State Bar of Michigan

Workers' Compensation Section Newsletter

Fall 2004

Contents

Section Honors Members with over 50 Years of Service

Alan Helmore

The Section honored its members who have dedicated over 50 years to the practice of Workers' Compensation. A humorous presentation was made by Jim Tanielian that brought back memories of the social aspect of workers' compensation practice as well as the professional side of the practice. All present received a history lesson and had more than a few laughs. The senior members were also honored at a luncheon following the Annual Meeting.

Honorees, Helmore, and Tanielian

50-year honorees Roberts, Anderson, & LeVasseur

Honorees that were able to be in attendance:

Peter Munroe – admitted in 1949
Norman LeVasseur –admitted in 1951
Richard Anderson – admitted in 1954
David Roberts – admitted in 1954

Honorees that couldn't be present:

Stuart Dunning – admitted in 1950
Bob Benham – admitted in 1951
Bill Devers – admitted in 1951
Willard Rappleye – admitted in 1952
Sam Thomas – admitted in 1952
Paul VanHartsvelt – admitted in 1952

Report from the Board of Magistrates

Jack A. Nolish, Chairperson, Board of Magistrates
Michigan Workers' Compensation Agency

Remarks made at the Workers' Compensation Section Meeting at the State Bar of Michigan Annual Meeting on Friday, October 1, 2004

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

Murray Feldman, Newsletter Editor

Opinions expressed herein are those of the authors, or the editor, and do not necessarily reflect the opinions of the Section Council or the membership.

Material for publication should be sent to the editor at:

300 East Long Lake Road, # 200
Bloomfield Hills, MI 48304
mfeldman@stroblpc.com
Phone: (248)540-2300
Fax: (248) 645-2690

Article submissions are due for:
February issue Jan. 15, 2005

It seems like a long time has passed since our last meeting on June 17, 2004. To borrow a phrase from Garrison Keillor, it has not been a quiet week in *Lake Trythecase*. Perhaps you have all heard of *Lake Trythecase*, the little town where the lawyers are strong, the Magistrates are good looking and both claims and defenses are sincere.

Bureau Consolidations

The Muskegon. Battle Creek and Ann Arbor Bureaus have been closed. The cases previously assigned to Muskegon and Battle Creek have moved to Grand Rapids and the Ann Arbor cases have been moved to Detroit. The planned closing of the Jackson Bureau has been delayed about a year due to lease issues.

Several things came together to cause these closures:

- Agency budget concerns and constraints;
- Reductions in the number of Magistrates, docket management issues and the need for more efficient use of space.
- The overall caseload has declined by approximately 10%, compared to last year and the outlook for an increase in filings in the coming years seems unclear.

There is no doubt that closing local bureaus will cause inconvenience to some and hardship to others. We need to remember that in most circumstances, the consolidations involved moving the cases one county over. We simply do not have the budget, Magistrates and staff to put a facility in every county.

Lansing Bureau

The long-planned move from the facility in Okemos to the consolidated hearings facility in Lansing has gone smoothly. Complaints I have received center around two concerns: parking and building security. The parking situation is a problem and will continue to be a challenge until the street work around the Ottawa building is completed.

Those needing handicap parking accommodation can make arrangements to use the 10 underground spaces in the building. This must be arranged by calling the Lansing office. Please do so one week ahead. Theses spaces can be used by anyone with the appropriate handicap sticker. Street level parking is also available.

With regard to security, we are trying to simplify the procedures and limit the "escort" of people to the hearings office. We must remember, however, that the Ottawa Building is a multi-purpose state office building and must be secure like other similar buildings in Post 9-11 America. We are establishing lists of attorneys for the security desk so counsel can proceed directly to the hearings office after checking in. These lists will have to be updated periodically. The question of making state building pass cards available is under discussion but may not be practical.

Upcoming Magistrate Appointments

On January 26, 2005, nine Mag-

istrates will have their terms expire: Block, Cooke, Cope, Day, Frankland, Harris, Quist, Sloss, and Wagner. Of those, Cope and Wagner are term-limited as of that date and Day is limited as of March 1.

By the time of publication, the Qualifications Advisory Committee will have interviewed those seeking re-appointment. Additionally, 39 experienced people have applied for the positions.

QAC is on track to have the approved list available by early November. It is hoped we can get the appointment process completed in time for a smooth docket transition.

Magistrate Assignments

Magistrate Reinhardt is handling the Kalamazoo docket; Magistrate Frankland is handling Jackson and Lansing; Magistrates Block and Quist are in Grand Rapids with Magistrate Block helping with the UP docket. Magistrate Grattan is in Lansing and Saginaw. In the coming months, I will be assisting for some weeks in Saginaw. Once the appointments are completed, there will be two full-time Magistrates in Saginaw.

Future Consolidations

The rumors are true; consideration is being given to a combined facility for Oakland and Macomb counties, most likely between Pontiac and Mt. Clemens. At present, we do not have a location so any plans in that regard are long term.

The Medicare Problem

The problem of resolving cases involving Medicare conditional payments and future needs set-asides continues to delay the resolution of cases. As of this week, the long awaited computer program changes have been made so that we can accurately identify the cases involving Medicare issues and track the problem. This type of information is needed when we have the chance to meet with CMS and other persons involved in the problem. These issues are creating problems on both sides of the cases. I am asking both sides of the Bar to assist with whatever political connections they may have to get this process fixed. Few think that Medicare should not be reimbursed for expenses paid that should be paid by the responsible party. Our problem is the delay in the process of getting the matters resolved.

In closing, I look forward to working with the new leadership of the Section. Alan Helmore has indicated that he hopes to lead the section to a more active role in the process and practice of Workers' Compensation in this State. I certainly will support him in those endeavors. On behalf of the Board of Magistrates, let me congratulate Alan on his new challenge and say that the door to my office is open, once you get past the three levels of security entrances.

Spring Seminar Plans

The overwhelming response to the seminar questionnaire was in favor of holding the Spring Seminar/Meeting at Mackinac Island. We are pleased to announce that the meeting will be held at the Mission Point Resort on Thursday, July 28 to Saturday, July 30. This is later than usual to accommodate later school closings and to increase our chances of better weather in northern Michigan. If you are interested you are encouraged to make reservations as early as possible to assure your room choice. These can be made by contacting Mission Point Resort at 1-800-833-7711.

A one-night deposit will be taken at the time of booking, which is 100% refundable if canceled in writing (email or fax) up to 14 days prior to arrival. Available room choices (single or double occupancy): Carriage Rooms - $194.00 per night; Garden Rooms -$224.00; Forest View 2 room Suite - $314. Children under 18 years of age are complimentary and meals are free for children under the age of 12. This special room pricing is available for 2 days prior and 2 days after our seminar to allow you to plan a complete vacation around the event.

Special events are being developed. There will be a group activity or activities, traditional golf outing, cocktail parties and an optional dinner. Details will be forthcoming. Any questions please contact Robin Helmore at *ahelmore@sbcglobal.net* or (248) 852-3594 (evenings).

From Your Editor

Murray Feldman, Strobl Cunningham & Sharp, PC

I want to begin this note by thanking all of you for your positive feedback and kind comments regarding the Summer 2004 Section Newsletter. As you know, it was one of my goals to increase participation by outstate attorneys, and as I travel around the State, I continue to encourage those of you who practice outside of the southeastern Michigan area to submit articles for publication.

Along with our regular columns, you will note some additions and new features in this edition of our Newsletter. First of all, we welcome Barry Adler and Steve Stillman, who will be writing a continuing column on social security/Medicare issues.

Also, thanks to Mike Mason to whom any comments should be directed for the crossword puzzle found on page 5. In addition, our feature article this quarter is authored by Mike Dunn and deals with the issue of third party cases.

Your editorial staff would also like to take this opportunity to congratulate Alan Helmore, who was recently elected Chairperson of the Section at the recent Section meeting and all other officers, who were elected at that time.

Medicare and Michigan Workers' Compensation

By Barry Adler & Steven Stilman

(Editor's Note: This column will be a continuing feature of the newsletter)

Michigan claims for workers' compensation benefits are routinely settled for a lump sum, which includes payment of past and future medical expenses. This poses unique problems for the Michigan workers' compensation practitioner when settling the case. Attorneys must be acutely aware of the procedures for notifying CMS of the settlement and obtaining CMS approval for the settlement.

There are two issues related to the payment of medical expenses and settlement of Michigan workers' compensation claims. First, there is the issue of whether or not Medicare has paid for any medical treatment for the *claimed condition(s)*. Secondly, to cover the issue of Medicare payments for future medical treatment, Medicare is required to make a determination regarding the appropriate amount to be "set aside" for future medical treatment out of the settlement proceeds.

CMS is currently advising that it will pre-approve allocations for future medical expenses in workers' compensation redemptions when a claimant is entitled to Medicare benefits, or if there is a "reasonable expectation" of Medicare entitlement within 30 months of the settlement date and the settlement is over $250,000. If the settlement is less than $250,000 and the claimant is not a Medicare recipient, you do not need to notify CMS of the settlement.

Set forth below is an outline of the steps that need to be taken in order to obtain CMS approval for the settlement of a workers' compensation claim in Michigan.

Start the Process - 1-800-999-1118

The first step is to open up an account on behalf of the claimant with CMS and to advise CMS that you are representing a particular Medicare beneficiary in a workers' compensation settlement. You must call CMS to set up a claim at **800-999-1118** or **646-548-6761**. Please be prepared to have the claimant's name; social security number; date of injury; the workers' compensation insurance name, address and phone number; the injury/disease date; a description of the injury (the ICD-9 diagnosis code is very helpful); as well as the name of the attorney representing the employer or workers' compensation insurance carrier.

Within two to three weeks of opening the file, you will receive a standard letter from CMS acknowledging that CMS has been advised of your retention to represent the claimant, notifying you of CMS' lien pursuant to the Secondary Payor laws and containing a Consent to Release form. Please have your client sign the Consent to Release form immediately and proceed to the next step, leading to the redemption of the claimant's workers' compensation claim.

Determine Conditional Payments and Set-Aside Agreement

There are two areas of CMS with which you must communicate in order to settle and redeem. Prior to the settlement, you must obtain from CMS a summary of conditional payments already made by Medicare pertaining to the claimant's injuries and you must contact a different division of CMS in order to determine the "adequacy in protecting Medicare's interests in workers' compensation settlements, i.e., set-aside arrangements."

In order to determine the amount of conditional payments already made by Medicare for the claimant's injuries, you must send a copy of the Consent to Release form signed by claimant with a short introductory letter listing your claimant's name; social security number (or health insurance claim number - HIC#); date of injury; and the injuries/conditions claimed. In your letter advise CMS that you are representing this claimant, give a brief description of the claim, and request a summary of conditional payments made to date by Medicare contractors.

Additionally, provide CMS with a copy of the completed Redemption/Settlement Order (which is to be entered with the court at hearing) as well as the Worker's Settlement Statement listing the attorney fees and costs or any other deductions.

The information above should be sent to:

CMS/United Government Services, L.L.C.
401 West Michigan Street
Milwaukee, WI 53203-2804
Attn: Medicare Secondary Payor Unit

If you have any questions regarding the conditional payments, you can call CMS in Milwaukee at 414-226-6300.

Within six to eight weeks you will receive a letter from CMS/United Government Services acknowledging your representation of the claimant and advising of the total amount paid by Medicare Part A and Medicare Part B. If an itemization is not provided with the correspondence, you can contact CMS in Milwaukee and request an itemized statement for each and every conditional payment.

However, the final determination of the amount due won't be determined by CMS until after the case is settled and you send a copy of the Redemption Order to United Government Services in Milwaukee. They may actually reduce the amount of conditional payments due after a Medicare Liability Settlement Claim Reimbursement Summary, i.e. the conditional payment demanded is actually discounted proportionately by the fees and costs.

Set-Aside Agreement

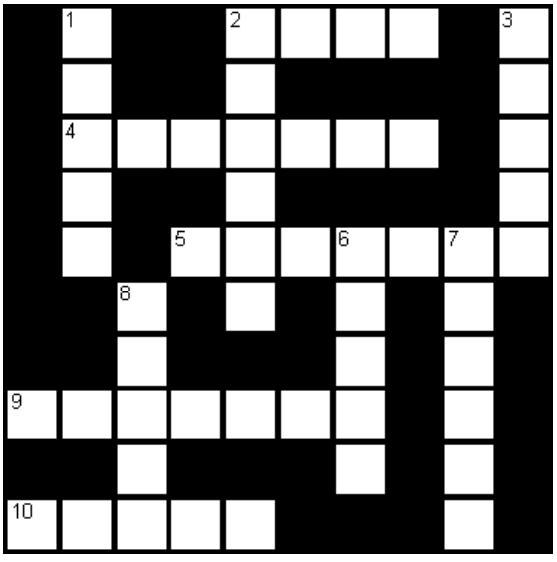
As stated above, you must also contact another division of CMS to determine the amount of benefits that your client will have to put away in a set-aside agreement for future medical care for the work-related injury. The part of CMS that determines this is as follows:

Budgets & Collections Branch
Division of Medicare Financial Management
233 North Michigan Avenue, Ste 600
Chicago, Illinois 60601-5519
Attn: Gloria J. Walker, Manager

Again, you must write a summary of your case, but you need to include much more detail. We have attached what appears to be a daunting list of information requested by CMS but is readily at your disposal, as follows:

1. A cover letter must include the following information for all WCMSA proposals.
   - Claimant's Name
   - Claimant's Date of Birth
   - Claimant's Health Insurance Claim Number (HICN) or Social Security Number (SSN) if claimant is not yet entitled to Medicare
   - Claimant's Address and Phone Number
   - Claimant's Release — claimant's signed authorization for CMS, its agents and/or contractors to discuss his or her case/medical condition with parties to a WC settlement that includes a WCMSA
   - Claimant's Counsel: Name, address and telephone number
   - Entitlement Information — Indicate if the claimant is currently enrolled in Part "A" and Part "B" of Medicare or in Part "A" only, or if the claimant may be enrolled in Medicare within 30 months of the settlement
   - Employer's Information — name, address and phone number
   - WC Insurer — name, address and phone number of employer's insurance company
   - Attorney Representing Employer or WC Insurer — name, address and phone number if employer's or WC Insurer's attorney has prepared documentation for the proposed WCMSA
   - Injury/Disease Date — the date the injury(ies) occurred.
   - Type of Injury/Disease — a brief description of the work-related injuries sustained including the ICD-9 diagnosis codes, if available.
   - Total WC Settlement Amount and Agreement Proposed — including the proposed Medicare set-aside amount plus the amount provided for all other aspects of the settlement

2. Documentation that must be available to CMS prior to the approval WCMSA:
   - Life Expectancy — Provide an evaluation of whether the claimant's condition would shorten the life span.
   - Life Care Plan — A life care plan is appropriate when the claimant's injury/disease is extensive/serious, e.g., paraplegia, quadriplegia, brain damage.
   - Current Treatment — Provide the treatment/services that the claimant regularly receives.
   - Future Treatment — Identify specific types of medical services/items, the frequency/duration of the medical services/items and the projected costs of the medical services/items related to the work injury/disease that are expected in the future in light of the claimant's condition. Indicate whether another insurance or plan will be future medical.
   - Patient Medical Recovery Prognosis — Describe the expected recovery, e.g., full or partial.
   - Amount for Future Medical Treatment — Identify the total amount of the WC settlement that is designated for medical benefits (separate from wage/indemnity benefits).
   - Medicare Set-Aside Amount — State the amount of the medical benefits that you propose to be placed in the Medicare set-aside arrangement for future items/services that would otherwise be covered by Medicare.



Across

2 Where there's a pun... (4)
4 "Wage earning capacity" (7)
5 Eminent Editor (7)
9 Section chair (7)
10 Selma's mother (5)

Down

1 Late bluesman (5)
2 Operatic composer? (6)
3 Recent mover, not a shaker (5)
6 Respected advocate (5)
7 The Bureau, now (6)
8 9 Across's instrument (5)

Conclusion - Redeem Your Case

Once you have been advised of the conditional payments requested by CMS (and you have verified that those payments are for work-related injuries), and you received a proposed set-aside arrangement, you can now proceed to redeem and settle your case. In the beginning, CMS used to request that a client sign off on the set-aside agreement. That is no longer required. However, CMS is now requesting a copy of the Redemption/Settlement Order once it is signed by the magistrate and entered with the court. Additionally, CMS is now requesting that there be a designation on the Redemption Order, as follows:

MEDICARE: The sum of $_____ _____ is designated as the sum to be regarded as a workers' compensation Medicare Set-Aside Arrangement.

A League of Their Own

By Murray R. Feldman

Your Editor, along with many other workers' compensation attorneys, recently had the pleasure and privilege to attend the investiture of Richard M. Skutt, appointed by Governor Granholm, as a Wayne County Circuit Court Judge.

After comments by Michigan Supreme Court Justice Marilyn Kelly, and former Supreme Court Justice Dennis Archer, Dick was presented with his robe by his daughter and Rick Warsh on behalf of the Workers' Compensation Section of the Michigan Trial Lawyers Association. A large contingent of workers' comp attorneys representing both the plaintiff and defense bars heard and agreed with Rick's comments, noting that while the Wayne County Circuit Court was gaining a valued judge, we in the work comp bar were losing a highly respected advocate and intellectual in the area of workers' compensation theory and law.

Dick, in his remarks, noted that while he looked forward to serving as a Wayne County Circuit Court Judge, he knew he would miss meeting many of us for coffee at the various Bureaus each morning. He invited not only those present, but all workers' comp attorneys to stop by his courtroom, noting "The coffee pot will always be on."

Dick, on behalf of the Workers' Compensation Section, congratulations and best wishes in your new position.

At Dick's investiture, your Editor had the opportunity to see Judge Anthony Guerriero, who many of you may remember as a former workers' compensation practitioner. Judge Guerriero was appointed by Governor Granholm as a District Court Judge in the 24th Judicial District Court (Allen Park) and is presently running for re-election. If you are in the Allen Park area, Judge Guerriero invites us all to stop by and see him at 6515 Roosevelt Rd., Allen Park, Michigan 48101.

Along with Dick's appointment as a Wayne County Circuit Court Judge and Tony Guerriero's appointment as a District Court Judge, we workers' comp attorneys are proud to note that Don Ducey has received the "Respected Advocate Award", given annually by the Michigan Trial Lawyers Association to a defense attorney. If there was ever a worthy recipient, it is Don Ducey, who we all admire and respect. Congratulations, Don, on behalf of the Section.

Pre-Trial Results

By Magistrate Jack A. Nolish

The consolidation of the various Agency hearing sites has a produced a situation where participants in the system may have to travel increased distances to the hearing sites. To better serve our customers, we are making certain information available by telephone so some travel can be eliminated.

Effective immediately, staff in the Detroit hearings office file room will answer phone inquiries regarding dates assigned at the initial pretrial. They will accomplish this by checking the Agency's computer system for information, which means they can ascertain these dates for cases pending in all hearings offices statewide. Please call: *313-456-3656*. There are three phone lines attached to this number but there is no voice-mail. If you get a busy signal, please call again. Since the file room where these calls will be handled is busiest in the morning, we ask that the inquiry calls be made in the afternoon. Also, we ask that inquiry calls be made no less than 3 business days after the scheduled pretrial date. This will allow for staff to have time to input the dates assigned by the magistrates. Please have the Social Security number for the employee available when you call. The Agency computer system indexes cases by that number. Although name look-up is possible, it is significantly slower and there are many "Jones" files.

Please feel free to address any comments regarding this new service to my attention or Anne Williams at the Detroit office.

WC Section Winter Seminar/ Meeting

Finding a location for the 2005 Winter Seminar proved to be extremely challenging, due to recent hurricanes.

We are pleased however to have found that the Iberostar Bavaro Suites in Punta Cana, Dominican Republic has suffered only minor damage and is available—but with limited space. We have been able to reserve 12 rooms for the week of February 26 to March 5. The Iberostar is an all-inclusive, 6-star resort, located on the famous Bavaro Beach with 20 miles of spectacular sugar white beaches. The Dominican Republic has been called "the New Caribbean", where natural beauty and beaches without end combine with championship golf, luxurious resorts, fabulous sites and ideal weather.

The cost of this trip will be $1,669.39 per person-double occupancy. This includes round trip airfare, hotel transfers, Garden View Junior Suite, all meals and beverages (including domestic & international alcohol), non-motorized water sports, tennis, daily & nightly sports & activities, mini-club for children 4 –12 years of age. Turkish bath, sauna and spa available at an additional cost. For additional information you can go to *www.AppleVacations.com* or to *www.Iberostar.com*. Follow the links to Punta Cana – Iberostar Bavaro Suites. All reservations must be made by December 21. Look for further information in a mailing in early November or contact Robin Helmore at *ahelmore@sbcglobal.net* or 248-852-3594 (evenings). Advance reservations can be made by contacting Debbie Fekete at AAA Travel 248-879-3334 or *dqfekete@aaamichigan.com*.

As always there will be an additional seminar charge, which is yet to be determined. However, it will be nominal in comparison to the overall cost of the trip.

Report from the Workers' Compensation Appellate Commission:

New Case Interprets *Rakestraw*

By William G. Reamon, Chairperson, WCAC

In the case of *Hale v Borgess Medical Center*, 2004 ACO # 266, Commissioner Glaser, joined by chairperson Reamon and Commissioner Will, issued an important opinion interpreting the *Rakestraw* case. The magistrate found that plaintiff's fall at work aggravated a pre-existing but asymptomatic spinal stenosis condition and granted an open award. Defendant appealed the open award, arguing that plaintiff's trial proofs, specifically her medical testimony, fell short of satisfying the "medically distinguishable" standard set forth in *Rakestraw*.

In affirming the magistrate's decision, Commissioner Glaser analyzed the Supreme Court decision of *Connaway v Welded Construction Co.,* 462 Mich 691, 614 NW2d 607 (2000), a companion case to *Mudel v Great Atlantic & Pacific Tea Company*.

In *Connaway*, plaintiff was found to have suffered a severe knee injury while employed in a Michigan location. She was not a Michigan resident nor was her employer located in Michigan at the time of the injury. After surgery and a period of convalescence during which time plaintiff received Michigan Workers' Compensation benefits, plaintiff tried to return to work, this time in the state of New York. Within ten days, she twisted the same knee and had an increase in symptoms. She then sought to have her Michigan Workers' Compensation benefits resumed.

Trial was ultimately held before Magistrate Wagner, who found that the New York episode only produced a temporary increase in symptoms with no pathologic change. The Commission reversed, finding that the New York injury produced a change of condition. The Supreme Court affirmed the Commission ruling, finding that the New York injury was neither a mere recurrence nor a temporary aggravation of the Michigan injury.

In the *Connaway* opinion, the Supreme Court highlighted certain facts upon which it based its conclusion that plaintiff's New York injury was more than a mere recurrence or temporary aggravation from that which she sustained in Michigan. Those facts included:

- plaintiff's physical condition following the New York injury was "subjectively different" than her physical condition before such injury;
- plaintiff experienced pain following the New York injury that she had not felt before such injury;
- following the New York injury plaintiff's treating physician restricted her from performing any "heavy industry"; and
- an examining physician opined that more than two years after the New York injury, plaintiff was incapable of engaging in any prolonged climbing, kneeling and squatting and that she would experience difficulty performing any prolonged standing or walking.

The former commission had found it significant that six years after the New York injury, plaintiff had yet to return to work. The Supreme Court reasoned that if the New York injury was simply a recurrence of the Michigan injury, or merely temporary in nature, it would be logical that plaintiff's ability to return to work would have been restored to the status quo once the effects of that injury ameliorated. Here they found the evidence demonstrated that the New York injury resulted in an " independent contribution" permanent in effect to plaintiff's "final condition", i.e., her current disability.

Connaway can thus be read to provide clues to the Supreme Court's interpretation of the terms "medically distinguishable" that appear to be lacking in the *Rakestraw* decision itself. The present commission panel applied this analysis to *Hale* as follows:

> Pain alone is not conclusive evidence. However, an injury producing continuing pain subjectively dissimilar from the pre-injury condition and causing impaired performance of pre-injury activities can constitute an " independent contribution" to the "final condition" thus resulting in a "medically distinguishable" condition.

Hale, supra p. 7. 🛠

American Bar Association Workers' Compensation Committee

Midwinter Meeting March 2-4, 2005

Wyndham Casa Marina Resort, Key West, Florida

For More Information Contact
Jim Reiter at (248)626-7300 or james.reiter@crpjdh.com

We've Moved!

WORKERS' COMPENSATION APPELLATE COMMISSION
611 W. Ottawa Street, 2nd Floor, Ottawa Building, P.O. Box 30468, Lansing, MI 48909
Telephone No.: (517) 373-8020

A Review of Recent Changes in Tort Law for Workers' Compensation Practitioners

By Michael R. Dunn

Part One of a Two-Part Series

Workers' compensation claimants often have other rights associated with the occurrence of their injury that require evaluation and legal advice. We may handle those claims ourselves or refer them out to attorneys who specialize. But in either case, it is incumbent upon the workers' compensation plaintiff practitioner to be familiar with the underlying potential claims and to at least be able to give some initial advice to the injured worker.

Given recent decisions, which are changing the landscape in areas of law involving work injuries and compensation claims, it is more important than ever that injured workers who may have tort claims have those matters reviewed by attorneys who are familiar with those specific areas of the law.

Recent Supreme Court decisions have particularly affected construction site accident cases and general contractor liability to injured workers, as well as the threshold under No Fault law for third party motor vehicle accident tort claims. It is helpful to have a general overview of these areas of the law and the potential impact of these cases, as they relate to the workers' compensation practitioner.

Construction site accidents frequently cause extremely serious injuries. Employees of subcontractors who have suffered such serious injuries, although unable to sue their own employer for negligence, can bring tort claims against other subcontractors whose employees were negligent and caused the injury. They may even be able to proceed against the property owner or general contractor. The general rule is that the property owner and the general contractor are immune from suit for injuries to a worker caused by the negligence of a subcontractor, but there are some very notable exceptions to that general rule. Two Supreme Court decisions issued in July of this year have impacted the right of a worker injured on a construction site to seek compensation through a tort remedy.

The first case is *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 684 NW2d 320 (2004). This case effectively reversed a line of cases that evolved from *Funk v General Motors*, 392 Mich 91, 220 NW2d 641 (1974), which had applied and expanded upon the logic of the *Funk* decision. These cases had held that a general contractor who retained control over the subcontractor could be held liable for the tortious conduct of that subcontractor. *Ormsby* now tells us that the legal theory of "retained control" was not meant to be an exception applicable to general contractors. Rather, it was a doctrine applicable to property owners who may be exposed to liability if they *retain control* over the construction project rather than delegate same to the general contractor. This can cause the property owner to stand in the legal shoes of the general contractor. There is another exception to the general rule of non-liability that applies to the general contractor called the *common work area* doctrine. This doctrine holds the general contractor responsible for: 1) readily observable dangers in a 2) common work area, 3) which pose a high degree of risk 4) to a significant number of workers. *Ormsby* tells us that property owners who *retain control* stand in the shoes of the general contractor and are also subject to the *common work area* exception to the general rule. The *Ormsby* ruling is presented in the context of explaining the *Funk* decision, and overruling cases, which the Supreme Court felt incorrectly relied upon *Funk* for saying more than it actually did.

There still seems to be room to make an argument for vicarious liability of a general contractor who retains control over the work of a subcontractor without relying on the *Funk* case. There is ample law in Michigan, under the doctrine of respondent superior, that principals and employers are vicariously liable for the torts of their agents and employees. The finding of an employer/employee or principal/agent relationship is based upon the principal/employer reserving unto itself the right to control the conduct of the agent/employee, rather than the actual exercise of that right. The *Ormsby* Court did not address the viability of such a theory in the context of the general contractor/subcontractor relationship.

The Supreme Court further held in the companion case of *Deshambo v Nielson*, 471 Mich 27, 684 NW2d 332 (2004), that the tort theory of *inherently dangerous activity* is not available as a viable theory for an employee of the subcontractor engaged in the *inherently dangerous activity*. In *Deshambo*, the Supreme Court held that the theory was intended for innocent bystanders, not workers who are actually engaged in the dangerous activity. Clearly, however, if the danger is created by the negligent or improper way a subcontractor is performing its job and if the injured worker was employed by a different subcontractor, a direct negligence claim would be available against the negligent subcontractor. If one could show that the general contractor and/or property owner had reason to know that the subcontractor was going to perform its duties in this dangerous fashion at the time it hired the subcontractor, then the reasons to apply the *inherently dangerous activity* doctrine against the owner/general contractor on behalf of an innocent bystander would also support applying the doctrine on behalf of an innocent injured employee of another subcontractor.

These cases present mixed questions of law and fact, and must be judged on a fact specific case-by-case basis. If you have a potential construction site accident claim, it is critically important to get an attorney familiar with this area of the law involved as soon as possible.

Part Two of this series will address tort claims arising out of work-related motor vehicle accidents.

Mike Dunn can be reached at (313) 964-2770 with any questions or comments.

From the Chair

Over the thirty-three years that I have been practicing workers' comp law, I have observed that the one aspect of the workers' compensation practice that we can always count on is that it is always in a state of change. As a general proposition, these changes seem to fall in line with the prevailing political wind. Over the last several years, the prevailing political climate seems to have favored the employer. In recent months, however, the climate appears to be changing. This pendulum effect is a source of both confusion and anxiety to employers and employees, as well as the lawyers.

As attorneys, we must react to these changes as an advocate for the positions of our respective clients. It is our legal, ethical and moral duty to do so. While we might not agree with the language of the Act or the Courts' interpretation or application of the Act, we must always remember that we have each taken an oath to uphold the laws of the State of Michigan. Let us never lose sight of this obligation as we respond to the changes that are certain to develop.

In the mid 1990's the political wind was blowing in favor of employers. It was a time of uncertainty as to the application of the Act, as the Act itself and its appellate court interpretation were undergoing rapid and substantial changes. After an unusually tumultuous year of service to the Section as its chairperson, Michael Brenton gave an eloquent address to the Section as he ended his term in 1995.

He reminded us that the basic purpose of the Section as defined in our bylaws is "to promote the fair and just administration of the workers' compensation law". Mike further pointed out that, while we as a group represent divergent interests in representing our clients, our primary responsibility as an organization is "to promote the integrity of the system and to act in the best interests *of* our profession and *for* the best interests of our profession". Mike concluded his remarks by suggesting that the best interests of all of the participants in the system will be achieved if the system is fair, *"fundamentally fair",* to both employer and employee.

> "I pledge to the members of this section that I will encourage the application of the concept of 'fundamental fairness' throughout my term."

I pledge to the members of this section that I will encourage the application of the concept of "fundamental fairness" throughout my term. I will encourage your Section Council to actively pursue policies that foster "fundamental fairness" throughout our profession and particularly in the application of the workers' compensation law. I recognize that the promotion of "fundamental fairness" in these times of anticipated changes may be difficult, but it will be my first priority as Chairperson of the Section.

I will encourage open exchanges of ideas and discussions of concerns between the plaintiffs' bar, defense bar, Board of Magistrates, Appellate Commission, and Agency Administration. Where appropriate, I will encourage the Council to address issues at the Court of Appeals, Supreme Court, the Legislature and Governor's office.

Many matters of concern to members of this Section have already been brought to the attention of the Agency. Some of the more prominent concerns are: The relocation and consolidation of agency hearing locations; parking problems, especially concerning handicapped parking; proposed and possible rule changes governing subpoenas, attorneys' fees and costs; Agency budget concerns; application of penalties and fees; and many other matters. While the Council cannot solve these concerns as they must be resolved by the appropriate administrative process, it can and will be a voice for the members of the Section in expressing opinions and suggestions as appropriate. In matters where there is a divergence of opinion along plaintiff and defendant lines or Southeastern Michigan and out-state lines, both sides of the issue will be presented to the appropriate authority.

Every member of the Section has a right to be heard by the Council and to express his or her opinion on any topic of concern. Matters of concern to Section members will be addressed by the Council and members are encouraged to express concerns either in person by asking to be put on the council's meeting agenda or by letter addressed to myself or the Section Secretary.

I anticipate a challenging and exciting year for all of us. On behalf of your Council and myself, I ask for your support and assistance as we move ahead through the year.

Alan Helmore

Poetry

By Magistrate Mike Barney

In this column I'd like to introduce the work of two lawyer-poets, both recognized modern masters and both, not so curiously, born and raised in Detroit. They are Brad Leithauser and Lawrence Joseph.

Mr. Leithauser, born in Detroit in 1953, received his primary and secondary education here, then matriculated to, and graduated from, both Harvard College and Harvard Law School. After a few years as a research attorney at the Kyoto Law Center in Japan, he turned to teaching literature, and is currently on the faculty of Mt. Holyoke. He has published three volumes of poetry and five novels, including one (*Darlington's Fall*) in verse. His literary work is known for its meticulous craftsmanship, its relentless experimentation, and its concern for nature.

Mr. Joseph, born in Detroit in 1948, has received degrees from the University of Michigan (B.A. in Literature and J.D. from the Law School) as well as a B.A. and M.A. in Literature from Cambridge University. He has been a law clerk for G. Mennen Williams on the Michigan Supreme Court, a litigator with Shearman & Sterling in New York City, and has taught at the Law Schools at The University of Detroit, Hofstra University and (currently) at St. John's University. He has published three volumes of poetry and a prose work, *Lawyerland*, perhaps the best book ever written about what lawyers really do, how they do it, and what they think about it as a profession.

SMALL WATERFALL: A BIRTHDAY POEM
By Brad Leithauser

Maybe an engineer,
stumbling on this small, all-
but-forest-swallowed waterfall--
a ten-foot drop at most--
could with some accuracy
say just how much energy
goes unharnessed here.

Enough, is it, to bring light
and heat to the one-room hut one might
build here at its foot--where,
piecing together the hush
in the current's hurl and crash,
a lone man might repair
to fix a shopworn life?

Enough, anyway, to light
one image in my head: this mist-
laced column of water's
as slim as a girl's waist--
yours, say, narrow still despite
the tumble down the birth canal
of a pair of nine-pound daughters.

Well, there's nothing for it but,
sloshing my way across the pool,
I must set whimsy into fact--
which is how, one blazing, cool
August day in New Hampshire, I
come to be standing with my
arms round a cataract.

...Nothing new in this, it turns out--
for I know all about embracing
a thing that flows and goes
and stays, self-propelled and -
replacing,
which in its roundabout route
carries and throws, carries and throws
off glints at every turn, bringing

all it touches to flower
(witness those flourishing daughters).
Your reach exceeds my grasp,
happily,
for yours is the river's power
to link with liquid, unseen threads
the low, far, moon-moved sea
and the sun's high-lit headwaters.

DO WHAT YOU CAN
By Lawrence Joseph

In the church of I AM she hears there is a time
to heal,
but her son, Top Dog of the Errol Flynn gang,

doesn't lay down his sawed-off shotgun,
the corn she planted in the field where

the Marvel Motor Car factory one was
doesn't grow with pigweed and cocklebur.

When someone in the Resurrection Lounge
laughs,
"Bohunk put a two-foot dogfish in the whore's
hand,"

someone's daughter whispers "F— you,"
places a half-smoked cigarette in her coat
pocket,

swings open the thick wooden door and walks
into air that freezes when it hears frost

coming in from Sault Ste. Marie. Driving, I see
a shed of homing pigeons, get out of my car to
look.

I answer "What you care?" to a woman who
shouts "What you want?"
Beside the Church of St. John Nepomocene

an old man, hunched and cold, prays, "Mother
of God"
to a statue of the Virgin Mary

surrounded by a heart-shaped rosary
of 53 black and 6 white bowling balls.

Where the Ford and Chrysler freeways cross
a sign snaps, 5,142,250,

the number of cars produced so far this year in
America.
Not so far away, on Beaufait Street,

a crowd gathers to look at the steam
from blood spread on the ice. The light red,

I press the accelerator to keep the motor warm.
I wonder if they know

that after the jury is instructed
on the Burden of Persuasion and the Burden of
Truth,

that after the sentence of 20 to 30 years comes
down,
when the accused begs, "Lord, I can't do that
kind of time,"

the judge, looking down, will smile and say,
"Then do what you can."

Crossing Over the Bar

By Murray A. Gorchow, Magistrate

So after 32 years practicing workers' compensation law on one side of the bar, here I am on the other side—on "The Bench." Many of you have wondered (a) What is it like to make such a switch after so many years? and (b) Do you like being a Magistrate? Indeed, the Editor of this *Newsletter* was also curious, and, given his new powers, asked me to write about it. So, here goes.

The short answers are: (a) "It's different, challenging, fascinating and fun!" and (b) "YES."

It is amazing how many attorneys there are that I have seen countless times at the Bureau (oops, Agency—at least I didn't say "Department") over my three-decade career whose names I never learned or whose names I knew unconnected to their faces. I very much enjoy introducing myself to these attorneys and learning their names. I have had more than a few embarrassing moments assuming I had the attorney's name correctly from the file only to use that name and discover an associate instead. I recognized both names and knew both faces, but did not have a clue of which face went with which name. Please feel free to introduce or reintroduce yourself.

In my personal life and as an attorney, I have always known how important it is to listen carefully and pay attention to what is being said by others. In the past, I have succeeded in this regard with mixed but growing success. Upon becoming a Magistrate, I was quickly impressed with the heightened and critical importance of these skills. As an attorney in Workers' Comp, I often felt I knew what the other attorney was saying or what they would say, and would be listening out of only one ear, while thinking of my next argument or listening to my client out of the other ear. No doubt a sometimes necessary, but risky proposition. As a Magistrate, I have quickly learned to make no assumptions about what is being said or will be said, but to listen carefully and ask questions to make sure I understand. I'd highly recommend this listening skill (sometimes called "active listening") to the readers in their practice and personal relationships as well. If I am not sure of what you, your client or a witness have said, or if I become distracted and miss what has been said, I will admit it and request a "do over".

As a Magistrate, the sometimes "tunnel vision" of my former life as advocate has been set aside. The need to focus and carefully listen to what all of the parties and witnesses have to say is critical. I am often surprised and fascinated by what I can and do learn about a case, the witnesses, the facts and law by being patient, open, attentive, withholding judgment, while the testimony or arguments unfold, until it is necessary to make a decision. It is an interesting and challenging experience.

The administrative handling of my docket every day might appear to be a necessary evil—and it is. But it is more than that. It is an opportunity for me to assist, encourage, cajole and oftentimes insist that the parties move their cases along toward a prompt resolution in the best interest of all parties.

In this regard, I am a big advocate of mediation to resolve cases before the final win/lose step of trial. While it is true that there are some cases where trial is necessary, I have seen mediation successfully resolve a relatively high percentage of cases reported as "impossible to settle." I very much enjoy the challenge of mediating cases for other Magistrates. It works. Experience has shown me that very often one party or another has made a false assumption as to what the Workers' Compensation law says or can do for them. Sometimes a party or an attorney has seriously miscalculated the strength or weakness of their case. Sometimes mediation reveals "the real issue" that separates the parties. All too often it is the first time the attorneys have been forced to make the time and space to give settlement a real chance. Sometimes mediation gives the attorneys the ammunition they need to encourage their client's to respect and accept their recommendations in the client's best interest.

The most interesting part of being a Magistrate is the intellectual stimulation of dealing with legal issues that, surprisingly to me, I have never had to deal with before. Every day presents something new and interesting to deal with and resolve.

Finally, I am appreciative and respectful of the responsibility and trust placed in me by Governor Granholm, and by the parties and the attorneys who appear before me, to do what is right and fair under the facts and law. I know and respect that there is a lot at stake for everyone involved.

Recent Decisions

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

The Supreme Court has not issued any new decisions since our Summer 2004 newsletter through the date of this submission. However, there have been some developments at the Supreme Court level as follows.

Illegal Aliens

The Supreme Court had originally agreed to hear the consolidated illegal alien cases: *Sanchez v Eagle Alloy, Inc* and *Vazquez v Eagle Alloy, Inc*, 254 Mich App 651; 658 NW2d 510 (2003). However, after briefing and oral argument, the Supreme Court vacated the leave grant "because the Court is no longer persuaded the questions presented should be reviewed by this Court." 471 Mich 851; 684 NW2d 342 (2004). The order vacating the leave grant was 5-2, with Justice Kelly and Justice Markman dissenting.

The Court's vacation of the leave grant leaves the Court of Appeals' published decision the final resolution of the cases. The Court of Appeals held the aliens are "employees" and were working under valid contracts of hire. Therefore, they were covered by the Act. However, the Court of Appeals ruled their weekly wage loss benefits were suspended by operation of the last sentence of MCL 418.361(1) because of their commission of a crime. The suspension begins when the employer discovered their illegal employment status and continues unless and until plaintiffs "obtain proper permission to live and work in the United States." *Id.* at 673.

Cases Pending Before the Supreme Court

The following cases are presently pending unresolved before the Supreme Court.

Bailey

In *Bailey v Oakwood Hospital and Medical Center/Second Injury Fund/Director of Bureau of Workers' and Unemployment Compensation* (SC Nos. 125110 and 125171), the issues arise under Chapter 9's vocationally disabled (f/k/a vocationally handicapped) provisions. The Court of Appeals' published decision in the case is found at 259 Mich App 298; 674 NW2d 160 (2003). In granting leave, the Supreme Court said among the issues to be briefed are:

> … whether the Court of Appeals properly interpreted MCL 418.921 and MCL 418.925 in *Robinson v General Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000), *Valencic v TPM, Inc*, 248 Mich App 601; 639 NW2d 846 (2001), and this case. In discussing this issue, the parties should consider the following: (1) whether the imposition of liability on the employer for paying benefits after 52 weeks of disability, and those situations where the Second Injury Fund does not receive statutory notice, is consistent with MCL 418.921's statement that the employer's liability "shall be limited" to a 52-week period and that responsibility for all later benefits "shall be the liability of the fund"; (2) whether MCL 418.925's placement of responsibility for providing notice to the Second Injury Fund on the carrier, not the employer, affects the analysis of this issue; and (3) whether the lack of a statutory remedy for a carrier's failure to provide timely notice to the Second Injury Fund affects the analysis of this issue.

Cain

In *Cain v Waste Management, Inc/Transportation Insurance Company and Second Injury Fund* (SC Nos. 125111 and 125180), the issues relate to how to determine specific losses and total and permanent disability benefits. The Court of Appeals' decision in the case is found at 259 Mich App 350; 674 NW2d 383 (2004). In the order granting leave, the Supreme Court said among the issues to be briefed are the following:

> whether the "loss of industrial use" standard may be applied to claims of specific loss under MCL 418.361(2); whether *Pipe v Leese Tool & Die Co*, 410 Mich 510 (1981), should be overruled; and whether total and permanent disability under MCL 418.361(3)(b) (loss of both legs) may be awarded on the basis of plaintiff's specific (anatomical) loss of one leg and his specific (industrial use) loss of the other leg.

Finally, in *Gordon v Henry Ford Health System*, 470 Mich 892; 683 NW2d 144 (2004), the Supreme Court granted oral argument to determine whether the Court should grant leave or take other peremptory action in accord with MCR 7.302(G)(1). The oral argument occurred in October 2004. The Court of Appeals' decision in the case was unpublished. This is a case where the employer was paying plaintiff under a final open award of benefits. Years later, an investigation disclosed the employee was operating two adult foster care homes. The employer filed a petition to stop on the basis of plaintiff's earnings there. The questions presented in the case revolve around whether the employer is relieved of liability and/or can offset earnings from plaintiff's operation of the homes.

Court of Appeals

Magistrates Not Bound by Rules of Evidence/Death Dependency

In *Moore v Prestige Painting & Construction Association of Michigan*, ____ Mich App ____; ____ NW2d ____ (2004) (CA No. 249924, released for publication October 12, 2004), the Court of Appeals resolved two issues: (1) whether Magistrates are bound by the Michigan Rules of Evidence or, instead, whether they can give probative effect to "'evidence of a type commonly relied upon by reasonable, prudent men in the conduct of their affairs'"; and, (2) whether an illegitimate child under the age of 16 can receive death dependency benefits.

The issues arose under the following facts. The employee died as a result of an incident arising out of and in the course

of his employment. He was unmarried but had been living with a woman, the plaintiff in the case. She testified she had an exclusive romantic relationship with the decedent and he was the father of her daughter. The daughter had been born six months before the decedent's death. The decedent had been living with plaintiff off and on during her pregnancy and did not financially support the daughter. Subsequent to the decedent's death, plaintiff married twice and neither of those husbands adopted the daughter.

The decedent had filed a paternity action just before his death. Blood had been drawn from the decedent, plaintiff, and the daughter for paternity testing. A biochemist's deposition in the workers' compensation case revealed he had not personally drawn the blood for the paternity testing, but the biochemist did describe the laboratory's standard procedure in performing the blood tests. The biochemist reviewed the raw data of the blood tests. The biochemist concluded that there was an approximately 97% probability the decedent was the father of the daughter in question.

The employer objected to the deposition testimony of the biochemist on the basis it was hearsay because he had only reviewed the final results of the blood tests and did not conduct the tests himself. The Magistrate did not directly address the objection and considered the deposition in concluding the daughter was the decedent's child and awarded benefits. The Commission disagreed with the Magistrate with respect to this ruling. But, the Court of Appeals – in turn – disagreed with the Commission and affirmed the Magistrate.

The Court of Appeals held the biochemist's testimony was correctly considered by the Magistrate because: "Worker's compensation magistrates are not strictly bound by the rules of evidence." The Court of Appeals explained that Magistrates "may admit and give probative effect to 'evidence of a type commonly relied upon by reasonable, prudent men in the conduct of their affairs.'" Under such standard, the Court of Appeals said the biochemist's deposition testimony sufficiently "established the reliability of the test results by describing the standard procedures followed" and by "identifying the documents showing these procedures had been followed."

Second, having concluded that the biochemist's testimony was correctly considered and established the daughter was the deceased's offspring, the Court reversed the Commission's holding that she did not constitute a dependent under MCL 418.331(b). The Court held the conclusive presumption of dependency for a child under 16 years of age at the time of death within § 331(b) applied. The Court said that the statute applies to both legitimate and illegitimate offspring.

As a result of these rulings, the Court reinstated the Magistrate's order awarding plaintiff 500 weeks of benefits for the use and benefit of the daughter.

Workers' Compensation Appellate Commission

Calculation of Partial Disability Benefits Where the Employee is Working at Lesser Paying Jobs

In *Lomax v Delta Tube & Fabricating Corp*, 2004 ACO #284, the plaintiff worked at a succession of different jobs for various employers post-injury. One of the issues presented was whether in calculating an ongoing partial rate of compensation you use a "rolling average" applied separately to each post-injury employment as the Commission had suggested was the correct approach in *Kuzma v Great Lakes Beverage Co*, 2002 ACO #6.

The Commission explained in *Lomax* that in an unpublished decision the Court of Appeals had reversed *Kuzma*'s "rolling average" method. Rather than a rolling average, the Court of Appeals in *Kuzma* – as quoted and adopted by the Commission in *Lomax* – said "'[i]f the employee's average weekly wage is less than that received before the injury, the benefits payable to the employee are eighty percent of the difference before [*sic*] the employee's "*after-tax weekly wage* before the date of injury and the *after-tax weekly wage*" that the employee is able to earn after the injury.'" That is, the wages earned after the injury are not to be "averaged".

Non-Settling Party Cannot Object to Redemption

In *Johnson v All Star Sports Bar et al*, 2004 ACO #265, one of the defendants in a multi-defendant case challenged the redemption between plaintiff and another defendant. The non-redeeming defendant argued that § 836(1)(b) requires that a redemption be agreed upon by "all parties" and § 837 allows appeals of redemptions by "any of the parties to the action." The Commission disagreed, saying that the word "party" in these statutes contemplates only the parties participating in the redemption. Therefore, the Commission affirmed the Deputy Director's approval of the redemption between plaintiff and one defendant.

Law of the Case Doctrine

In *Woodard v Sebro Plastics, Inc*, 2004 ACO 268, the case returned to the Commission following a remand pursuant to a prior Commission opinion two years earlier. The primary issue in the case was whether plaintiff filed her claim timely, *i.e.*, within the two-year limitation described in MCL 418.381(1). The controversy reduced to whether plaintiff's first petition, which had been dismissed for lack of prosecution, should be used as the measuring point for determining whether her claim was timely. Plaintiff argued it should. Conversely, the employer argued plaintiff's second petition, which was the basis for the instant action, should be used as the measuring point.

In its prior decision, the Commission agreed with defendant that the second petition should be the measuring point. The Commission then remanded the case for the Magistrate to establish the dates when plaintiff received unemployment compensation benefits in order to see whether some of the delay in filing the second petition could be excused by the tolling provisions in § 381(1).

On remand, the parties stipulated to the dates when plaintiff received unemployment compensation benefits. They did not toll the time for making claim.

Following the remand, the case automatically returned to the Commission because the Commission had retained jurisdiction. In its decision after the remand, the

Continued on next page

Recent Decisions

Continued from page 13

Commission ruled that the prior Commission panel had incorrectly held plaintiff's second petition, rather than her first petition, was the correct measuring point. Consequently, the Commission held that plaintiff's claim was filed timely with reference to the first petition. The Commission rejected the argument that the law of the case doctrine precluded it from changing its mind. The Commission said that law of the case did not apply here because the legal question was whether plaintiff's claim was timely filed and the Commission's prior ruling on that point was not final.

Specificity of Job Offer for § 301(5) Purposes

In *Nill v Borders Group, Inc*, 2004 ACO #289, the Magistrate denied plaintiff benefits for a refusal of a valid offer of reasonable employment under MCL 418.301(5)(a). The Magistrate had found the employer's letter offering the job did not adequately describe the work being offered but that the offer was later sufficiently clarified in conversations with the employer.

Plaintiff appealed challenging the sufficiency of the job offer. In affirming the Magistrate, the Commission offered the following synopsis of what constitutes a valid job offer for § 301(5)(a)/ "reasonable employment" purposes:

> The employer has the burden of making an offer of reasonable employment sufficiently specific that the employee understands the nature of the work to be performed, and can make a reasonable decision regarding his or her ability to perform the work in question. Although preferable, the details of the job need not be in writing, and may be clarified by subsequent information. As the magistrate stated, the original letter did not describe the job offered. Rather, it was the classic formulation rejected in *Price*: "Work will be provided within your restrictions." The testimony of Mr. Holmes [of the employer], however, did clarify the nature of the work sufficiently for plaintiff to understand the type of work to be performed and make a reasoned judgment about performing it. As a result, we find the magistrate's decision regarding the offer of reasonable employment to be supported by competent, material and substantial evidence on the whole record.

Rakestraw and Medically Distinguishable Conditions

In *Hale v Borgess Medical Center*, 2004 ACO #266, the plaintiff had brought to the workplace non-work-related pre-existing problems, including retrolisthesis, congenital pedicles, degenerative changes, and spinal stenosis. Plaintiff claimed that she slipped on water on the floor at work causing her to fall on her right knee causing pain, which migrated to her hip and into her back. The Magistrate granted plaintiff an open award of benefits for a low back condition.

Defendant challenged that ruling on appeal arguing the Magistrate incorrectly awarded benefits on the basis of a symptomatic aggravation of plaintiff's pre-existing problem, contrary to *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003). The Commission disagreed.

The Commission found instructive the companion case to *Mudel v Great Atlantic & Pacific Tea Co*: *Connaway v Welded Construction Co*, 462 Mich 691; 614 NW2d 607 (2000). After reviewing *Connaway*, the Commission said that, while pain alone is not conclusive evidence of a medically distinguishable problem, "continuing pain, subjectively dissimilar from her pre-injury condition, and causing impaired performance of pre-injury activities can constitute … a 'medically distinguishable' condition" satisfying *Rakestraw*. The Commission then quoted testimony from plaintiff's expert to the effect that "'symptomatology follows pathology. So when her pain starts, I make the assumption that pathology begins to change or becomes present.'"

Sington and the Employee's Efforts to Find Work

In *Henry v City of Midland*, 2004 ACO #248, plaintiff suffered an injury to his right foot. He was accommodated for a period of time by his employer but the job was ultimately taken away from him. The Magistrate granted plaintiff an open award of benefits concluding plaintiff's injury precluded him working at the highest paying job within his qualifications and training, an operator/mechanic job, per *Sington v Chrysler Corporation*, 467 Mich 144; 648 NW2d 624 (2002).

The Commission affirmed the finding that plaintiff was "disabled" but remanded for a supplemental opinion on the level of plaintiff's wage loss given plaintiff's lack of effort to find work.

In explaining its affirmance of the "disability" finding, the Commission said that where an employer accommodates an employee and then takes the job away the burden of proof shifts to defendant: "At this point the burden lies with defendant to produce evidence showing that there are jobs in the general marketplace the same or similar to plaintiff's accommodated work as an operator/mechanic. Defendant offered no such proof."

With respect to necessity for a remand on the rate question, the Commission noted plaintiff could do jobs other than an operator/mechanic, such as working as a salesman, because he had done purchasing work as a sales representative prior to his injury. The Commission noted plaintiff made no effort to seek such work. Plaintiff implied he "would not return to work except for defendant." Under such circumstances, the Commission explained a remand is necessary to determine plaintiff's level of wage loss because:

> However, an employee bears the burden of proving he experiences a wage loss due to the injury. The existence of jobs in the marketplace reasonably available to plaintiff within his qualifications

> and training and within his capacity to perform, may represent wages which the employee is able to earn after injury. This is particularly true where the employee testifies there are specific jobs reasonably available to the employee which he can perform, but makes no effort to obtain them. The magistrate did not provide any summary or analysis of plaintiff's somewhat conflicting testimony concerning his efforts to search for or obtain work both before and after he last worked at Johnson Contracting.
>
> An employee's efforts in seeking employment may be an important inquiry under *Sington*.

The Commission said, while plaintiff had "significant restrictions, … we need the magistrate's analysis of plaintiff's remaining physical abilities, the work plaintiff remains qualified and trained to do, the availability of such work, as well as the impact of plaintiff's effort or lack of effort to find work."

Records Under Rule 5 and "Conditions of the Aging Process"

In *Shappee v Dynamic Finishing, LLC*, 2004 ACO #282, the Commission affirmed the Magistrate's award. Two of the issues the Commission addressed were the scope of the Board of Magistrates' Rule 5 (42-day rule) and the requisite proof for demonstrating the condition is one of the "aging process" so as to trigger application of §301(2)'s more stringent "significant manner" work relationship standard.

With respect to the administrative rule, the employer argued the Magistrate erred by excluding a handwritten note of defendant's doctor describing the primary cause of arthritis. Plaintiff resisted admission of the note on the basis it was not within the purview of Rule 5 because the rule only contemplates 42-day notice of intent to introduce treatment records.

The Commission held that the Magistrate should have admitted the handwritten note. In so doing, the Commission described the following broad scope of Rule 5:

> We begin with the observation that Magistrate Rule 5 is a notice provision, not an exception to the hearsay rule. The rule requires notification of the intent to introduce records. By its own terms, the rule is very broad, applying to a "record, memorandum, report of data compilation". It is not limited to treating medical records, or even medical records. … The rule does not in any way supplant the applicable rules of evidence. Thus, the admissibility of the document in question turns not on the scope of Rule 5, but on the application of the rules of evidence.

As a result of this ruling, the Commission agreed with defendant the note should have been admitted. However, the Commission agreed with plaintiff that exclusion of the note was harmless error because it did not affect the outcome of the case.

With respect to the "condition of the aging process" issue, defendant argued the Magistrate erred by not applying § 301(2)'s more stringent standard because degenerative arthritis was at issue. The Commission disagreed. The Commission said that, while plaintiff's arthritis was longstanding and degenerative, "no witness stated that it was a condition of aging process. As a result, the magistrate did not err in applying the lesser causation standard from §301(1)."

Sington After Remand

The *Sington* case returned to the Commission following its remand after the Michigan Supreme Court's decision. On remand, the Magistrate found Mr. Sington remained capable of performing 13 of the 17 job classifications. The Magistrate denied Mr. Sington benefits on the basis he remained capable of earning equal wages within his qualifications and training at Chrysler. And, the Magistrate found that the jobs plaintiff could do, though accommodating plaintiff's condition, were regular or real jobs and not make work or special jobs for injured workers.

The Commission affirmed the Magistrate saying:

> Magistrate Wierzbicki, having heard the live testimony of both plaintiff's and defendant's witness, determined as noted above that defendant would have hired and placed a new worker with similary physical limitations (PQX vs. PQ) in at least 13 regular full-time classified positions. Further, the magistrate found plaintiff able to continue in such full-time-classified positions despite a *de-minimus* physical limitation. Finally, while it remains true a giant manufacturer has the flexibility in moving employees from one job to the next that a small "mom and pop" operation might not have, given the facts as found by the magistrate, these were real jobs in which plaintiff could have been replaced with new unrestricted workers.

The separate concurring opinion reflected the Chairperson's opinion that vocational expert testimony is "probably best utilized in cases presenting issues of the claimant's alleged transferable skills" rather than on a wholesale basis.

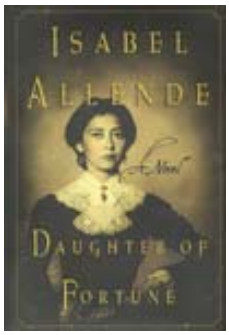
Remember previous issues of the newsletter can be found on the Section webpage at:

www.michbar.org/workerscomp

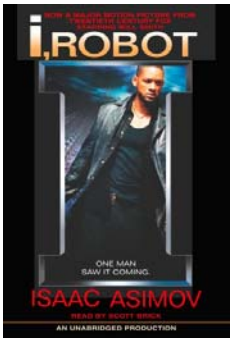
Books on Tape Review

by Alex Ornstein

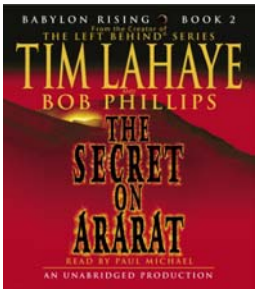
For your listening pleasure—



Daughter of Fortune by Isabel Allende, Harper Audio, is an Oprah's Book Club choice. Imagine opening the front door and finding a baby in a basket (like Moses) and you have the beginning of this story. It is set in Valporaiso, Chile at the time of the American Gold Rush. Characters include adopting mother, Rose Sommers; her brother strait-laced Jeremy Sommers, the local manager of British Imports; Captain Sommers, a commanding sailor and adventurer who the main character Eliza most emulates; her first love Jaquin Andieta; and her later love, TaoChi-en, a Chinese healer. The boat crossing was very arduous and landing in California started a memorable adventure. This one is for the ladies. Read by Blair Brown, it is ten cassettes. Between 4 and 5 hours.



I, Robot is the classic written by Isaac Asimov. Random House Audio. It is five cassettes and you will learn the laws of robotics: Do not harm a human by direct action or omission, obey humans, and protect their existence. In a series of vignettes we see the development of the positronic brain, the exporting of robots to other worlds and how they do in outer space, etc. We see the developments from the standpoint of robot technicians, testers, always a robot psychologist, and then from a Robot named David at the end.



Babylon Rising-the Secret on Ararat is 8 CDs from Random House Audio and written by Tim LaHaye. This is the story about a search for Noah's Ark. The main character, Michael Murphy, a professor at a modest college teaching archeology, is also a dedicated Christian and many of the scenes and words used are quite encouraging about letting Jesus into the other characters' and certainly the listeners' lives. There are biblical references galore. This book is great for those who want to give up our very exciting comp life and go back to a monastery.

SBM
State Bar of Michigan
michael franck building
306 townsend street
Lansing, MI 48933-2083

www.michbar.org

Presorted
First-Class Mail
U.S. Postage Paid
Lansing, MI 48933
Permit No. 191