

STATE BAR OF MICHIGAN

Workers' Compensation Section Newsletter

Fall 2006



Fall Seminar Schedule Set

The Section's annual winter seminar will be held at the Detroit Bureau site, 3026 W. Grand Blvd., Detroit, Michigan 48202, on Friday, December 1, 2006, from 8:30 a.m. to noon. The seminar will begin with complimentary coffee and donuts from 8:30 a.m. to 9:00 a.m. Along with presentations and updates from Agency Director Jack Nolish, WCAC Chairperson Martha Glaser, and Board of Magistrates Chairperson Murray Gorchow, our "State of the Law" update will be presented by John Bradon. Our featured speaker will be Mr. Bill VanWambeke. Mr. VanWambeke, a former executive of St. Paul/Travelers, is now General Counsel for M. Hayes, a Baltimore firm that provides Medicare-related services. He is a member of the drafting committee of a Medicare reform bill and has a great deal of experience and insight on Medicare and related issues. We are very fortunate to have Mr. VanWambeke as our featured speaker.

The seminar is free to all Section members and we encourage you to attend, as we should have decisions on a variety of cases and issues by then, including *Stokes* and other cases of note. The seminar will be taped and available on video to be shown throughout the state. Your committee, which includes Murray Feldman, Chuck Palmer, Danielle Susser, and Robert Kluczynski, looks forward to seeing you. Please feel free to contact any of us with any questions. ✖

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Opinions expressed herein are those
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Article submissions are due for:
Winter issue February 15, 2007

From the Chair

For those of you who attended the State Bar Annual Meeting in September, you will likely notice that there was no Workers' Compensation Section Meeting. The reason for that is that our Section bylaws were amended last year to change our Section's annual meeting to the spring meeting. Historically, that has been our most well-attended meeting. The Section will also realize cost savings by not holding our meeting at the State Bar Annual Meeting.

In 2007, our spring meeting (and annual meeting) will be held at Crystal Mountain Golf & Ski Resort in Thompsonville, Michigan, commencing at 5:00 p.m. on Thursday, June 14, 2007, and running until noon on Saturday, June 16, 2007. Please mark your calendar and plan on attending.

There are two upcoming events that are of interest to our Section members. The Grand Rapids Bar Association Workers' Compensation Section Seminar will be held on November 10, 2006, at the Eberhard Center on the downtown campus of Grand Valley State University. The registration fee is \$50 per attendee. Space is limited. If you are interested in attending, contact Ella Parker at (616) 361-3999. Also, the Section's fall seminar will be held on December 1, 2006, at 9:00 a.m. in the Cadillac Place Building in Detroit.

On a more somber note, Michigan's economic woes are trickling down to our area of practice. There seems to be a correlation between the loss of manufacturing jobs and the progressive decline in workers' compensation claims filed over the last several years. However, there is growth in at least two sectors of the Michigan economy; healthcare and wholesale (according to a recent article I read). One wonders whether employer efforts to enhance workplace safety and employer return to work programs have also contributed to a reduction in litigated claims. Perhaps the good news is that fewer people are getting injured and/or fewer people are losing time from work due to injuries.

A collection of all of the newsletters published since the inception of our Section has been compiled. The Section will assume the cost to scan all of the newsletters into PDF format. The plan is to post the compilation on the Section's website for download and review by members. The newsletters chronicle a history of workers' compensation law in Michigan since Ben Marcus was the first chairperson of the Section 51 years ago.

In reflecting on things to be grateful for in this practice, the Agency staff at the various hearing sites come to mind. They are cooperative and helpful and make it easier for us to accomplish our jobs. If you think about it, thank them for the good job that they do.

Inside this newsletter is information regarding the Section's winter meeting in February at Riviera Maya, in Mexico. These meetings are always great learning experiences with opportunities to get to better know your colleagues in a more relaxed setting. I encourage you to consider attending this year's seminar. Flight arrangements are available out of Detroit or Grand Rapids. ✂

Len Hickey, Hickey Combs PLC, Chairperson

The Workers' Compensation Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the website, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

Director's Message

By Jack A. Nolish, Director, Workers' Compensation Agency

I am pleased to report that things are going well this quarter at the WCA.

We have our computer system back up and running and we are now starting to see docket reports on a regular basis. As expected, the docket is getting smaller. As of 9/22, there were 14,138 cases pending on the dockets statewide. Additionally, there are 1,402 cases in the various "await" categories, the biggest proportion being CMS related. Of the 14,138, 70 percent are 0-12 months old and the balance over 12 months. By and large, the docket is moving very well. We are going to fine-tune some of the magistrate assignments and time allocations so we can deal with the increases in the Kalamazoo and Pontiac dockets.

As this is being written, the Qualifications Advisory Committee is conducting its interviews for the upcoming round of Magistrate appointments. This process will conclude by mid-October and we should have the next list shortly thereafter. The expiration date for the terms of the sitting magistrates is 1/27/07 and we hope to have the appointment process concluded by that time. Once the appointments are done, we will continue with our allocation of time and locations to balance the docket.

The new subpoena rules previously published have now been subject to their public hearing. No opposition was raised to the proposed rule changes and they will now go to JCAR (Joint Committee on Administrative Rules) and then on to the legislature. Assuming there are no problems, we should see them implemented by the end of January 2007, or slightly after. **THE NEW RULES ARE NOT YET IN EFFECT. THE EFFECTIVE DATE WILL BE ANNOUNCED AS SOON AS IT IS AVAILABLE.** Before the new effective date, we will have a new subpoena form available. Obviously, when the new rule goes into effect, the existing subpoena form will become obsolete and will not be signed by the Magistrates.

We are about to undergo some major movement in the Lansing area. The General Office Building (GOB) at the State Secondary Complex, which houses what I call the "mechanical" side of the Agency, is undergoing major renovation. Our floor is being remodeled starting in mid-November and we will be moved temporarily to the Hollister Building in downtown Lansing. We expect to be there about six months and should return to the GOB by early to mid summer. I raise this point for both information and to advise you of a practical problem: we are now in the fourth quarter of the year and typically there are year-end, "close-out specials" involving redemptions of cases. If you have a case with the file at the GOB that you think might redeem by the end of the year, please request that the file be sent to the appropriate hearings office as soon as possible. Our files will be packed up around the end of the second week in November and will not be back on shelves in the new location for some time. So, if you think there is even a slight possibility that a case may redeem by year end, please order the file sooner rather than later. Please contact Sue Jones at the GOB. Sue's contact information is: sjones@michigan.gov, facsimile at (517) 322-6012, or US Mail at P.O. Box 30016, Lansing, MI 48909. It is necessary to **only use one method** when requesting a file. It is our goal to have as little disruption

Continued on next page

The Doors are Open

Jack A. Nolish, Director

Murray A. Gorchow, Chair
of the Board of Magistrates

We have been in our respective positions as Director and Chair for about a year. One of our tasks is to do annual performance reviews of the people that are our "direct reports." It has occurred to us that we should not be immune from similar scrutiny by the Workers' Compensation community to whom we "report."

We have always been advocates of the open door policy in both our management and public service roles. We have assumed that everyone was aware of our approach. Since we have not heard complaints about our performance in these positions, we like to assume that we are doing a fine job. Maybe, we should assume that we are just not hearing. We want to make sure that all members of the WC community understand that we want to serve all the Workers' Compensation "stakeholders." We have come to our positions with the over-riding goal that all the parties in the system should be given a fair and equal ear in our administration.

This approach works, however, only when voices are lifted. To facilitate this, we want to make sure that everyone feels comfortable coming forward and telling us how we are doing. We want to hear from you regarding your ideas, concerns, issues, problems, and by the way, a few compliments wouldn't hurt. Complaints, however, will be met with a request for suggestions. You are aware that the Agency handles matters across the state and we can each only be in one place at a time. We want to hear from all members of the WC community regardless of location. We want the practitioners, defendant as well as plaintiff, from all over the state to be our eyes and ears about what is happening and make sure we get the information. Most importantly, don't keep things to yourselves. If you or a client have a gripe with the system, let us know. If you don't think we are heading in the right direction, please help us head in a better one. We hope to hear from you soon.

Call us:

Jack Nolish (313) 456-3650/(517) 322-6373;
Murray Gorchow 313-456-3877.

Email us:

NolishJ@michigan.gov
GorchowM@michigan.gov

Stop by:

Murray is in the Detroit office full time and Jack travels between Detroit and Lansing offices.

Director's Message

Continued from page 3

in the workflow as possible due to the move, but we will certainly appreciate your cooperation and patience. We do not expect that the move will have significant impact on the handling of new filings.

There are things on the legislative horizon. We are working on legislation to bring back the Uninsured Security Fund and legislation to streamline the uninsured employer investigation and enforcement process. As presently structured, we must proceed through circuit court to have an uninsured employer shut-down. The new legislation will create an administrative process that will be able to move much more quickly.

Chairperson Gorchow has written in his article about the reduction in file contents, particularly in redemption

cases. We are placing the redemption process under increasing scrutiny. All redemptions orders are being audited and reports provided to Gorchow and me on a quarterly basis. Obviously, any redemption brought in for 15-day appeal period waiver will be subject to immediate scrutiny and, in some cases, there has been a request for review filed instead of the granting of a 15-day waiver. The error factor in redemption orders is low but still above what we expect. Simple math errors continue. We have seen redemption orders where all the payment lines have been left blank. We have seen poorly described structured settlements. We have found failure to properly deal with CMS, Medicaid, Friend of the Court, and other problems. There is one of those "time management" books out there

that has a title that applies to this situation: "If you don't have time to do it right, when will you have time to do it over?" Certainly this concept applies to the redemption process. All settlements contain some element of the need to get it done. Defective paperwork resulting in redemption review certainly produces the opposite of the desired result. Please make sure you are using the current version of the redemption order: WC-113 (Rev. 1/04). Older versions will no longer be accepted by the Magistrates.

Lastly, my e-mail list continues to grow and if you are interested in participating, please send your e-mail address to nolishj@michigan.gov. ✖

Workers' Compensation Appellate Commission

By Martha M. Glaser, Chairperson

I had hoped to be writing about the clear and concise direction that the Court of Appeals presented to us, in *Stokes v DaimlerChrysler* (Docket # 268544). Perhaps by the time you read this newsletter, we will have gotten that direction. We check the Court of Appeals website everyday for news.

We have recently had a few cases in which we revisited the proper venue for appeals from determinations awarding attorney fees. Section 858(1) provides in relevant part: "The payment of fees for all attorneys and physicians for services under this act shall be subject to the approval of a worker's 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."

That section would seem pretty straightforward; however, the Court of Appeals has interpreted a difference between appeals that involve a dispute between an attorney and their client, and those that involve a dispute between two parties to an action. That Court held in *McDougall v General Motors Corp*, 185 Mich App 509 (1990), that a decision of a magistrate involving attorney fees between an attorney and

client must be appealed to the Director within 15 days, pursuant to Section 845. A magistrate's decision awarding attorney fees to a party [such as 315(1) apportionment] must be appealed to the Workers' Compensation Appellate Commission within 30 days, pursuant to Section 861a.

We have held that a decision involving a dispute between two attorneys who have represented the same client is covered by Section 845.

If the appeal is not timely and in the correct venue, your appeal may be dismissed. So don't be confused by the statute. Be aware of the category your attorney fee issue falls into before you file a Claim for Review. ✖

Workers' Compensation Agency Files and Recordkeeping

By Chief Magistrate Gorchow

As many of you know, Director Jack Nolish and I have been dealing with issues concerning what belongs and what does not belong in Workers' Compensation Agency (WCA) files. The concern arises because the Agency receives subpoenas for our Agency files not just from attorneys with Workers' Compensation cases, but also from other courts. The Agency also gets FOIA requests for WCA files. There are HIPAA, medical confidentiality, and Social Security Number Privacy Act concerns as well.

We are dealing with this in several ways. First, we have prepared a rule change regarding subpoenas that was the subject of public hearings on October 11. The proposed rule takes the WCA out of the business of receiving and being the custodian of subpoenaed records. The party requesting the subpoena will become the recipient of those records instead of the Agency.

Second, if you have not already noticed, Magistrates are already taking steps to keep our files lean. We are doing this by checking our files, as they come to us each day, for medical or other records attached to Notices of Intent. The Magistrate will keep only the Notices, and return the records to the attorney that sent the Notice. Rule 5 (R 418.55) of the Rules of the Board of Magistrates requires that the records be sent to "all parties"—but only the Notice of Intent goes to the Magistrate. Attorneys should stop sending the records to the Magistrate. Counsel should advise their secretaries accordingly. At redemption, dismissal, withdrawal, entering a voluntary pay, or closing the record at the end of trial, at the very latest, the Magistrate will check the Agency file and remove and

return any records, medical or otherwise, that have not been marked and admitted into evidence.

At redemption, Magistrates do receive medical records and reports as required by Rule 9 (R 408.39) of the Agency's General Rules. That Rule requires a report with "findings of a recent medical examination." The purpose is to inform the Magistrate of the status of plaintiff's condition to help us decide if the redemption is in plaintiff's best interest. Magistrates also like to have some medical from both parties to demonstrate the issues in the case concerning work relationship and disability. However, there is no requirement that we receive at redemption the depositions and all of the medical records in counsel's file. We do not need everything in counsel's file to decide whether to approve or reject a redemption. Counsel routinely try to give Magistrates depositions and huge stacks of doctors and hospital records, including nurses' notes, medication orders, lab tests, etc. *ad nauseum*. The Agency cannot be the permanent custodian of the parties' records. The Agency will no longer keep counsel's depositions and records unless they are exhibits admitted at a hearing. The cost and expense of warehousing the parties' records, and of ultimately having to comply with State Bar rules regarding proper disposal of those records, belongs to counsel. The state of Michigan cannot be in the business of unnecessarily warehousing and placing on micro-discs stacks of records and depositions. Nor does the Agency want to be in the position of providing records (that are not properly in evidence and a part of our files) to third parties issuing subpoenas and making FOIA

requests. The records are available from the source directly.

Therefore, at Redemption, Magistrates will accept only the few reports that they need to decide whether or not to approve the Redemption. I have been stapling or clipping them together as a group and using a Plaintiff's Exhibit sticker and marking them as: "Red Exhs." I have encouraged the other Magistrates to do so as well. This way, the Agency personnel who process the file will know that those medical records are in evidence and are properly part of the Agency file. They will also know that they must be produced in response to subpoenas and FOIA requests.

Sometimes, attorneys may have only the hospital record or the deposition. Simply go through the hospital record and give the discharge summary(s) to the Magistrate. Often, the doctor's report is attached to the deposition. Attorneys should keep the deposition and give the report to the Magistrate. If the report is typed into the deposition, the attorney can remove the pages that have the report and give only that to the Magistrate. Give the Magistrate only what they need. They will ask for more if they need it.

Ultimately, only cases that have been tried will deserve the label "fat file." Ultimately, Agency files should only have Applications for Hearing, Notices of Hearing, Carriers' Responses, Appearances, Answers, copies of Subpoenas, Notices of Intent, Motions, Briefs, and Answers to same, and other Agency forms, etc.

If anyone in the Workers' Compensation community has any questions, comments, suggestions, please let me know. Thanks for your cooperation. ✕

STATE BAR OF MICHIGAN WORKER'S COMPENSATION SECTION WINTER SEMINAR

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In Memoriam – Michael J. Barney

Magistrate Mike Barney passed away in September after a heroic struggle with pancreatic cancer. He was two days shy of his 57th birthday. For those who knew Mike only in his role as a workers' compensation magistrate, he will be remembered as a judge of eminent fairness and judicial temperament. He was respected by everyone who appeared in his courtroom because he was a man of scrupulous fairness, who did not prejudge any case or claim and who treated litigants and lawyers with utmost respect and courtesy. It is no small wonder that he was the most sought after magistrate to mediate claims pending before other magistrates. And his devotion to his job was unparalleled. Through chemotherapy and severe pain, he went to work week in and week out, even as the disease took a greater and greater toll on his strength and energy. The weekend that he passed away, he was still concerned about his next week's docket. It is a fitting tribute that Mike was appointed to serve as a magistrate under both Republican and Democratic administrations. He was a man of letters, a student and critic of popular culture, who believed that even lawyers could be enlightened. Hence, he posted "The Poem of the Day" every day in his courtroom.

Those who knew him outside of the courtroom are well aware that he was a creative and ingenious poet of some renown in poetry circles. He had his own works published on many occasions and ran his own publishing venture: Gravity Presses, Lest We All Float Away. Extremely popular at poetry readings, he always had time to encourage others who struggled with learning the craft of poetry.

An avid golfer, Mike could think of no better way of spending his Saturday than a round of golf with his friends. His company and conversation was a

delight to anyone lucky enough to spend time with him in a leisurely setting. And he was also that rarest of commodities, a dedicated Tigers fan, long before everyone in Michigan became a fan in 2006. It is especially sad to think that Mike missed out on seeing the Tigers' post-season success this year. He followed the Tigers year in and year out, and it is a measure of his positive and optimistic nature that he could always say something positive, even when they were losing 119 games!

Mike was always gracious and never vented his frustration on anyone else. Throughout his illness, he was always upbeat, and never felt sorry for himself or let his suffering take center stage. Even in his most painful last days, he never complained. He was always more concerned about others than himself. Mike was that rarest of people: a true gentleman, a real Renaissance man, an artist of creative genius and real accomplishment, and yet he was genuinely humble. He was a special light to all who knew him and the world will be that much darker for his loss.

Mike is survived by his devoted wife, Shirley, and his loving daughters, Kiara and Cassia, and his grandchildren, Satinka, Shae, and Magnus. Condolences may be sent to the family at 27030 Havelock, Dearborn Heights MI 48127. ✕



News and Notes

Paige II

The Section welcomes back Magistrate Melody Paige. Magistrate Paige previously sat as a magistrate and has now been re-appointed to complete the unexpired term of former Magistrate Alexander Ornstein. Magistrate Paige will eventually split her time between the Detroit and Pontiac hearing sites, but will be handling Magistrate Wolock's docket in Pontiac exclusively until further notice from Chief Magistrate Gorchow.



The Section congratulates Chairperson Martha Glaser and Appellate Commissioner Rodger Will for their re-appointments to the Workers' Compensation Appellate Commission.



In conjunction with the Environmental Law Section, our members have been invited to attend a free seminar, entitled "Metalworking Fluids: Law, Medicine, and Science." The seminar is scheduled on November 1, 2006, from noon to 1:30 p.m., at the offices of Ernest Chiodo, P. C., 35770 Harper Ave., Clinton Twp., Michigan 48035. The telephone number is (586) 746-1761. The seminar is presented by the Environmental Litigation and Administrative Practice Committee of the Environmental Law Section. If you are interested in attending, call the listed phone number for details. ✕

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

As of the date these case summaries are submitted, the Court of Appeals has not yet issued its decision in *Stokes v DaimlerChrysler Corp.* *Stokes* is the *en banc* decision from the Workers' Compensation Appellate Commission addressing implementation of the Michigan Supreme Court's decision on the definition of disability in *Sington v Chrysler Corp.*, 467 Mich 144; 648 NW2d 624 (2002). The Supreme Court had stayed the Commission's *Stokes* decision and remanded the case to the Court of Appeals to hear on leave granted. Oral argument in *Stokes* occurred August 8, 2006. The Supreme Court had directed the Court of Appeals to issue a decision "before October 1, 2006." However, the Court of Appeals has missed that deadline. The case will presumably be released soon. Here are other developments in workers' compensation since our last newsletter.

Supreme Court

Death Benefits

In *Paige v City of Sterling Heights*, 476 Mich 495; 720 NW2d 219 (2006), a death case, the Court addressed two issues. The first issue was whether the phrase "the proximate cause" in MCL 418.375(2) means "the sole proximate cause" of death or "a substantial factor" in causing death. The second issue was whether a child of the deceased is entitled to a presumption of whole dependency.

The deceased had worked as a firefighter for the city of Sterling Heights. There, he sustained a work-related heart attack. He was granted an open award of workers' compensation benefits during his lifetime, but never in fact received the benefits given his election of "like benefits" as provided for firefighters and police officers in MCL 418.161(1)(c). Approximately nine years after his last day of work, Mr. Paige suffered a second heart attack and underwent

quadruple coronary artery bypass. Approximately five months later, he died in his sleep. Mr. Paige's son, who was eight years old at the time of the initial heart attack and 17 years old at the time of death, filed for death dependency benefits under § 375(2).

Section 375(2) says in pertinent part, "If the injury received by such employee was the proximate cause of his or her death," death benefits can be payable. The Magistrate and Workers' Compensation Appellate Commission awarded death benefits relying on *Hagerman v Gencorp Automotive*, 457 Mich 720; 579 NW2d 347 (1998). *Hagerman* was a 4-3 Supreme Court decision that construed "the proximate cause" requirement as synonymous with the phrase "a proximate cause." Later, in a non-workers' compensation case, *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000) [a governmental tort liability case], the Supreme Court disagreed with *Hagerman's* understanding of the phrase "the proximate cause." The question presented by *Paige* was, therefore, whether *Hagerman's* construction of the phrase in § 375(2) controlled or whether *Robinson's* understanding of that phrase controlled.

The Supreme Court held *Robinson's* understanding of the phrase controlled and overruled *Hagerman*. The Supreme Court said the common meaning of the definite article "the" differs from the common meaning of the indefinite article "a." And, the Court explained that the term "proximate cause" had a longstanding specialized meaning in Michigan jurisprudence pre-dating enactment of the workers' compensation statute. The Court therefore concluded the phrase "the proximate cause" means "the sole proximate cause, i.e., 'the one most immediate, efficient, and direct cause of the injury or damage.'" The Court remanded the case to the Commission for determination of whether the work injury was the proximate cause of

the death under this understanding of the phrase.

The dependency issue related to the fact the decedent's son was under the age of 16 at the time of the work injury but over the age of 16 at the time of death. An older Supreme Court case had held that the presumption of whole dependency applies only if the child was under the age of 16 at the time of the employee's death. *Runnion v Speidel*, 270 Mich 18; 257 NW 926 (1934). But, a more recent Court of Appeals case, *Murphy v Ameritech*, 221 Mich App 591; 561 NW2d 875 (1997), construed a different death provision in the Act as enabling a Magistrate to presume whole dependency under circumstances such as presented in *Paige*. The Workers' Compensation Appellate Commission relied on *Murphy*, rather than *Runnion*, to affirm the finding of a presumption of whole dependency.

The Supreme Court disagreed with the Commission on the dependency question for two reasons. First, the Court said *Runnion* was correct and addressed directly the statute at issue, whereas *Murphy* addressed a different provision. Second and "more important," the Court held that even if *Murphy* had directly addressed the statute presented in this case, "the WCAC would not be justified in choosing to follow *Murphy* instead of *Runnion*. The obvious reason for this is the fundamental principle that only this Court has the authority to overrule one of its prior decisions. Until this Court does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete."

Therefore, if on remand in *Paige* the work injury is deemed the proximate cause of the death, the Commission was instructed to determine the extent of the son's dependency at the time of injury.

The Court's decision was 5-2, except that Justice Weaver did not concur with

respect to the majority's response to Justice Cavanagh's partial dissent. Justice Cavanagh, with whom Justice Kelly concurred, would adhere to *Hagerman's* understanding of "the proximate cause," but agreed with the majority on the dependency question. The exchanges between the dissent and majority were especially sharp.

Jacobs and VanTil Appeals Dismissed

The Supreme Court had heard oral argument in May 2006 in two cases in which the Workers' Compensation Section had filed an *amicus curiae* brief. The two cases are *Jacobs v Technidisc, Inc* and *Michigan Mutual Insurance Co, and VanTil v Environmental Resources Management, Inc* (SC Nos. 128715 and 128283, respectively). The common issue in the two cases was the extent to which the Workers' Compensation Agency enjoys subject matter jurisdiction of workers' compensation issues. In addition to the Section, the Director also filed an *amicus curiae* brief. The Section, Director, and Michigan Mutual Insurance Company in *Jacobs* advocated for exclusive subject matter jurisdiction in the Workers' Compensation Agency.

Following oral argument and supplemental briefing at the Supreme Court, the Court issued an order near the end of its 2005-2006 term saying the case would be put over to the Court's present term of 2006-2007 without additional briefing or argument.

The Supreme Court has now issued orders dismissing and vacating the two cases. This means there will be no decision forthcoming on this subject in these cases. *VanTil* was dismissed on the basis that the plaintiff died and no motion for substitution of the plaintiff had been received by the Court within the time limits required by the court rules. In *Jacobs*, the Court vacated its orders granting leave which, in effect, leaves the circuit court order in that third-party case intact. The third-party settlement had set a weekly workers' compensation rate for a particular duration in the circuit court consent judgment.

Justice Corrigan wrote a concurring opinion in *Jacobs*. She indicated she agreed that "we should not reopen this ancient case, which involves the enforcement of a 1993 consent judgment." But, Justice Corrigan wrote separately expressing agreement with Michigan Mutual's position that settlements of workers' compensation cases can only legitimately occur at the Workers' Compensation Agency after approval by a Magistrate, rather than as part of resolution of a third-party case in circuit court.

Other Supreme Court Orders Res Judicata

You may recall from the last Section newsletter that the Court of Appeals in *Banks v LAB Lansing Body Assembly*, 271 Mich App 227; 720 NW2d 756 (2006) and in *Williamson v City of Livonia and Second Injury Fund*, unpublished decision in CA No. 260274, had reversed the Appellate Commission and Magistrate in each case on the basis that *res judicata* does not bar claimants from separately litigating different body parts, even if all claims had been available at the time of the initial adjudication. *Banks* was not appealed to the Supreme Court, but *Williamson* was.

The Supreme Court issued an order in *Williamson* peremptorily reversing the Court of Appeals and reinstating the Commission's decision, which had held *res judicata* did bar the subsequent action. The Supreme Court said:

The Court of Appeals erred by finding *res judicata* inapplicable because plaintiff's first petition pertained to a psychological condition and his second petition pertained to cardiovascular disease. A worker's compensation award is an adjudication as to the condition of the injured employee at the time it is entered, and conclusive of all matters adjudicable at that time. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160-161 (1980).

Scope of Review

The Supreme Court issued another order disposing of a workers' compensation case in lieu of granting leave. The

case addresses the scope of the Commission's factual review. *Sahr v Wal-Mart Stores*, ___ Mich ___; 721 NW2d 172 (2006). The Magistrate had denied plaintiff benefits, but the Commission reversed based on its reading of the medical testimony. The Court of Appeals in an unpublished decision affirmed the Commission. The Supreme Court reversed the Court of Appeals and Commission and reinstated the Magistrate's decision. The Supreme Court said:

The CAC rejected all of the reasons provided by the magistrate for finding that plaintiff had failed to meet her burden of proving workplace causation for her back complaints because the treating doctor did not directly relate plaintiff's disability to her smoking. Because the magistrate did not base her decision on any such alleged opinion by the treating doctor, the WCAC did not provide an adequate reason for rejecting the magistrate's comprehensive findings as unsupported by competent, material and substantial evidence.

Attorney Fees

Finally, among the cases remanded by the Supreme Court to the Court of Appeals for consideration leave was granted in *Petersen v Magna Corp*, SC No. 131247, order entered September 27, 2006. Among the issues to be decided by the Court of Appeals is "the issue of awarding attorney fees on unpaid medical expenses."

Court of Appeals

Traveling Employee Doctrine Adopted

In *Bowman and Auto Club Insurance Association v R.L. Coolsaet Construction Company and Second Injury Fund*, ___ Mich App ___; ___ NW2d ___ (2006), the Court of Appeals re-adopted the "traveling employee doctrine" from Professor Larson's treatise to be part of Michigan's workers' compensation law.

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Plaintiff was a journeyman pipefitter. He bid and accepted a job approximately 200 miles from his home and arranged for a temporary residence in a travel trailer campground near the job site. On the day of his injury, heavy rains forced work at the job site to cease early. Plaintiff left the job site and was driving his truck to the campground. Plaintiff ran a stop sign, struck another vehicle, and severely injured himself. He claimed the injury was work-related. The Magistrate denied benefits on the strength of the general rule that says injuries sustained going to and coming from work are not compensable. The Appellate Commission affirmed in a 2-1 decision. The Commission dissent urged that Michigan adopt the "traveling employee doctrine" that would cover employees for injuries sustained while on a business trip unless the employees were engaged in a personal errand or in an activity whose major purpose is social or recreational.

The Court of Appeals agreed with the Commission dissent that Michigan should adopt the "traveling employee doctrine." The Court said the doctrine had been originally adopted by the Court of Appeals in *Eversman v Concrete Cutting & Breaking*, 224 Mich App 221; 568 NW2d 387 (1997). The Court recognized that *Eversman* was overruled by the Supreme Court. 463 Mich 86 (2000) 463 Mich 86; 614 NW2d 862 (2000). But, the Court of Appeals said the Supreme Court had overruled the Court of Appeals in *Eversman* on the social or recreational question and had not explicitly disapproved of the Court of Appeals' adoption of the traveling employee doctrine. The Court said adopting the traveling employee doctrine "reasonably accommodates the unique circumstances faced by employees who must travel on a business trip to perform their work."

The Court remanded the case to the Commission to determine whether the doctrine applies to the facts presented in *Bowman*. But, the Court added in this

regard that plaintiff had been "returning from the worksite to his trailer at the campground" and there was "no indication from the record that plaintiff was engaged in primarily a social or recreational activity at the time of the accident or that he made a distinct departure on a personal errand" so as to come within any exception to the traveling employee doctrine.

The appeal in this case was pursued by the automobile insurance carrier paying plaintiff benefits only. The auto carrier also asked for interest on its reimbursement of medical payments from the workers' compensation payors. The Court of Appeals said the auto carrier had not preserved such interest argument before the Commission, but the Court added that if the auto carrier "desires to make these arguments to the WCAC on remand ... it should do so."

Unpublished Court of Appeals' Decisions

Given that *Bowman* is the only Court of Appeals published decision to report, we will make mention of the two unpublished Court of Appeals' decisions released since our last newsletter.

In *Beus v Broad, Vogt & Conant, Inc*, CA Docket No. 258995, unpublished decision released August 3, 2006, the Court addressed another automobile accident injury.

The employee had been hired in Michigan for a position in Mexico. His employer agreed to pay for relocation expenses incurred by the employee and his family. The employee accepted the job, moved to Mexico, and left his family behind so his children could finish school and the family home could be sold. After the school year finished and the family home sold, the employee's wife and children temporarily relocated to the employee's parents' home in Arizona. While his family was there, the employee flew from Mexico to Arizona. In Arizona, he met a potential client,

performed other business activities, and began the process of driving his family in a van from Arizona to Mexico. They spent one night in a motel in Mexico on their journey. The next morning while driving, the van rolled over and the employee died as a result.

The primary question presented was whether the employee had been engaged in an activity whose major purpose was social or recreational so as to be excluded from benefits under MCL 418.301(3). The Magistrate found the deceased was so engaged and denied benefits. The Appellate Commission reversed. The Commission said the deceased was on a "business trip." The Court of Appeals, in turn, reversed the Commission in a 2-1 decision and denied benefits.

The Court held that, while the deceased went to Arizona in part for business reasons, "his activity had shifted from any business meeting in Arizona to the relocation of his family to Mexico." The Court also said any business purpose to the deceased's trip was a minor aspect of the trip with the major reason being relocation of the family and that "enhanced plaintiff's life outside of work, i.e., his 'social' life."

The Court of Appeals' dissenter would have affirmed the Commission on the basis there was evidence the trip's major purpose was business-related.

Braun v Secure Pak and Amerisure Insurance Co, CA Docket No. 260118, is the other unpublished decision. In *Braun*, the Court of Appeals reversed the Appellate Commission and remanded the case to the Commission for further proceedings consistent with the Court's opinion.

The case involved a truck driver who had clocked out of work and was on the employer's premises just outside the door of the workplace. He testified that he was lingering there in hope of being recalled for another assignment and was discussing fishing plans for the weekend with co-employees while smoking a cigarette.

He collapsed while doing so injuring himself in the fall.

The Magistrate originally denied benefits on the basis that plaintiff was engaged in an activity whose major purpose at the time of injury was social or recreational under MCL 418.301(3). On plaintiff's initial appeal to the Appellate Commission, the Commission remanded the case to the Magistrate for a more comprehensive opinion. On remand, the Magistrate changed his mind and awarded benefits. The case then returned to the Commission. The Commission reversed the Magistrate primarily on the basis that the Magistrate ignored and otherwise misunderstood certain testimony.

On plaintiff's appeal of the Commission's second decision, the Court of Appeals agreed with plaintiff that the Commission misapplied its scope of review in displacing the Magistrate's second decision. The Court said the Commission did not adequately explain why the record did not support the Magistrate's second viewpoint that the injury was compensable. Consequently, the Court remanded the case with instructions the Commission reconsider whether the Magistrate's second decision was supported by competent, material, and substantial evidence on the whole record.

Workers' Compensation Appellate Commission

Remand to Consider Vocational Testimony

In *Stivers v DaimlerChrysler Corp*, 2006 ACO #230, the defendant took the deposition of a vocational counselor and offered it as evidence against plaintiff's disability claim under *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). After the record was closed, the Magistrate re-opened the record to consider whether the vocational counselor qualified as an "expert witness" under the criteria described by the Supreme Court in *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004) and *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786 (1993). The Magistrate also relied on his reading

of the Commission's decision in *Carnoskes v Aetna Industries, Inc*, 2004 ACO #376.

Based on his understanding of these cases, the Magistrate concluded the vocational counselor was not an "expert." And the Magistrate did not consider the vocational counselor's testimony in reaching his conclusion on whether plaintiff was disabled under *Sington*.

The employer appealed, arguing the vocational testimony should not have been excluded. The Commission agreed with the employer. The Commission, in an opinion authored by Commissioner Will, said the Magistrate misunderstands *Carnoskes* because: "Actually, in *Carnoskes* the Commission said, 'That is not to say that vocational expert testimony is irrelevant to the *Sington* analysis.'" The Commission held that, correctly understood, *Carnoskes* means "the claimant's testimony is a vital element to consider in the *Sington* analysis with vocational testimony as a helpful guide to the magistrate in some cases." The Commission explained that while a Magistrate may give little weight to a vocational counselor's testimony just as he or she may give little weight to a particular doctor's testimony, the vocational testimony "should not be excluded, at least within a scenario similar to the instant case."

The Commission concluded by remanding the case "to the magistrate to consider the testimony of the vocational advisor, Mr. Hostetler, giving such weight as he considers necessary along with the other testimony he finds credible."

Return to Work With Physical Restrictions and Accommodations

In *Guyton v General Wine Co and Accident Fund Insurance Company of America*, 2006 ACO #145, plaintiff suffered an undisputed work-related right shoulder injury while performing her job of packing bottles of liquor and wine in boxes. Plaintiff ultimately underwent surgery on her shoulder. She returned to work for her employer with physical restrictions at jobs that accommodated her condition. She worked more than 100 weeks but less than 250 weeks at such jobs.

The Magistrate concluded that plaintiff was unable to return to the job she was performing at the time of her injury. The Magistrate next concluded that plaintiff's return to work with physical restrictions and accommodations meant that plaintiff was laboring post-injury at "reasonable employment" under MCL 418.301(5). Given plaintiff's duration of employment of more than 100 but less than 250 weeks, the Magistrate applied § 301(5)(d) and granted plaintiff an open award of benefits finding the post-injury work did not establish a new wage earning capacity.

The employer appealed, arguing the Magistrate legally erred by characterizing plaintiff's post-injury work as "reasonable employment." The employer argued plaintiff's post-injury work was simply other work suitable to her qualifications and training and it paid as much as she had been earning at the time of injury. Therefore, the employer argued plaintiff would not be "disabled" under § 301(4) and *Sington*, despite the return to work under physical restrictions and with accommodations. Alternatively, the employer sought a remand for redetermination by the Magistrate.

The Commission, in an opinion authored by Commissioner Ries, agreed with defendants that the Magistrate's decision was deficient and remanded the case. The Commission said, "it is evident that the magistrate concluded that, because plaintiff 'worked under restrictions and with accommodation' after January 24, 2000, she necessarily 'did not establish a wage earning capacity within her qualifications and training.' We disagree." The Commission said that "the work to which plaintiff returned in this case may have been suitable to her qualifications and training at the time of her injury and might be reasonably available to her." Therefore, the Commission remanded for the Magistrate to resolve whether plaintiff was laboring post-injury at § 301(4) work suitable to her qualifications and training or, on the other hand, laboring at § 301(5) reasonable employment.

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Liability for Fertility Treatment

In *Nelson v Mork Otto and Sons and Farm Bureau Mutual Insurance Co of Michigan*, 2006 ACO #135, the Commission addressed issues in a “case at once interesting and difficult.”

Plaintiff had sustained an injury at the age of 15 that damaged her pituitary gland. As a result of the injury, her gland could no longer manufacture and secrete the hormones necessary for ovulation. Years later she married a man who had undergone a vasectomy because it had become medically inadvisable for plaintiff to become pregnant. Some months after the marriage, plaintiff and her husband decided they would like to attempt to have a child. Plaintiff and her husband sought the services of a fertility specialist and considered various options.

The first of the issues presented was whether plaintiff’s claim for fertility treatment was cognizable under our Act. The second issue was, assuming the treatment was cognizable, what form of fertility treatment would be considered reasonable and work-related under the circumstances presented in this case. The fact plaintiff’s husband had an irreversible vasectomy complicated resolution of the second issue.

The Commission, in an opinion authored by Commissioner Ries, said the primary focus is on the employer’s necessity to pay for “the effects of the injury” under MCL 418.315. The Commission said plaintiff’s inability to ovulate is an effect of her work injury, while her husband’s vasectomy is not. As such, the Commission said the employer has the

obligation to pay for medical treatment and prescriptions of certain hormones so as to alleviate the effect of plaintiff’s inability to ovulate. However, the proofs did not demonstrate it was defendants’ obligation to provide artificial insemination with donor sperm or sperm harvested from her husband so that plaintiff could become pregnant. The employer’s responsibility “extends only to relieving plaintiff of the effects of plaintiff’s injury at work and not to relieving plaintiff or her husband from the effects of his vasectomy.”

Finally, the Commission concluded that it was within the Magistrate’s discretion to assess attorney fees on the employer for the medical expenses for which the employer has been found liable. ✕

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