him.² The other statute in the fourth sentence of MCL 418.131(1),³ which the Court of Appeals said applied given that "[McQueer] was ordered by a supervisory employee to stand beneath the bucket of a Bobcat while his supervisor used the bucket to push or pound the posts into the ground, then it is clear that [he] was exposed to a continually operative dangerous condition..."⁴ allowing the inference of the specific intent to injure.

A decision is expected by the end of the 2017-2018 Term of the Court on Tuesday, July 31, 2018.

The Michigan Court of Appeals has not issued an opinion that can be cited as authority to apply in another workers' compensation case since last issue of the *Newsletter*.

To begin 2018, the Michigan Compensation Appellate Commission decided four cases involving the administration of workers' compensation cases, *Grant v Suburban Mobility Auth for Regional Transp (SMART)*,⁵ *Davis v Wolverine Packing Co*,⁶ *Veldheer v Quality Dining, Inc*,⁷ and *White v EDS Care Mgt LLC*.⁸

The administrative issue presented to this Commission in the case of *Grant* concerned the statute requiring an employer to *immediately report* the coordination of compensation to the Workers' Compensation Agency, MCL 418.354(10).⁹ The Commission said that SMART had *immediately reported* the coordination of compensation given that the reporting was on September 11 following the agreement of the lawyer about the amount on August 8 to the calculation after July 17, 2013. *Grant* at 2. ("Under these facts, it can hardly be said that [Grant] was unaware of the agreed calculations...") Oddly, the Commission did not question the standing of the employee to question the speed of reporting given that an employer must report to the Agency, not an employee receiv-

ing compensation. It would seem that only the Agency could contest the speed of reporting the coordination of compensation. Nothing precludes coordination or the continued coordination of compensation when an employer does not *immediately report* that coordination to the Agency.

The administrative issue in *Davis* concerned the ability to resolve a dispute that occurred after a decision had been appealed. After a decision by the Workers' Compensation Board of Magistrates (COLOMBO, M., presiding), Wolverine Packing appealed to the Commission and later, asked Curtis Davis to report for a medical examination by the terms of MCL 418.385.¹⁰ When Davis did not go, Wolverine Packing asked the Commission to suspend the interim appeal ("70%") benefit that was being paid. Davis objected saying that partial statements of fact made by Wolverine Packing were not accurate or not complete. *Davis* at 1-2.

The Commission decided the problem should be considered by the Board. *Davis* at 2. ("the parties disagree on the sufficiency and accuracy of the evidence that has been provided...we remand this matter to the Board of Magistrates for the limited purpose of considering [Wolverine Packing's] [motion]...")

The administrative issue in the case of *Veldheer* and *White* was the imposition of the sanctions available by the terms of MCL 418.861b.¹¹

In the case of *Veldheer*, the Board of Magistrates decided a dispute between two lawyers over the recovery of the costs and a fee for the successful prosecution of a claim by Elizabeth Veldheer. The Board ruled that Schroder was entitled to reimbursement of all his costs and all of the fee from Veldheer. *Veldheer* at 1. Viilo appealed this decision to the Appellate Commission, *Id.*, arguing that the Board was wrong as a matter of law "when [the Board] denied his motion to compel answers to interrogatories from Schroeder" and "by not splitting the attorney fees at issue." *Id.* at 3.

The Commission recognized that the questions presented by Viilo were meritless. *Id.* (discovery is fully under the discretion of the [Board of Magistrates.] *** the record is perfectly clear that no steps were ever taken by Viilo to substitute [as] counsel [for Veldheer]...")

The Commission denied the request by Schroder for lack of detail. *Id.* at 4. ("In [Schroeder's] motion for sanctions, he makes no specific request or recommendations on what those sanctions should be...") But imposed sanctions on its own, sanctions of the costs and the fee of the lawyer that Schroder

had hired. *Id.* “[Viilo] should be held responsible for Schroeder’s costs and fees in defending himself at the trial and the current appeal.”)

There are two features to be noted. One is that the Commission did not have subject-matter jurisdiction given that disputes over attorney fees decided by the Board must be appealed to the Director. MCL 418.858(1).¹² And all that can be done is dismiss. *Fox v Bd of Regents of the Univ of Mich.*¹³

The other feature is the extent of the sanction. Section 861b concerns only the vexatiousness of the appeal, not of the trial, given that the *claim was vexatious* means the *claim for review* and not the application for mediation or hearing.

The Commission, upon its own motion, or the motion of any party, may dismiss a *claim for review*, assess costs, or take other disciplinary action when it has been determined that the claim or any of the proceedings with regard to *the claim* was vexatious by reason of either of the following...” (emphasis added)

In the case of *White*, the Commission assessed Brenda R. White a sanction of \$2,500.00 for appealing an order of the Board of Magistrate approving an agreement to redeem liability, an order that was final and satisfied by EDS Care. *White* at 1. (“The redemption was not appealed during the 15-day appeal period. The appropriate checks were mailed...”)

The particular appeal was not the first. Indeed, Brenda R. White was a “serial” filer. *Id.* at 2. (“[Brenda R. White] has continued to file applications based on the same dates of injury...and has inundated the Workers’ Compensation System, the courts of the State of Michigan, and, in fact, the Supreme Court of the United States with filings.”)

There are two features to this. One is that the Commission did not specify who to pay, the party requesting the sanction, EDS Car/Travelers, or the Commission itself.

The other noteworthy feature is that payment of the sanction was a prerequisite to filing anything further by *White*. *Id.* at 3. (“[White] may not file any additional claims [claims for review] with the Commission regarding this matter...” ✕

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 School Law Review.

Endnotes

- 1 “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 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.”
- 2 *McQueer v Perfect Fence Co*, unpublished opinion of the Court of Appeals, issued on April 19, 2016 (Docket no. 325619).
- 3 “An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.”
- 4 *McQueer* unpublished opinion of the Court of Appeals at 10.
- 5 *Grant v Suburban Mobility Auth for Regional Transp (SMART)*, 2018 Mich ACO 1.
- 6 *Davis v Wolverine Packing Co*, 2018 Mich ACO 2.
- 7 *Veldheer v Quality Dining, Inc*, 2018 Mich ACO 3.
- 8 *White v EDS Care Mgt, LLC*, 2018 Mich ACO 4.
- 9 “The employer or carrier taking a credit or making a reduction as provided in this section shall immediately report to the bureau the amount of any credit or reduction, and as requested by the bureau, furnish to the bureau satisfactory proof of the basis for a credit or reduction.”
- 10 “After the employee has given notice of injury and from time to time thereafter during the continuance of his or her disability, if so requested by the employer or the carrier, he or she shall submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, furnished and paid for by the employer or the carrier.”
- 11 “The commission, upon its own motion, or the motion of any party, may dismiss a claim for review, assess costs, or take other disciplinary action when it has been determined that the claim or any of the proceedings with regard to the claim was vexatious...”
- 12 “The payment of fees for all attorneys and physicians for services under this act shall be subject to the approval of a workers’ compensation magistrate. In the event of disagreement as to such fees, an interested party may apply to the bureau for a hearing. After an order by the workers’ compensation magistrate, review may be had by the director if a request is filed within 15 days. Thereafter the director’s order may be reviewed by the appellate commission on request of an interested party, if a request is filed within 15 days.”
- 13 *Fox v Bd of Regents of the Univ of Mich*, 375 Mich 238; 242-243; 134 NW2d 146 (1965).

Workers' Compensation Section Winter Meeting

The section council sponsored our annual Winter Meeting in December of 2017. The Inn at St. John's was a fine host to a large group of section members. A large breakfast spread was well visited and appreciated by those in attendance, and kept all focused on the helpful information provided by speaker Kathleen Wyeth.



Chairperson Tim Esper introduces the speakers.



Director Mark Long speaks about the current status of the Agency.



Section members participate in the winter section meeting.





The Top Ten Ways to Aggravate Magistrates

By Christopher Ambrose

As seen the 2009 Spring newsletter.

I have been privileged to sit as a magistrate for the past five years, after serving “in the trenches” for almost fifteen years prior to that. It has been interesting to see things from both sides of the bench to be sure. As a magistrate, I have seen some fine examples of lawyering, including true cooperation, professionalism, and a real spirit of working together toward a common goal: justice. However, I have also seen some examples of how not to behave. I have now gained a true understanding as to why magistrates are not always in the best of moods on any given docket day. Therefore, for the benefit of the very few of you who have ever committed the following, I give you my top ten list.

10. Showing up late. I know there is always a great reason as to why you get to court at 10:30 and beyond. Bad weather. Really, really nice weather. Couldn't find the “new” Lansing bureau (going on 16 months now). Other more important bureaus first. Social Security hearing. Deposition. Yes, there are good reasons sometimes, but at least call the other side, and maybe leave a message with the judge. We need to get business done, and a trial date should be a priority.

9. Acting unprofessionally. Watching attorneys squabble in court is not fun. It may make for good television, but this is neither LA Law, nor Boston Legal. Yelling, stomping feet, and being discourteous to either opposing counsel or a witness does nothing to flatter you or enhance your reputation. It is so true that honey beats out vinegar, every time. We can hear you, and there is never a reason to raise your voice in court. Ever. Period.

8. Not exchanging medical before the trial date. All pertinent documents, including medical, need to be shared in advance of a court date. Showing up three or more months after the pretrial, and announcing medical has not been exchanged is frustrating to the court to say the least. Please send this information to opposing counsel as soon as you receive it.

7. Forgetting to send out the notice of intent on medical you plan to offer into evidence. I have surprised more than

one attorney when reciting the Rule that deals with this issue. You are much better off sending a notice to opposing counsel rather than being caught with your pants down on this one, 42 days is 42 days—6 weeks. A month plus about 12 days. Not real complicated, folks. This is not a good excuse for an adjournment.

6. Not negotiating ahead of the court date. Nothing like having lawyers at the bench on the third or fourth trial date who have yet to discuss settlement. “I need an adjournment to prepare a demand” or “I need an adjournment to get authority” sounds pretty weak after the case is 12 months old. Let us all commit to discussing settlement early and often.

5. Not preparing exhibits in advance. There is nothing more frustrating than starting a trial, asking about exhibits, and being told that more time may be needed to go through the medical, and figure out what will be used as an exhibit, and what will not. Please do this in advance. Talk to opposing counsel as to what will be stipulated to, and what will be in contention. Ask the magistrates for stickers, and mark them ahead of time. It will save a lot of time, and make for a much cleaner record.

4. Offering exhibits that are repetitive, burdensome, and irrelevant. Okay, maybe there is something more frustrating than not marking exhibits in advance. That would be getting handed a three foot high pile of documents that have not been reviewed, sorted out, or otherwise culled in advance. Imagine spending a Friday reading an exhibit with the same operative note in seven different places. Or looking at an x-ray report of an eyeball in advance of an MRI on a knee claim. Or going through 85 pages of EKG readout in a psychiatric case. I don't have to imagine, as I have done this on numerous Fridays. Not fun. It makes no sense to hand the magistrate records you haven't gone through. Often, this comes back to haunt you and your client.

3. Refusing to facilitate. Please don't tell the judge that this case is “impossible to settle” if it is not. Many, many times,

I have strongly urged attorneys to facilitate cases when they feel settlement is impossible. Eighty percent of the time, these cases get resolved. Magistrates know this isn't always possible, but please make an effort if there is any chance to alternatively resolve the dispute.

2. Not checking documents prior to a redemption. Incorrect addresses, failure to put down the amount of the settlement on the Order, not filling in the social security allocation, mismatched injury dates, wrong carrier listed, incorrect tabulation, completely bungled multiple carrier forms are things we as magistrates see each day. Although we are polite about these things when on the record, it is impolite to say the least to hand in documents that have not been flyspecked first. Yes, it is our job to check the documents during a redemption, but often, the mistakes and omissions are fairly obvious and can be avoided.

And, the number one way to aggravate a magistrate.....

1. Asking about Medicare, Medicaid, Friend of the Court for the first time when a Plaintiff is on the stand during a redemption. Nothing like getting to the end of the redemption, and finding out that there is a Medicare card, or a huge Medicaid lien, or seven different Friend of the Court cases in arrears. Again, do the advance work, and these things should not happen. We know Medicare, etc are a pain to deal with. However, they are a reality, and need to be dealt with properly.

The vast majority of comp practitioners are very prepared, on time, and cooperative. To all of you, a big "Thanks!" To the few of you guilty of some or all of the above, if you follow these concepts, you are much more likely to see a magistrate in a good mood, with a big smile, and more than willing to work with you. ✖

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



Words, Words, Words*

By Martin L. Critchell

The hearing of an agreement to redeem liability that was once *de rigueur* is now an option for the parties because of a statute that was added to the workers' compensation act by 2011 PA 266,¹

“Parties may stipulate in writing to the determinations in subsection (1). If all parties stipulate in writing to those determinations, the stipulation may serve as a waiver of hearing, and the magistrate may approve the redemption agreement. A magistrate may conduct a hearing on a proposed stipulation.”

The option is available to the parties to an agreement to redeem the liability for a personal injury sustained by an employee after December 18, 2011 given “the amendments to this act made by 2011 PA 266 apply to personal injuries and work-related diseases incurred on or after December 19, 2011.”² The option is not available when the agreement to redeem includes an injury before December 19, 2011. An agreement to redeem that includes an injury before December 19, 2011 requires a hearing by the terms of the statute before its change by 2011 PA 266.

To exercise the option, all of the parties in the case must sign a document reciting that the participation in the agreement to redeem is voluntary; that the injured employee understands the rights afforded by the workers' compensation act and the consequences of the agreement to redeem to those rights; the agreement to redeem is in the best interest of the injured employee; and that any pending application for mediation or hearing described a valid claim. These circumstances are the circumstances described in §§(1) which is referenced in the first sentence of the statute. A stipulation to these three (or, four) circumstances obviates presenting a ten-day notice to an insured employer³ or any of the 9 circumstances that are described in §§(3) of the statute such as other benefits received by the employee and the nature and extent of the injury and disability.⁴

The option may be exercised when attending a hearing is inconvenient because the hearing site is far-distant from the parties and counsel or because of conflicting schedules. The option may be exercised when liability is recognized by an earlier voluntary payment or an earlier order and the agreement to redeem is concluding the further (future) payments. And the option may be exercised when only part of a claim is concluded such as weekly compensation with medical left open.

The Workers' Compensation Board of Magistrates is not bound by the exercise of the option by the parties given “a magistrate may conduct a hearing on a proposed stipulation”⁵ and reject proceeding that way and only by the traditional process.

About the Author

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* “polonius: What do you read, my lord?
HAMLET: Words, words, words.”
HAMLET, Act 2, Scene 2, Line 199.

Endnotes

- 1 MCL 418.836(2).
- 2 MCL 418.891(4).
- 3 MCL 418.835(2), first sentence.
- 4 MCL 418.836(3)(a), (b).
- 5 MCL 418.836(2), last sentence.



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