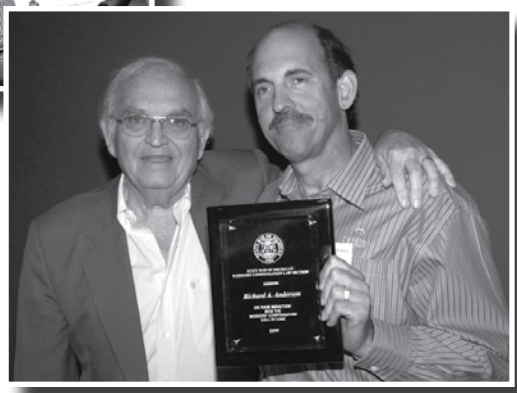
State Bar of Michigan

Workers' Compensation Section Newsletter

Fall 2009

Photos from the Workers' Compensation Hall of Fame Dinner

Murray Feldman and Denice LeVasseur congratulate Nancy Day on her induction into the Workers' Compensation Hall of Fame.



Arthur Wall, a 2009 inductee into the Workers' Compensation Hall of Fame, along with Paul Lazar and Murray Feldman.

Richard Anderson is congratulated by his son, Mark Anderson, for his induction into the Workers' Compensation Hall of Fame.

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

Tom Ruth, 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.

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From the Chair

We are used to working on behalf of our clients and advancing their interests. My guess is that most of us like what we do and find satisfaction in the way we earn a living. The Workers' Compensation Section is designed to advance the interests of the lawyers who practice in this area. Our mission statement reads:

> 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.

I will strive to fulfill our mission on behalf of the attorneys who are members of our section.

Consider these statistics: We are the 14th largest section. We have among the largest treasury of any section—in large part due to past chairperson Alan Helmore and the fiscal restraint he taught us. (This is in no way meant to denigrate past officers or section council members, but rather an acknowledgement that attitudes have changed regarding how our dues should be spent.) The number of active Michigan lawyers in 1999 was 33,219; in 2009, it is 38,150—a 15 percent increase. The number of members in our section in 1999 was 1,262; in 2009, that number is 851—a 32 percent decrease. In 1998, there were 21,368 new cases opened by 104 A's or C's. In 2008, only 10,368 new cases were opened.

Our section is proud to sponsor an annual law school scholarship and we are considering expanding the program, but with declining membership and dues, this may not be feasible in the long term. The section council will study this.

Look around at the agency locations and you will see that the average age of workers' compensation practitioners is increasing. Our ranks lack diversity and perspective. Sure, there will always be a comp practice, but if this trend continues, our collective wisdom and understanding of how our system operates will be narrow and concentrated among a few remaining attorneys. With that in mind, I will seek more diversity in age, race, and gender in the ranks of attorneys practicing workers' compensation law by, among other things, speaking to up-and-coming attorneys at all the law schools in our state in an attempt to educate students and faculty about the satisfaction of a workers' compensation practice.

Here are some of my thoughts about technology and our practice: The online version of red (previously brown) Welch and Royal book; the agency website with its form templates that can easily be filled in by your computer and then printed out and filed; the calculation program; the State Bar e-blasts; medical records on disc or delivered by e-mail; and even Jan Leventer's cell phone list have all made our practice more efficient and convenient. Typically, section council members drive from their offices to the section council meetings in Lansing. At my suggestion, Director Nolish arranged for the use of the agency's equipment and the council recently had two successful meetings by video conference—some council members were in Detroit and some were in Lansing. I'm currently looking for a cost-effective teleconference option that will allow us to have council meetings while sitting at our desks.

Did you know that there are Michigan Court Rules regarding electronic signatures and filing? I will be working with our administration to determine if electronic signatures on agency template forms are a possibility. There is a Michigan

Court Rule that provides for video arraignments. The Oakland County Circuit Court currently has a limited program for video motions and pre-trial conferences. MCR 2.107 (4) provides that parties may agree to service of pleadings by e-mail with the filing of an agreement with the Court. Section (4) (a) provides that the parties and attorneys who have stipulated to service by e-mail shall immediately notify all other parties and the court if the party's or attorney's e-mail address changes. The rule further provides for the maximum size of documents; the obligation to furnish paper copies under certain circumstances; formatting documents in a manner that prevents alteration of their contents; time limits for determining the day on which documents are considered to have been sent; and the sender to maintain an archived record of sent items. In federal court, most filings must be made electronically and are accessible on the web to practitioners and the public. The courts are prodding practitioners to enter the 21st century. The agency is not in a position to implement much in the way of technology, so if any of you have suggestions on adapting to the electronic culture, please let a council member know so we can discuss it at our meetings.

I assume that, by now, most of us read newspapers and articles online. Sending the section newsletter directly to the computers of every member is environmentally friendly and saves money on paper and postage. Many other sections already do this. Of course, there may have to be an "opt out" for "old-timers" to continue receiving a print edition. This is another goal I hope the section can accomplish.

Old business for consideration during my tenure: The section council decided to manage the Hall of Fame. There is a need for us to establish criteria for admission into the Hall of Fame. We will work on this. And I'd like to place photos of the Hall of Famers in the display case at the Detroit agency. Please contact a council member if you can help locate some of these photos.

If you've seen the mildly risqué photos posted at various agency locations, you know that many of us had a great time at our spring seminar in Las Vegas. Are any of you interested in a spring section trip to Cuba? Should I look into that, or should we return to Las Vegas? Or should we hold the meeting in the Caribbean? Please contact a council member to express your preference. We will return to Crystal Mountain for the summer seminar in 2010.

Back to the topic of our aging demographics:

An older man met and courted an older woman. He chose a bench in a lovely park to propose to her. In the old-fashioned style, he got on his knee in front of her and said, "I have two questions. First, will you marry me?"

"Yes, I will," she answered. "What is your second question?"

The older gentleman replied, "Will you help me up?" 🛠

Editor's Comment

As you know, we had a great turnout for the Spring Seminar. It was worth the trip to see our own John Cooper entertain the crowd with his horn.

It's the hope of all that YOU continue to be active in YOUR section - and showing up at the meetings is a great way to stay in touch with people and on top of your practice.

Congratulations to all the new council members and especially your new chairperson, Joel Alpert. Many thanks, again, to Murray Feldman for all his hard, effective work last year.

The council is proposing to send this **newsletter by e-mail** to all members of the section. This would be a cost effective way to provide you with section information—fast. There are some "old school" holdouts who like the feel of paper (including yours truly), but there are some decided advantages to e-mail distribution. **Let us know what you think about this proposal -** by telling a council member or e-mailing me at *newsletterpoll@aol.com.*

— Tom Ruth

Note from the Past Chair

Thanks to All

I'd like to take this opportunity to thank everyone who attended our summer seminar at Crystal Mountain and to those who have approached me since the seminar expressing your kind words and thoughts with regard to my year as chairperson. I'm proud of the work we accomplished. It was wonderful seeing such a great crowd at the summer seminar—the largest anyone could remember. Since the seminar, I've been asked several times whether I feel any sense of relief now that my term as chairperson has expired. Actually, the feeling I have is one of gratitude to our section officers and council with whom I worked, and to all of you who have been so generous with your kind words.

— Murray Feldman

Board of Magistrates Update

By Murray A. Gorchow, Chairperson, Board of Magistrates

In the summer 2006 issue of the *Newsletter*, I wrote about bifurcating redemptions leaving medical open in response to the delays resulting from the slow response time by the Centers for Medicare and Medicaid Services (CMS). In last summer's issue of the *Newsletter*, I expressed concerns about bifurcated CMS redemptions because of CMS's more recent position that conditional payments must be dealt with at the first redemption even though they were taking longer to provide conditional payment letters than set-aside letters. I explained in that article that failure to do so left plaintiff and his counsel quite vulnerable to adverse legal/financial consequences.

Recently, some of you have expressed the mistaken understanding that the Board of Magistrates was no longer considering any bifurcated CMS redemptions. This is not the case. Of course, each magistrate makes his or her own decision whether to approve a proposed redemption. In my last article, I expressed significant concerns about such redemptions, but stated the circumstances in which I would still consider a bifurcated CMS redemption. I will take a case-by-case approach as to whether the redemption is in plaintiff's best interest, taking into consideration any plaintiff hardship situations necessitating prompt redemption of indemnity. I will weigh the imminent nature and degree of the hardship against the likelihood of any outstanding conditional payment, especially if the likelihood and estimated amount appears small relative to the size of the indemnity redemption.

The best thing for counsel to do would be to approach the assigned magistrate ahead of time to discuss the circumstances warranting the need to present a bifurcated CMS redemption.

It is my understanding from a number of you that the delay in receiving conditional payment letters is getting shorter. I am also noticing this shift. As to the other CMS problems that confront us, there is a new substitute bill pending in Congress that would certainly afford significant relief.

On another subject, I would like to thank everyone for the relatively smooth transition with the closing of the Mt. Clemens hearing office and the change of pre-trial day in Pontiac from Tuesday to Monday. I know that these changes have caused some dislocation and inconvenience for a number of you.

Finally, as many of you know, the 2004 "Blue Book" with the Workers' Compensation Act and Rules needed to be updated and we were running out of copies. Through a collaborative effort between the Institute for Continuing Legal Education (ICLE), the Workers' Compensation Law Section of the State Bar, and the Workers' Compensation Agency, an updated blue book was created. The new book has an improved, user-friendly index with many cross-references and alternative language references. For the first time, all rules are indexed as well. Whenever there is a rule that pertains to a particular section of the Act, you will find the rule referenced with the pertinent section of the Act. The book is now available to section members at a reasonable cost with a discount. Orders can be made online through ICLE at *www.icle.org/books/MWDCA*—use coupon code MWDCA15 during the checkout for the section discount—or by calling ICLE at (877) 229-4350.

As always, if anyone has a problem, question, suggestion, or concern, please contact me. I am happy to help out whenever I can. 🛠

Harold Dean WC Open

Although not an official section event, this year's Harold Dean WC Open was another rousing success with more than 130 golfers participating. Spotted in the crowd were Irv Vahratian and a number of our retirees who we only get to see once a year at this event. With great weather came great scores, but the highlight of the day was the fun and frivolity shared by section members and others who attended this annual event. Of course, this event would not be possible without the dedication and hard work of Ray Bohnenstiehl and his staff. Another great job, Ray! 🛠

The New Redemption Order Form WC-113

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

Well, here we are. The calendar tells me that as I write this during the first weeks of August, we are in the midst of the dog days of summer, defined by Webster as "the period between early July and early September when the hot sultry weather of summer usually occurs in the Northern Hemisphere." I must have missed those hot and sultry days—at home, the air conditioning hasn't been on in weeks (which is OK with me) and golf is being played in long pants. Another definition mentions "a period of stagnation and inactivity." Wrong again.

I want to thank everyone for their cooperation and patience in conjunction with the closure of the Mt. Clemens hearings office. I know this closure was not good news and causes great inconvenience for all the participants in cases. Unfortunately, budget difficulties and the reduced docket require us to "right-size" the agency's operations. This process is not over—everything we do, everywhere we do it, and everyone who does it is under review. On the lighter side of the budget problems, several magistrates and I have formed the FGA, or Furlough Golf Association. Hopefully, we will have a very short season.

Without going into the details, we have been putting great amounts of time, effort, and resources into the Chrysler, General Motors, and Delphi bankruptcies. Those proceedings put thousands of injured workers and their families at great risk. I am pleased to say that most, but not all, of the issues have been resolved. Additional information will be disseminated as it becomes available.

Between bankruptcy crises, we have been updating forms. With this article, you will see the revised Application for Mediation or Hearing-Form C (WC-104C) and the new Request for Compliance Hearing (WC-40). Both forms will be available on the website in a downloadable and fillable PDF format. As with our other PDF files, you will be able to fill out the forms, but unless you have the more advanced version of Adobe Acrobat, you won't be able to save them once they've been filled out. You can, however, download and save the original PDF and use it repeatedly. This is identical to the process for the WC-105 series. Together, these forms replace the old 104C which, although useful, appeared to be a form for use by defendants. It did not address issues that a plaintiff might raise during or after a case that might have been covered in the earlier hearing.

The revised 104C, still blue, no longer has a box labeled "Request for Rule 5 Hearing" and is now designed for use by the defense side of a case. If you are using the electronic version, please print the completed forms on blue paper and send to Lansing in the usual fashion.

If either side, most commonly the plaintiff, wishes to bring an issue of compliance before the agency, it should be done using the WC-40 Request for Compliance Hearing. This is designed for issues under Rule 5, Rule 4(2), insurance compliance issues, and any other that might be properly brought. This form is designed to replace the letters that I receive calling for "emergency Rule 5 hearings" and the like. Please note that it does require a recitation:

> A request for hearing must contain sufficient information to warrant investigation or inquiry into an allegation of non-compliance. Please outline the facts and law involved in this matter. Include names, dates, amounts and any other pertinent information. Also, specify the relief sought.

This language mimics the requirements of Rule V (1) and (2) and is designed to give some idea of what is involved. As you know, not all requests for hearing we receive result in a hearing being scheduled. Frequently, the request is made in situations where nothing clearly enforceable is involved or the matter is best heard by the magistrates. Please remember that the termination of benefits being paid voluntarily is best brought before a magistrate using the 60-day rule. We are also able to resolve many issues without setting the matter for hearing.

By the time you read this, the forms will be available online and printed versions will soon be available at the hearing sites.

As always, we expect that there will be questions about the forms. Please feel free to contact me in that regard. We are also looking at the "Application for Mediation or Hearing" form 104A … stay tuned.

Forms WC-104C and WC-40 can be found on the following pages.

APPLICATION FOR MEDIATION OR HEARING — FORM C

Michigan Department of Energy, Labor & Economic Growth
Workers' Compensation Agency
PO Box 30016, Lansing, MI 48909

Submitted on behalf of ☐ Insurance Company ☐ Self-Insured Employer ☐ Attorney ☐ Other

Name of Employee (Last, First, MI)	Social Security Number	Date of Birth	
Employee Street Address	City	State	ZIP Code
Name of Employer	County of Injury	Federal ID Number (if known)	
Employer Street Address	City	State	ZIP Code
Date(s) of Injury			

☐ **Add other employer and date(s) of injury**

Name of Employer to be Added	County of Injury	Federal ID Number (if known)	
Street Address	City	State	ZIP Code

Date(s) of injury to be added		INSURANCE CARRIER (DO NOT FILL IN)	
1.	2.	1.	2.
3.	4.	3.	4.

☐ **Petition to stop weekly benefits** *(Provide explanation below and attach affidavit of payment)*	☐ **Petition to fix fees** *(Provide explanation below)*
☐ **Petition to recoup** *(Provide explanation below)*	☐ **Add Funds** *(Specify name of Fund and provision of Act below)*
☐ **Petition to determine rights; e.g., dependency, AWW, etc.** *(Specify below)*	☐ **Other** *(Provide a brief explanation of the issues below)*
☐ **Non-cooperation with vocational rehabilitation** *(Provide explanation below)*	

Name of Party Submitting Form			NAIC or Self-Insured Number (if applicable)	
Street Address			Name of Attorney (if applicable)	
City	State	ZIP Code	Attorney ID Number **P-**	Date
Name of Preparer (Please print)		Signature of Preparer		Telephone Number

DELEG is an equal opportunity employer/program. Auxiliary aids, services, and other reasonable accommodations are available upon request to individuals with disabilities.	Authority: Workers' Disability Compensation Act, 418.222; R408.34 Completion: Voluntary Penalty: None

WC-104C (Rev. 8/09) Prior editions obsolete

REQUEST FOR COMPLIANCE HEARING

Michigan Department of Energy, Labor & Economic Growth
Workers' Compensation Agency
PO Box 30016, Lansing, MI 48909

Type of hearing requested ☐ Rule 5 ☐ Rule 4(2) ☐ Insurance Compliance ☐ Other _____

Submitted on behalf of ☐ Employee ☐ Employer ☐ Insurance Company ☐ Other _____

Name of Employee (Last, First, MI)			Social Security Number	Plaintiff Attorney	
Employee Street Address			Date of Birth	Plaintiff Attorney Tele. No.	Attorney ID Number P-
City	State	ZIP Code	Employee Telephone Number	Plaintiff Attorney Email Address	

Name of Employer			Carrier or Self-Insured Name	Defendant Attorney	
Employer Street Address			NAIC or Self-Insured Number	Defendant Attorney Tele. No.	Attorney ID Number P-
City	State	ZIP Code	Service Company/TPA Name (if applicable)	Defendant Attorney E-mail Address	

A request for a hearing must contain sufficient information to warrant investigation or inquiry into an allegation of non-compliance. Please outline the facts and law involved in this matter. Include names, dates, amounts, and any other pertinent information. Also, specify the relief sought.

Name of Requester			Telephone Number*	
Street Address*			E-mail*	
City*	State*	ZIP Code*	Signature	Date

* If not listed in upper portion of form

DELEG is an equal opportunity employer/program. Auxiliary aids, services, and other reasonable accommodations are available upon request to individuals with disabilities.	Authority: MCL 418.205; 418.601, *et seq*.; R408.34; R408.35 Completion: Voluntary Penalty: None

WC-40 (8/09)

Life After the Board of Magistrates

Molly Cooke

By L'Mell M. Smith

Anyone who has practiced workers' compensation law for any amount of time has at least heard of Molly (Beitner) Cooke. Molly was admitted to the State Bar in 1967 and practiced law with Beitner & Beitner for several years. In 1973, Gov. William Milliken appointed her to the then Workers' Compensation Appeal Board. Molly's opinion was that she felt the *de novo* review required of the board was "unwieldy" and caused a huge backlog.

She served on the Appeal Board until 1987, when Gov. James Blanchard appointed her to the Workers' Compensation Appellate Commission. The general opinion was that she was an excellent choice because of her demonstrated superior knowledge of the W.C. Act while on the Appeal Board. The politics at that time created the impression that she was plaintiff oriented, which Molly denies, stating that she always relied purely on the Act and it never let her down. Molly also commented that while she was a WCAC member, she formed the opinion that remands to magistrates were "demoralizing" and she tried to avoid them whenever possible.

Perhaps because of the drive from Detroit to Lansing, where the WCAC offices were located, Molly sought appointment to the Board of Magistrates. Because of her outstanding service record and knowledge of the Act, she received that appointment from Gov. John Engler. However, when her term expired, she chose not to seek reappointment and resigned. Molly's reputation and lifetime of service earned her election to the State Bar of Michigan Workers' Compensation Section Hall of Fame.

These days, Molly refers to herself as a "71-year-old party doll." After retiring, she spent time designing and decorating her new condominium in Plymouth, an older office building that has been refurbished and turned into a dual purpose residential-commercial building.

Molly has four daughters: Marie, who lives in Royal Oak; Kathryn, located in New York City; Elizabeth, who resides in Birmingham; and Selma, who lives in Los Angeles and is better known by her stage name, Selma Blair. The movie and television actress most recently starred in the NBC sitcom *Kath and Kim*. Molly also has two grandsons, ages 2 and 10. She also made a point to mention son-in-law, Michael Ketter, upon whom she greatly relies and feels will look after her in the future.

Suffice it to say, Molly is thriving and having a wonderful time in her retirement. I'm sure all who know her wish her the best. She still resists modern technology and has no e-mail address—the one concession she has made is the GPS unit in her car— but can be contacted at her listing in the *Michigan Bar Journal*.

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

Attorney Fees On Unpaid Medical Expenses

The Supreme Court has released its opinion in *Petersen v Magna Corp*, ____ Mich ____; ____ NW2d ____ (2009) (SC Docket Nos. 136542, 136543). The issue in the case is whether attorney fees can be assessed on employers and/or their carriers under MCL 418.315(1)'s last sentence, which reads, "The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee." Four of the seven justices held that only employers and insurance carriers (and not medical providers or medical creditors) can be assessed plaintiff's counsel's fees on unpaid medical expenses. It is a matter of the magistrate's discretion whether to award such attorney fees.

There are five different opinions from the seven justices in the case. Chief Justice Kelly authored the lead opinion with Justice Cavanagh concurring. Justice Hathaway authored the second opinion with Justice Weaver concurring. Both of these opinions reach the same result—the one described in the paragraph above—but for different reasons. Justice Markman dissented in a lengthy opinion. Justice Young dissented in a separate opinion. And Justice Corrigan dissented, joining Justice Markman's dissent and part of Justice Young's dissent.

With respect to the opinion authored by Chief Justice Kelly, she finds that the statutory language at issue is ambiguous in the sense that it does not identify among whom the attorney fees are to be prorated, e.g., the employee, the employer, the insurance carrier, or the medical provider or medical creditor. The chief justice concludes that the sentence at issue only allows for proration between employers and their carriers. In response to one of the dissents, Chief Justice Kelly clarifies that nothing in her opinion is to be construed as *requiring* a magistrate to prorate a fee against an employer or the employer's carrier; it is instead a matter of the magistrate's discretion.

In the course of her opinion, the chief justice embarks on a discussion of how to determine when a statute is ambiguous. In so doing, the chief justice disapproves of more recent opinions from the Supreme Court that define ambiguity, then discusses *stare decisis* and would change the rules as to when Supreme Court precedent can be overturned.

The second opinion authored by Justice Hathaway agrees with the lead opinion but "only to the extent that it concludes that the term 'prorate' in MCL 418.315(1) applies exclusively to employers and their insurance carriers." What Justice Hathaway disagrees with in the lead opinion is the lead opinion's finding that the statute is ambiguous. For that reason, Justice Hathaway undertakes no discussion of ambiguity and *stare decisis*.

The primary dissenting opinion is that of Justice Markman, who says the proration sentence in § 315(1) contemplates a division of attorney fees among the different medical providers who reap the benefit of the unpaid medical award as opposed to assessment of fees on employers or carriers. Justice Markman says the majority is adding an additional cost upon the workers' compensation process "by penalizing employers and forcing them to pay not only for their own attorneys, but also for their employees' attorneys." Justice Markman also criticizes the chief justice's definition of ambiguity, saying it creates "an extraordinarily low threshold for finding ambiguity" which permits a justice to "utilize whatever factors are deemed appropriate [by that justice] in reaching a result."

Justice Young joined in parts of Justice Markman's dissent but would hold that the term "prorate" applies only to a proration between the claimant and the employer—not to medical providers or medical creditors who are not parties to the case or represented by counsel. Justice Young says the majority's opinion will have a chilling effect on employers and carriers contesting medical expenses.

Finally, Justice Corrigan fully agreed with Justice Markman's opinion and a portion of Justice Young's criticism of the majority's holding.

Lofton Remanded Again

There was confusion relating to the Supreme Court's entry and release of its orders in *Lofton v AutoZone, Inc* (SC Docket No. 136029, rel'd July 15, 2009). Recall that *Lofton* is the case that had been remanded by the court last year to the Board of Magistrates. That remand was:

> [F]or reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008). If it is found that plaintiff is disabled under MCL 418.301(4), but that the limitation of wage earning capacity is only partial, the magistrate shall compute wage loss benefits under MCL 418.361(1), based upon what the plaintiff remains capable of earning.

In remanding the case, the court retained jurisdiction and set a time limit for the magistrate's remand decision.

On remand, the magistrate granted plaintiff weekly benefits at the maximum weekly rate of compensation. The case then returned to the Supreme Court. On June 17, the Workers' Compensation Appellate Commission received the following 4-3 order from the Court:

> By order of October 1, 2008, this Court vacated the decision of the Workers' Compensation Appellate Commission (WCAC) mailed April 4, 2007, and remanded this case to the Board of Magistrates for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008), with instruction that the magistrate assigned to the case take additional proofs upon request of either party and issue a decision. This Court retained jurisdiction. On order of the Court, the assigned magistrate having subsequently presided over an evidentiary hearing and having submitted a new decision in accordance with this Court's instructions, we REMAND this case to the WCAC for review of any challenges the parties may have to the magistrate's decision pursuant to the standard of review established in MCL 418.861a. The motion for leave to file brief amicus curiae is GRANTED.
>
> We do not retain jurisdiction.

Chief Justice Kelly and Justices Cavanagh and Hathaway disagreed with the above ruling and would have granted leave to appeal.

For unexplained reasons, the above order was retracted by the Court. The following month, on July 15, the Court issued another order that reads the same *verbatim* as the June order quoted above. The only difference is the votes of the justices—whereas in the June order, Chief Justice Kelly and Justices Cavanagh and Hathaway granted leave to appeal, in

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Recent Cases
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the July order, Chief Justice Kelly and Justices Weaver and Hathaway would grant leave to appeal.

In any event, the case has now returned to the Appellate Commission without the Court retaining jurisdiction.

Upcoming Arguments on Applications

The Supreme Court has scheduled an oral argument on the application for leave to appeal in *Bezeau v Palace Sports & Entertainment, Inc* (SC Docket No. 137500, rel'd May 8, 2009). The Court said "the parties shall address whether the jurisdictional standard established at MCL 418.845, as interpreted by this Court in *Karaczewski v Farbman Stein Co*, 478 Mich 28 (2007), should be applied in this case." Section 845 and *Karaczewski* address when Michigan can exercise jurisdiction over injuries occurring outside of the state. Section 845 was amended by the legislature on January 13, 2009. It presently reads:

> The worker's compensation agency shall have jurisdiction over all controversies arising out of injuries suffered outside this state if the injured employee is employed by an employer subject to this act and if either the employee is a resident of this state at the time of injury or the contract of hire was made in this state. The employee or his or her dependents shall be entitled to the compensation and other benefits provided by this act.

The court invited the Workers' Compensation Section to file an *amicus curiae* brief in *Bezeau*.

Another case scheduled for oral argument on the application for leave to appeal is *Loos v J.B. Installed Sales, Inc* (SC Docket No. 137987, rel'd May 1, 2009). The issue in *Loos* is whether the claimant is an employee or an independent contractor in light of income tax filings.

As of this writing, the dates for oral argument in *Bezeau* and *Loos* have not yet been set.

Court of Appeals

Two *Stokes* Cases

The Court of Appeals released two unpublished opinions in cases remanded to it by the Supreme Court for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). The Supreme Court, after release of *Stokes,* had remanded most cases to the Board of Magistrates, but remanded these two cases to the Court of Appeals to hear as on leave granted. What the two cases have in common is that there had already been vocational testimony proffered by the parties even though both cases had been prior to the Supreme Court's *Stokes* opinion. Both cases had resulted in open awards of weekly benefits.

In *Kenney v Alticor, Inc* (CA Docket No. 278090, rel'd June 18, 2009), defendant challenged whether plaintiff was disabled under *Sington* and *Stokes*. The Workers' Compensation Appellate Commission had "found that plaintiff's testimony that she would not have refused any job offered to her because she was desperate for a job and that she was unable to find an employer willing to hire her for any job was sufficient to establish that she was unable to perform all the jobs within her wage-earning capacity that pay any rate, let alone that pay at the maximum rate." The Court of Appeals disagreed with the Appellate Commission's view that plaintiff's proofs were adequate. The Court said "plaintiff's generalized and conclusory testimony regarding her inability to find an employer willing to hire her for any job simply lacks sufficient detail to allow a proper and thorough disability analysis under the stringent requirements detailed in *Stokes*." The court explained:

> [A]lthough the appellate courts of this state have observed that a claimant's testimony alone is sufficient to support a finding of disability, see, e.g., *Sanford v Ryerson & Haynes, Inc*, 396 Mich 630, 637; 242 NW2d 393 (1976); *Woods v Sears, Roebuck & Co*, 135 Mich App 500, 504; 353 NW2d 894 (1984); *Black v Gen Motors Corp*, 125 Mich App 469, 474; 336 NW2d 28 (1983), and although *Stokes* acknowledged that a claimant can establish what jobs, if any, the claimant is qualified and trained to perform within the same salary range as his or her maximum earning capacity without expert testimony and through the claimant's own testimony, *Stokes*, *supra* at 282, the claimant is still required to present an objective means to assess employment opportunities, such as job listings from a newspaper, a job-placement agency, or a career counselor. *Id.*

Rather than reverse the award, the court remanded the case to the Board of Magistrates without retaining jurisdiction for a new evidentiary hearing and a new decision on disability.

In *Martin v Eaton Corp* (CA Docket No. 276134, rel'd July 21, 2009), the Court of Appeals responded similarly to the defendant's appeal. In this case, the Appellate Commission had also rejected defendant's argument that plaintiff did not sufficiently prove disability. The Appellate Commission had found "that in light of the limited duties plaintiff performed as a janitor and the lack of recent training in the jobs

he had performed in the distant past, the magistrate did not err in finding him disabled from working in the jobs paying the maximum wage and that it is unreasonable to expect him to look for work within those types of jobs." The Appellate Commission had also noted that plaintiff was "diligently seeking employment."

The Court of Appeals disagreed after reviewing *Stokes'* different steps, saying that where—as in this case—the second *Stokes* step is not adequately addressed, it becomes virtually impossible to satisfy the steps that follow. The court described that second step of the *Stokes* analysis as follows:

> The second step requires proof of what jobs plaintiff is *qualified and trained* to perform within the same salary range as his maximum earning capacity when he suffered his injury. Plaintiff's proofs on this step were deficient. Although plaintiff is not required to present a transferable-skills analysis, he "must provide some reasonable means to assess employment opportunities to which his qualifications and training might translate." *Id.* at 282. The focus is on jobs within plaintiff's maximum salary range. Plaintiff provided no solid evidence regarding jobs for which he is qualified and trained that fall within his maximum salary range. Delmar [plaintiff's vocational expert] found that plaintiff's work for defendant "was skilled and transferable," but he did not identify the specific nature of those jobs to which plaintiff's skills might translate. Delmar acknowledged and recognized plaintiff's additional employment training and history, but did not examine whether plaintiff's background would otherwise qualify him for jobs which he could obtain wages within his maximum earning capacity. Instead, Delmar found that plaintiff's retail experience "was too remote in time to be relevant to be included as a component of his present wage earning capacity," and he made the same conclusion with regard to plaintiff's work as a tax preparer. Delmar also dismissed plaintiff's work experience with Ralston in the food packaging industry as being too isolated to that industry. Step two must be approached and proven as outlined in *Stokes*.
>
> Step two of the *Sington*/*Stokes* test requires an articulation of the jobs for which plaintiff is qualified and trained and that fall within his maximum earning capacity. It requires a more particular statement of such jobs than that which the magistrate made. Had the parties and Delmar had the benefit of *Stokes*, it is likely that their treatment of this matter would have been more complete.

The court, therefore, vacated the Appellate Commission's determination and remanded the case to the magistrate for reconsideration without retaining jurisdiction and, if requested, a new hearing to allow additional proofs.

Seasonal Employee

In an unpublished seasonal employee case, *Reece v Event Staffing* (CA Docket No. 284451, rel'd July 30, 2009), the Court of Appeals addressed the question of year-round liability for weekly benefits where a professional football player suffered a football injury. "[T]he magistrate found that plaintiff was entitled to wage-loss benefits during the off-season, even though plaintiff would not otherwise be earning wages playing professional football or engaged in other wage-earning employment. [And,] [t]he WCAC affirmed the magistrate's decision" in that regard.

The defendant argued to the Court of Appeals that, under the second sentence of MCL 418.301(4) and *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 8-9; 760 NW2d 586 (2008), plaintiff is not entitled to wage-loss benefits during football's off season. The second sentence of the definition of disability in § 301(4) says, "The establishment of disability does not create a presumption of wage loss." *Romero* says this sentence means claimants must link the disability and wage loss to recover weekly benefits.

Applying § 301(4) second sentence and *Romero*, the Court said that "in order to be entitled to wage-loss benefits, a claimant must demonstrate a clear connection between wage loss and work-related injury." The court held this "requisite connection is not shown when plaintiff's lost wages are attributable to the end of the football season, rather than his shoulder injury." The court therefore concluded that the Appellate Commission "erred as a matter when it awarded wage loss benefits for time in the off-season when plaintiff would not otherwise be earning wages." The court remanded the case to the magistrate for determination of what portion of plaintiff's lost wages result from the end of the football season rather than his disability.

The court had reached the same conclusion in an earlier case: *Raybon v D.P. Fox Football Holdings LLC* (CA Docket No. 268634, rel'd July 17, 2007).

Out-of State Injury

In another unpublished opinion addressing a number of issues, the Court of Appeals primarily addressed the out-of-state injury provision described in MCL 418.845 (and at issue in the *Bezeau* Supreme Court case described earlier). The case is *Schindler v Asplundh Tree Expert Co* (CA Docket No. 279295, rel'd June 9, 2009). This case had been remanded to the court by the Supreme Court to consider "'whether the

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Michigan Bureau of Worker's Compensation has jurisdiction over the controversy arising out of plaintiff's injury'" and, assuming Michigan has jurisdiction, the court was to proceed to address the remaining issues relating to the occurrence of the injury and disability.

The Court addressed the jurisdictional issue by applying § 845 (as it read before its amendment of January 13, 2009) and *Karaczewski* (described above in *Bezeau*). Recall that § 845—before the way it currently reads—required that for injuries occurring outside of Michigan the employee must *both* be a resident of Michigan at the time of injury and be employed under a contract of hire made in Michigan.

In this case, the parties did not dispute that plaintiff was a Michigan resident when injured. The jurisdictional dispute centered solely on where the contract of hire was made. The employer contended that, while plaintiff was hired in 1993 via a contract of hire in Michigan, plaintiff was periodically laid off afterwards and signed a new contract of hire in 1997 in Wisconsin. The Appellate Commission found as fact, however, that there was no evidence that a subsequent contract of hire was entered into in Wisconsin. The court explained that plaintiff's "1993 contract and a union letter in 2004 reflecting that plaintiff was a member of the Michigan union" constituted sufficient factual evidence to affirm the finding that the "contract of hire arose in Michigan." After reviewing other issues, the court affirmed the award on the basis that there was also record support for the Appellate Commission's other factual findings.

Workers' Compensation Appellate Commission

En Banc Opinion

In *Trammel v Consumers Energy Co*, 2009 ACO #126, the Appellate Commission unanimously held that, in determining specific losses under MCL 418.361(2) where there has been an implant in the body, the "usefulness" of the body member at issue is to be determined without considering the ameliorating effects of the implant.

The Appellate Commission *sua sponte* decided to *en banc* this case and then unanimously reached the result described above. In so doing, the Appellate Commission rejected the defendant's argument that two Court of Appeals cases, *Tew v Hillsdale Tool & Manufacturing Co*, 142 Mich App 29; 369 NW2d 254 (1985) and *O'Connor v Binney Auto Parts*, 203 Mich App 522; 513 NW2d 818 (1994), control insofar as they say implants are to be considered in assessing "usefulness" for specific loss purposes. The Appellate Commission disagreed with defendant finding that *Cain v Waste Management, Inc*, 465 Mich 509; 638 NW2d 98 (2002) and *Cain v Waste Management, Inc (After Remand)*, 472 Mich 236; 697 NW2d 130 (2005) expressed disagreement with *Tew* and *O'Connor*.

Declining To Present Additional *Stokes* Proofs

In *Glave v City of Battle Creek School District*, 2009 ACO #41, the case had been tried before the Supreme Court's release of *Stokes* and resulted in an open award of benefits for a back injury. Defendant appealed, arguing the magistrate's disability analysis did not satisfy the *Stokes* criteria.

In a 2-1 opinion, the Appellate Commission agreed, noting that the magistrate had allowed the parties to supplement the record so as to address *Stokes* but plaintiff declined to present any additional proofs. As such, the Appellate Commission said, "The proofs simply cannot satisfy the *Stokes* standard. Plaintiff testified that he could not perform his previous jobs. *Stokes* requires much more. Plaintiff failed to show the jobs suitable to his qualifications and training under the *Stokes* standard. Without that proof, plaintiff cannot prevail." 🛠

Invite someone to join the section

http://www.michbar.org/sections/pdfs/app_03v2_exst.pdf

Michigan's Shrinking State Employee Workforce

By Murray A. Gorchow, Chairperson, Board of Magistrates

The state employee workforce numbers have been shrinking steadily in the first decade of the twenty-first century. We have certainly witnessed and been affected by a reduction in the number of magistrates from 30 in 2003 to 25 currently. The Appellate Commission was reduced from 7 to 5. The number of mediators has been reduced from 10 to only 4. There has been a reduction in overall Workers' Compensation Agency (WCA) staff from 202 in 2000 to 149 in 2008. Five hearings offices have been closed.

The WCA is not alone. In a recent study, *The Retrenchment of the State Employee Workforce in Michigan*, by Ballard & Funari, August 17, 2009, the writers have given us the numbers on what has been happening, statewide, including the real numbers and rate of reduction, pay level comparisons to the private sector, and changes in wages and benefits. From 2001 to 2008, the size of the state workforce decreased by more than 11,000, or 18.1 percent, affecting nearly every department of state government, even though workloads have not shrunk proportionally. By 2008, employment reductions led to a decrease of more than $600 million annually in salary alone, when compared to 2001. The accumulated savings over this period is over $3 billion.

Over this time frame, state employees have also accepted unpaid furlough programs, one of which is currently under way. Real wage growth for state employees has been very close to zero, and state employees have paid more for retirement and health-care benefits, including substantial increases in premiums, deductibles, and co-pays. Taken together, these changes have saved the state of Michigan approximately $3.3 billion in wages, $143 million in pension expenditures, and $300 million in health expenditures, for a total of more than $3.7 billion.

The House Fiscal Agency reports that state employees earn less than their private-sector counterparts, on average, in *each* one of eight different categories of educational attainment. State employees with a high-school education or some college receive salaries that are roughly comparable with their counterparts in the private sector. However, more than half have at least a bachelor's degree. In terms of salaries, on average, these highly educated state employees fall substantially short (only 72.4 percent to 80.4 percent) of their private-sector counterparts.

The study authors noted that it is far beyond the scope of their study to determine the "optimal" size of the state workforce, or the "optimal" structure of salaries and fringe benefits for state workers. However, I agree with their conclusion that it is "indisputable that state employees have already played a very considerable role in helping the state of Michigan to address its budgetary problems."

SBM Forms Task Force on the Future of Michigan's Courts

The State Bar of Michigan is creating a special task force to identify how Michigan's justice system can meet the needs of the public in the face of transformational changes underway in the state's economy.

The task force will have 27 members, including attorneys from a broad range of practices and circuit, probate, district, and appellate judges. It will be chaired by State Bar President Edward H. Pappas and Barry L. Howard, former chief judge of the Oakland County Circuit Court. The Hon. Marilyn J. Kelly, chief justice of the Michigan Supreme Court will also serve as a member.

"Michigan is facing an economic upheaval unprecedented in our lifetimes and unparalleled among the 50 states, and we are called upon to think deeply about how we can be a pioneer in the provision of effective and efficient court services. Already, too many people in need of legal services are unable to afford them," said Ed Pappas.

"During the last century, Michigan's court system earned a national reputation for integrity and resilience. We helped develop best practices on a wide-range of issues, from caseload management in our urban courts to drug courts to domestic violence programs. Once again, we must act to protect what is essential and transform what no longer works. We are at a critical crossroads, and we will meet the challenge," Pappas added.

The work of the task force will be aided by four committees: Court Structure and Resources, Access to Justice, Technology, and Business Impact. Membership of the committees will be drawn from state and national experts and key stakeholders.

The State Bar is designing an electronic platform for the project, including webstreaming of task force meetings, a blog, and a discussion board to encourage the participation of its members and the public in all aspects of the task force's work.

The first meeting of the special task force will be in October. A final report is expected in late May or June of 2010.

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McCoy gives birth to FGA

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

With the motto, *Carpe Furlough Diem* (seize the furlough day), Magistrate Victor McCoy put together the inaugural event of the **F**urlough **G**olf **A**ssociation held on August 21, 2009, at the MSU Forest Akers East course in East Lansing. Not only was there golf, but we had the opportunity to celebrate Magistrate Jennifer Barnes' 21+ birthday.

The round was enthusiastically observed by the MSU herd of cows in the adjacent field. The weather provided gale force winds buffeting the brutal, no-holds barred competition between the two teams.

Barnes demonstrated that new clubs for her birthday was a wise move indeed. Nolish proved that some days, the golf mojo just passes you by.

Although serious scorekeeping questions remain as of the date of this writing, Team Gorchow did emerge victorious by some number of strokes (score remains un-audited), trophy in hand.

Many thanks to Vic for all the effort putting together this fine day. Vic led the way in showing that when the State gives furloughs, the furloughed play golf.

(Left to right) Director Jack Nolish, Magistrate Jennifer Barnes, Magistrate Victory McCoy (FGA Commissioner), and Magistrate Michael Mason

(Left to right) Magistrate Paul Purcell, Magistrate Carol Guyton, Chief Magistrate Murray Gorchow (seen holding the trophy), and Magistrate Lee Decker

Member Directory Searching for Cell Phones

Have you ever wanted to find a colleague's contact information while you're away from a computer? Now you can easily find it by accessing the State Bar online member directory page from your cell phone. The online member directory was recently redesigned to recognize cell phone Internet browsers and automatically reconfigure the page for viewing on a smaller cell phone screen. Visit the member directory on the Bar's website, *www.michbar.org*, just as you would on a computer.

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