State Bar of Michigan

Workers' Compensation Section Newsletter

Spring 2009

Contents

What Happens in Vegas . . .

By Murray Feldman

As you know from notices posted at various bureaus, and from e-mails sent directly to you, your section has scheduled a seminar in Las Vegas, Nevada for April 30–May 3, 2009. In the most recent e-mail, we have included not only a registration form, but a listing of the activities which will occur, including a detailed agenda for the seminar on May 1, 2009. Please note that payment *must* be received on or before March 2, 2009. Departures are available from both Detroit and Grand Rapids. We are looking forward to a great turnout. Any questions with regard to the seminar should be directed to Ms. Deb Strain at (248) 457-4046 or at *dstrain@gmhlaw.com*. Your section looks forward to your joining us in Las Vegas and participating in all of the activities planned.

Summer Section Meeting

By Murray Feldman

A reminder to note on your calendars…our summer section meeting is scheduled for June 18–20, 2009, at Crystal Mountain Resort. For any of you who have not been to Crystal Mountain recently, they have upgraded their facilities significantly and have opened a new spa. They have two golf courses, both of which are terrific. We are planning a wonderful presentation and lots of fun activities for our members and their families. Although we will not have confirmation until March, your section has invited newly-elected Supreme Court Justice Diane Hathaway (and her husband) as our guest speaker for our program on June 19, 2009, and we are hopeful they will be able to attend. Your section will be financially supporting the seminar to reduce direct costs to members, and you will also be receiving these details, along with reservation forms, in the near future. As always, your participation strengthens our section, and we look forward to a great turnout at this event.

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.

Material for publication should be sent to the editor at:

4301 Fashion Square Blvd.
Saginaw, MI 48603
tomrut@bkf-law.com

Letter to the Editor

Kudos to Work Comp Attorneys

By Jerry Marcinkoski

A recent letter-writing campaign was launched against me and other members of the Board of Law Examiners, where I hold a position. The letter writer (a disgruntled candidate for the bar) asked for "negative" information about me and invited "anonymous submissions." The letter was sent to plaintiffs' attorneys and codefendants in a great many cases where I had been involved in the past.

It was personally gratifying to have many plaintiffs' attorneys, as well as co-defense counsel, telephone to give me a "heads up" about the letter, express disgust with it, and say they were throwing it in the wastebasket. I'm told I'm not the most popular attorney around at this point in time. The fact that, nevertheless, so many attorneys expressed support speaks volumes about the character of workers' compensation attorneys. The section fosters this, and I appreciate it. Kudos to the section's workers' compensation attorneys. 🛠

Editor's Note

Remember to sign up quickly for the Vegas trip and the spring seminar. Do you recall these terms? Answers on page 11. (Yes, I pulled these from *Black's Law Dictionary*).

1. GEREFA _____
2. MORTMAIN ACTS _____
3. HUE and CRY _____
4. CHIMIN _____
5. CHAMPERTY _____
6. GALE _____
7. SUPER ALTUM MARE _____
8. WAIF _____
9. ODD LOT _____
10. SHIRE REEVE _____

Workers' Compensation Appellate Commission

By Martha M. Gasparovich, Chairperson

We all know that the one constant in the practice of workers' compensation in Michigan is change. We have certainly seen a few changes in our case law in the last couple of years.

If you disagree with the way the courts have interpreted our Act in the past, or disagree with a future interpretation, then that issue should be raised over and over again. If the issue comes up in a case, it needs to be tried, and while acknowledging the current case law, the argument needs to be respectfully made to the magistrate as to why the case law is wrong. Of course the magistrate is going to follow the law. So you then need to appeal to the WCAC on that issue, again arguing why the case law is wrong. The Commission will, of course, follow the law, but sometimes, if you have a persuasive legal argument, the Commission or one of its panel members may write an opinion which respectfully agrees with your point, but will ultimately follow the case law.

You can't stop there, though. You must appeal to the Court of Appeals, which may or may not grant leave, and then to the Supreme Court, which again may or may not grant leave.

If you can get the Commission, the Court of Appeals, or the Supreme Court to acknowledge your argument, even if you lose in that case, you have accomplished a great deal.

So, what do you do if you lose??? If you really believe that your interpretation of the Act has merit and the case law is wrong…you do it all over again in the next case which presents the issue.

Whether or not you agree with the results of *Sington, Rakestraw, Karaczewski,* or *Stokes,* these decisions did not occur just because the Supreme Court decided one day to reverse decades of precedent. These cases all came about because some very competent and extremely persistent attorneys raised the issues in every relevant case that they tried. They appealed those cases, making the same arguments over and over, until, in each one of those cases, they got the Court's attention.

Prior to those cases, the issues had been raised over and over, each time acknowledging the prior court rulings and precedent, but preserving the issue for appeal. Sometimes the makeup of the court can make a difference; sometimes new developments in the state's global positioning can make a difference. However, if an interpretation is never challenged, it will never change.

There are many good sources of information to prepare to make these challenges. Every one of you should have access to a respectable source such as Westlaw, Lexis Nexis, Welch's Workers' Compensation in Michigan, or any other reference which will keep you up to date, and help you research unusual issues.

The WCAC's website lists cases of recent interest, which are cases that we think address important disputes of current or future court interpretations. Three cases in which the Commission sat en banc have now been decided and can be found on our website. Those three cases are:

Curtiss v Curtiss Reporting, 2009ACO #9, is a case that we used to express when a remand for purposes of developing the record after *Stokes*, 2008 will occur. Mr. Curtiss probably did not prove disability under any of the previous *Stokes* standards. The question was whether or not an appellant had to at least have established disability under the case law at the time of the trial, or the current case law, whichever is less strict. A majority agreed that this case, and in essence, all cases tried before the Supreme Court issued Stokes on June 12, 2008, and the issue of disability was preserved, should be remanded for further proofs.

Slais v State of Michigan, Dept. of State Police, 2009 ACO #10 involved a vocational rehabilitation case. The issues that the Commission addressed were whether due process required a recording of the proceedings at any point, and if so, at what point. The hearing at the director's level has never been a formal recorded hearing. Although, at times, it may result in an order being issued, when a vocational rehabilitation issue has been presented to a magistrate, there has not been consistency in how it was handled.

The case of *Mazzara v Cappucini Giuseppe Masonry*, 2000 ACO #386, addressed the magistrate's role, finding that the magistrate only had authority to review what the director had done to determine whether there was an abuse of discretion. No new evidence could be presented. Some magistrates were following *Mazzara*, and some were not. In *Slais*, the magistrate followed the *Mazzara* rule. Defendant argued that it was deprived of its due process rights because there was no record made at any level on which it could base an appeal. The plaintiff, in this case, was happy with the result, and did not want to have to have a new hearing. The WC Agency intervened, not wanting to be required to provide a formal hearing at the director's level. A majority of the Commission agreed that the hearing before the magistrate must be recorded but that no formal hearing is required at the director level. Since no recording is required at the director hearing level, the filing

Continued on next page

WC Appellate Commission
Continued from page 3

of an application with the Board of Magistrates initiates a new process, and a de novo hearing is required.

Nelson v GMC and Coleman v GMC, 2009 ACO #11 were two cases with almost identical factual circumstances. They both dealt with cumulative trauma injuries that are contributed to by employment in both Michigan and, subsequently, in another state. Therefore, they were consolidated and heard together. Section 301(1) provides that in cases involving cumulative trauma, "the date of injury shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability." A majority of the Commission held that the subsequent contribution in another state does not negate the obligation of the Michigan employer for its contribution to the injury, even in light of *Karaczewski*. The majority relied on *Smith v Lawerence Baking*, 370 Mich 169 (1963) and *Arnold v GMC*, 456 Mich 682 (1998). *Smith* held that the legislature intended our Act to be for Michigan employers and not employers from other states, unless they meet certain criteria. The minority's position was that because plaintiff was last subjected to the conditions that led to the disability in another state, MCL 418.301(1) requires the subsequent employer to be totally liable. The *Nelson/Coleman* case has less of an impact now, because of the legislative amendment to section 845. However, you may find yourself dealing with an injured worker who was affected by *Karaczewski*, before the amendment was passed.

We are looking forward to seeing all of you at the annual meeting and seminar in June. The attendance continues to increase, so don't miss out on the abounding fun and information. 🛠

The Top Ten Ways to Aggravate Magistrates

By Christopher Ambrose

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

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

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

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

7. Forgetting to send out the notice of intent on medical you plan to offer into evidence. I have surprised more than one attorney when reciting the Rule that deals with this issue. You are much better off sending a notice to opposing counsel rather than being caught with your pants down on this one, 42 days is 42 days–6 weeks. A month plus about 12 days. Not real complicated, folks. This is not a good excuse for an adjournment.

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

5. Not preparing exhibits in advance. There is nothing more frustrating than starting a trial, asking about exhibits, and being told that more time may be needed

to go through the medical, and figure out what will be used as an exhibit, and what will not. Please do this in advance. Talk to opposing counsel as to what will be stipulated to, and what will be in contention. Ask the magistrates for stickers, and mark them ahead of time. It will save a lot of time, and make for a much cleaner record.

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

3. Refusing to facilitate. Please don't tell the judge that this case is "impossible to settle" if it is not. Many, many times, I have strongly urged attorneys to facilitate cases when they feel settlement is impossible. Eighty percent of the time, these cases get resolved. Magistrates know this isn't always possible, but please make an effort if there is any chance to alternatively resolve the dispute.

Continued on page 12

Karaczewski Redux

By Murray A. Gorchow, Chairperson, Board of Magistrates

In the winter 2007-2008 issue of the *Workers' Compensation Section Newsletter,* I wrote an article entitled "Jurisdiction Over Out-of-State Injuries, A Change in the Law." The Supreme Court had reinterpreted the Act on this subject in the case of *Karaczewski v Farbman Stein Co*, 478 Mich 28 (2007), and overruled its prior decision in *Boyd v W G Wade Shows*, 443 Mich 515 (1993). At that time, Section 845 of the Act read as follows:

> The bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury *and* the contract of hire was made in this state. Such employee or his dependents shall be entitled to the compensation and other benefits provided by this act. (Emphasis added).

Until 2007, the leading case on Section 845 had been *Boyd v W.G. Wade Shows*. *Boyd* reaffirmed that if the contract of hire is entered into in Michigan, even if the worker is not a resident of Michigan on the date of injury, the Board of Magistrates has jurisdiction to resolve controversies for out-of-state injuries arising from that employment. In 2007, the Supreme Court overturned 74 years of precedent, and held that in order for an out-of-state injury claim to come under the jurisdiction of this state, the injured employee must be a resident of Michigan at the time of the injury, *and* the contract of hire must *also* have occurred in Michigan. The Court in *Karaczewski* interpreted Section 845 to mandate *both* requirements be satisfied, not just one.

In January 2009, the legislature responded by amending Section 845 to read as follows:

> 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. (Emphasis added).

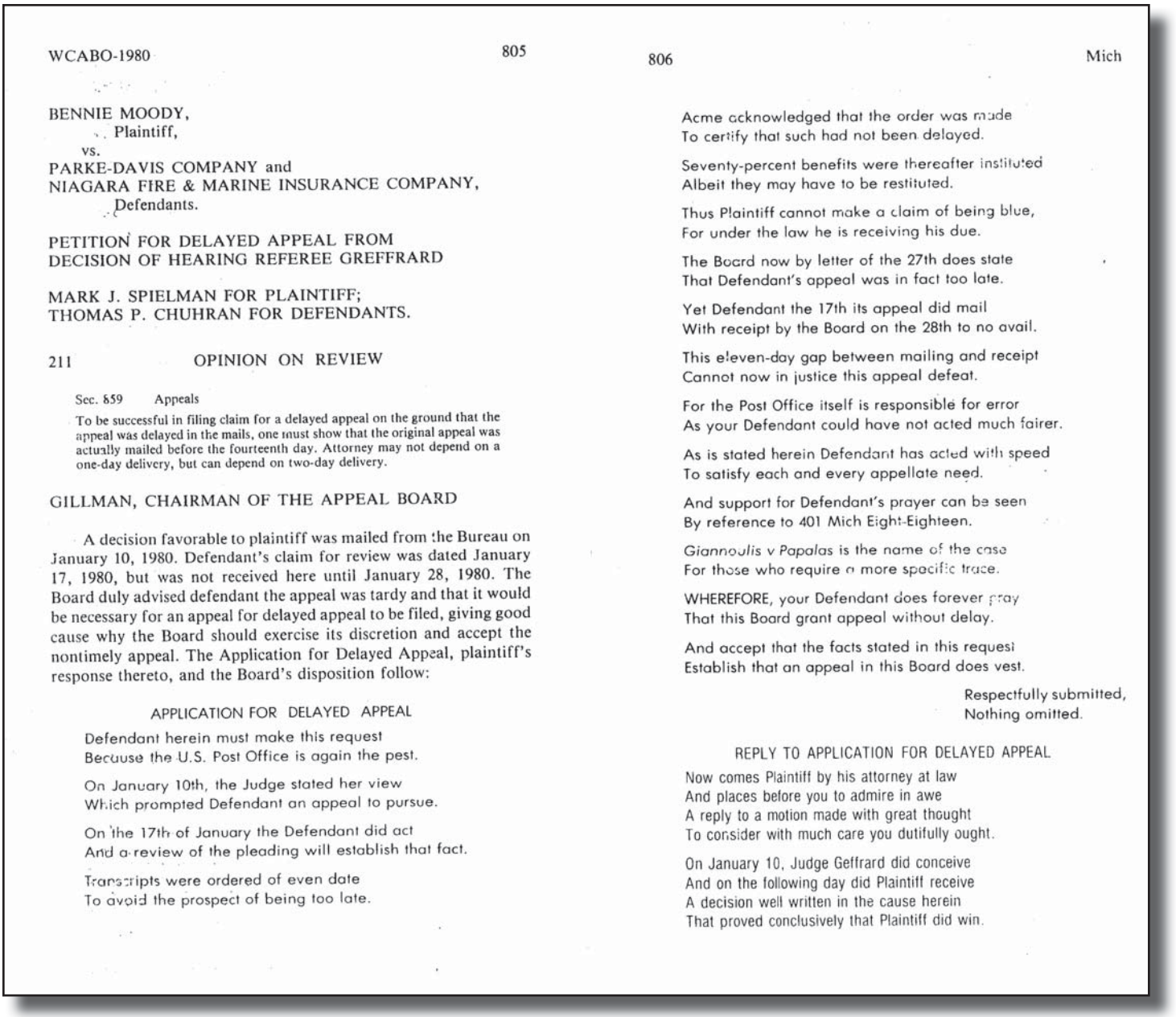
This amendment was given immediate effect on January 13, 2009. Apparently, the amendment was intended to be a "*Karaczewski* fix." Unfortunately, there was no indication in the newly amended section that it was to have retroactive effect. As I wrote in my previous article, this issue involves the subject matter jurisdiction of the Board of Magistrates. The parties may not stipulate to confer on the Board of Magistrates subject matter jurisdiction that it does not possess. If we do not have subject matter jurisdiction over a claim, the only authority we have as magistrates is to dismiss the claim. *Bowie v Arder*, 441 Mich 23, 56 (1992).

What, then, do we do with claims for injury dates after *Karaczewski* was decided on May 23, 2007, but before the Act was amended, effective January 13, 2009? It will be up to counsel to research and argue the issue, and for the Board of Magistrates to decide, on a case-by-case basis, whether or not the recently amended section applies to injury dates falling in the gap. There is a considerable body of workers' compensation retroactivity case law over the years that will need to be considered in dealing with this question. I have been advised that there are appeals pending involving out-of-state injury cases that might decide the retroactivity issue. Keep your eyes open, and when the issue arises in your practice, get thee to your libraries and computers! 🛠

Something from the Past to Lighten the Present

By Murray A. Gorchow, Chairperson, Board of Magistrates

Eight years into my legal career practicing workers' compensation, I came across a delightfully entertaining decision of the Workers' Compensation Appeal Board. The 1980 decision was written by the then chairman of the Appeal Board, Mike Gillman, a 2002 inductee to the Workers' Compensation Hall of Fame. Counsel for the defendant-appellant, Tom Chuhran, a 1999 inductee to the Workers' Compensation Hall of Fame, who passed away last year, wrote an application for delayed appeal in poetic verse, to which plaintiff's counsel, Mark Spielman, replied in verse. Not to be deterred, Chairperson Gillman wrote his opinion in kind, with a surprising twist of a conclusion. I do not vouch for the continuing validity of the *dicta* regarding acceptable delays of the United States postal service, when filing an appeal with the Appellate Commission, but I thought everyone was entitled to some fun and humor in the context of the professional rain clouds many of us find ourselves navigating these days. Enjoy!



WCABO-1980 805

BENNIE MOODY,
Plaintiff,
vs.
PARKE-DAVIS COMPANY and
NIAGARA FIRE & MARINE INSURANCE COMPANY,
Defendants.

PETITION FOR DELAYED APPEAL FROM
DECISION OF HEARING REFEREE GREFFRARD

MARK J. SPIELMAN FOR PLAINTIFF;
THOMAS P. CHUHRAN FOR DEFENDANTS.

211 OPINION ON REVIEW

Sec. 859 Appeals

To be successful in filing claim for a delayed appeal on the ground that the appeal was delayed in the mails, one must show that the original appeal was actually mailed before the fourteenth day. Attorney may not depend on a one-day delivery, but can depend on two-day delivery.

GILLMAN, CHAIRMAN OF THE APPEAL BOARD

A decision favorable to plaintiff was mailed from the Bureau on January 10, 1980. Defendant's claim for review was dated January 17, 1980, but was not received here until January 28, 1980. The Board duly advised defendant the appeal was tardy and that it would be necessary for an appeal for delayed appeal to be filed, giving good cause why the Board should exercise its discretion and accept the nontimely appeal. The Application for Delayed Appeal, plaintiff's response thereto, and the Board's disposition follow:

APPLICATION FOR DELAYED APPEAL

Defendant herein must make this request
Because the U.S. Post Office is again the pest.

On January 10th, the Judge stated her view
Which prompted Defendant an appeal to pursue.

On the 17th of January the Defendant did act
And a review of the pleading will establish that fact.

Transcripts were ordered of even date
To avoid the prospect of being too late.

806 Mich

Acme acknowledged that the order was made
To certify that such had not been delayed.

Seventy-percent benefits were thereafter instituted
Albeit they may have to be restituted.

Thus Plaintiff cannot make a claim of being blue,
For under the law he is receiving his due.

The Board now by letter of the 27th does state
That Defendant's appeal was in fact too late.

Yet Defendant the 17th its appeal did mail
With receipt by the Board on the 28th to no avail.

This eleven-day gap between mailing and receipt
Cannot now in justice this appeal defeat.

For the Post Office itself is responsible for error
As your Defendant could have not acted much fairer.

As is stated herein Defendant has acted with speed
To satisfy each and every appellate need.

And support for Defendant's prayer can be seen
By reference to 401 Mich Eight-Eighteen.

Giannoulis v Papalas is the name of the case
For those who require a more specific trace.

WHEREFORE, your Defendant does forever pray
That this Board grant appeal without delay.

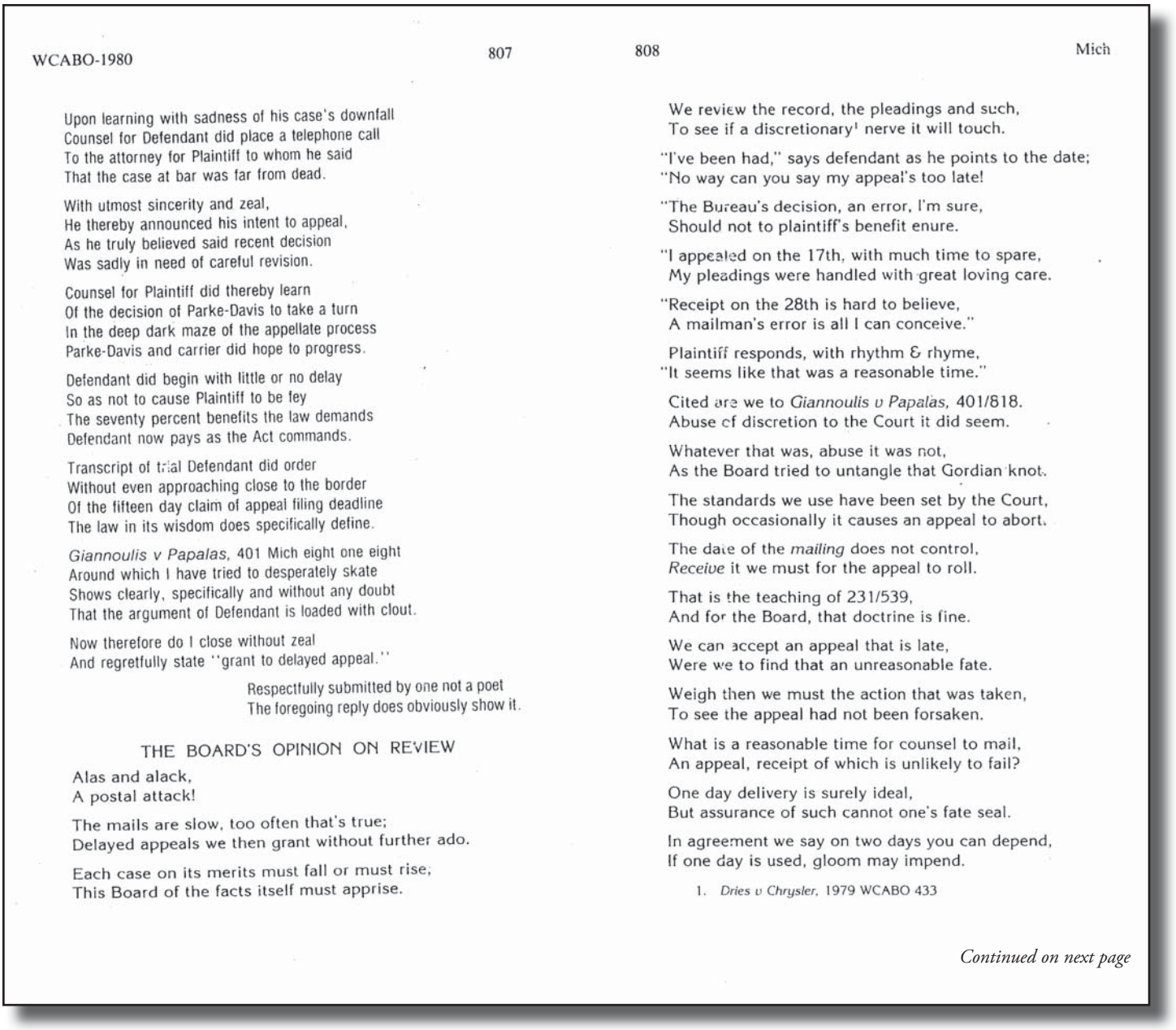
And accept that the facts stated in this request
Establish that an appeal in this Board does vest.

Respectfully submitted,
Nothing omitted.

REPLY TO APPLICATION FOR DELAYED APPEAL

Now comes Plaintiff by his attorney at law
And places before you to admire in awe
A reply to a motion made with great thought
To consider with much care you dutifully ought.

On January 10, Judge Geffrard did conceive
And on the following day did Plaintiff receive
A decision well written in the cause herein
That proved conclusively that Plaintiff did win.



WCABO-1980 807 808 Mich

Upon learning with sadness of his case's downfall
Counsel for Defendant did place a telephone call
To the attorney for Plaintiff to whom he said
That the case at bar was far from dead.

With utmost sincerity and zeal,
He thereby announced his intent to appeal,
As he truly believed said recent decision
Was sadly in need of careful revision.

Counsel for Plaintiff did thereby learn
Of the decision of Parke-Davis to take a turn
In the deep dark maze of the appellate process
Parke-Davis and carrier did hope to progress.

Defendant did begin with little or no delay
So as not to cause Plaintiff to be fey
The seventy percent benefits the law demands
Defendant now pays as the Act commands.

Transcript of trial Defendant did order
Without even approaching close to the border
Of the fifteen day claim of appeal filing deadline
The law in its wisdom does specifically define.

Giannoulis v Papalas, 401 Mich eight one eight
Around which I have tried to desperately skate
Shows clearly, specifically and without any doubt
That the argument of Defendant is loaded with clout.

Now therefore do I close without zeal
And regretfully state "grant to delayed appeal."

Respectfully submitted by one not a poet
The foregoing reply does obviously show it.

THE BOARD'S OPINION ON REVIEW

Alas and alack,
A postal attack!

The mails are slow, too often that's true;
Delayed appeals we then grant without further ado.

Each case on its merits must fall or must rise;
This Board of the facts itself must apprise.

We review the record, the pleadings and such,
To see if a discretionary[1] nerve it will touch.

"I've been had," says defendant as he points to the date;
"No way can you say my appeal's too late!

"The Bureau's decision, an error, I'm sure,
Should not to plaintiff's benefit enure.

"I appealed on the 17th, with much time to spare,
My pleadings were handled with great loving care.

"Receipt on the 28th is hard to believe,
A mailman's error is all I can conceive."

Plaintiff responds, with rhythm & rhyme,
"It seems like that was a reasonable time."

Cited are we to *Giannoulis v Papalas*, 401/818.
Abuse of discretion to the Court it did seem.

Whatever that was, abuse it was not,
As the Board tried to untangle that Gordian knot.

The standards we use have been set by the Court,
Though occasionally it causes an appeal to abort.

The date of the *mailing* does not control,
Receive it we must for the appeal to roll.

That is the teaching of 231/539,
And for the Board, that doctrine is fine.

We can accept an appeal that is late,
Were we to find that an unreasonable fate.

Weigh then we must the action that was taken,
To see the appeal had not been forsaken.

What is a reasonable time for counsel to mail,
An appeal, receipt of which is unlikely to fail?

One day delivery is surely ideal,
But assurance of such cannot one's fate seal.

In agreement we say on two days you can depend,
If one day is used, gloom may impend.

1. *Dries v Chrysler*, 1979 WCABO 433

Continued on next page

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

There have not been any full decisions from the Supreme Court since our last newsletter, as of this writing. There has, however, been a substantive order from the Court in *Sazima v Shepherd Bar & Restaurant*, ____ Mich ____; 758 NW2d 270 (2008) (SC Docket No. 136940, rel'd December 17, 2008).

The employer in this case did not have an employee parking lot. It directed its employees to park in public spaces near its place of business (a restaurant), but not in parking spots in front of the restaurant, as they were reserved for customers. Plaintiff parked in a space down the street from the employer's location. She fell and was injured while walking from that parking space to work. The magistrate awarded benefits, and the Workers' Compensation Appellate Commission affirmed. After the Court of Appeals denied leave, the Supreme Court heard oral argument and

Continued on next page

resolved the appeal as follows:

> On November 19, 2009, the Court heard oral argument on the application for leave to appeal the June 17, 2008 order of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE the ruling of the Worker's Compensation Appellate Commission (WCAC). The WCAC erred by finding that the plaintiff's injury occurred in the course of her employment. "[T]here is no recovery for an employee who is injured on a public street or other property not owned, leased, or maintained by the employer while traveling to or from a nonemployer parking lot because this injury is not in the course of employment." *Simkins v General Motors Corp (After Remand)*, 453 Mich 703, 723 (1996); see also MCL 418.301(3). The plaintiff's activity did not confer a special benefit on her employer, did not serve a dual purpose, nor did it subject her to excessive risk. The plaintiff was "'master of [her] own movements upon the street and encountered there a risk incident to any user of the street.'" *Bowman v RL Coolsaet Constr Co (On Remand)*, 275 Mich App 188, 193 (2007), quoting *Dent v Ford Motor Co*, 275 Mich 39, 42 (1936). We agree with Justice Weaver's concurring opinion in *Simkins*, and overrule *Fischer v Lincoln Tool & Die Co*, 37 Mich App 198 (1971), which is inconsistent with *Simkins*.

The Court's ruling was 4-3. Plaintiff has moved the Court for reconsideration, and that motion pends as of this writing.

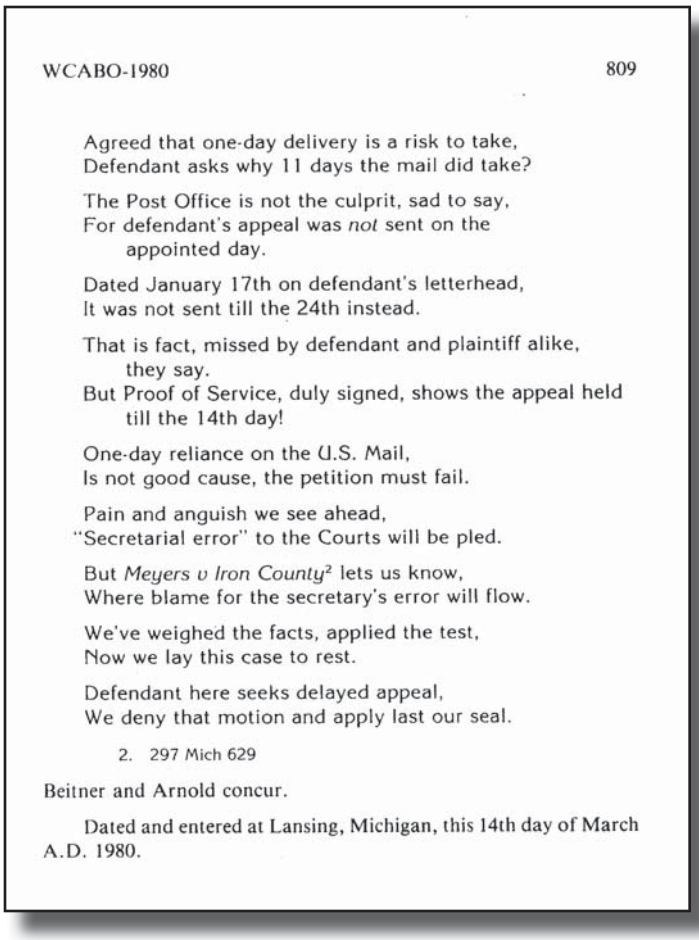
On January 22, 2009, the Supreme Court heard oral argument in *Petersen v Magna Corp* (SC Docket Nos. 136542 and 136543). The issue in *Petersen* is whether the defendant can be charged with plaintiff's counsel's fees in relationship to unpaid medical expenses. The case is still pending before the Court.

Finally, recall that the Supreme Court had remanded *Lofton v AutoZone, Inc* (SC Docket No. 136029) to the Board of Magistrates for application of *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008) and, if plaintiff is disabled under *Stokes*, a determination of whether plaintiff's disability is partial under MCL 418.361(1). The Court in remanding the case retained jurisdiction and required the magistrate to issue a decision and file it with the Court. The magistrate on remand resolved the case, finding plaintiff partially disabled. The case is now back before the Supreme Court.

Court of Appeals

There have been no published decisions from the Court of Appeals through the time of this writing. There have, however, been five non-precedential, unpublished decisions: *Swinton v Michigan State University* (CA Docket No. 280135, rel'd October 7, 2008) [mental disability award reversed and remanded for further proceedings]; *Rogers v Delphi Auto Systems* (CA Docket No. 278822, rel'd October 21, 2008) [remand for application for *Stokes*]; *Loos v J.B. Installed Sales, Inc* (CA Docket No. 275704, rel'd November 20, 2008) [income tax forms not dispositive on issue of whether claimant is an "employee"]; *Patterson v Delphi Corp* (CA Docket No. 278823, rel'd January 27, 2009) [open award affirmed, though the Commission may have used an improper legal perspective, given Commission's "further analysis" and findings]; *Adrine v Event Staffing, Inc* (CA Docket No. 281360, rel'd February 3, 2009) [dismissal of defendant's appeal for failure to pay 70 percent benefits reversed].

Something from the Past . . ., continued from page 7



WCABO-1980 809

Agreed that one-day delivery is a risk to take,
Defendant asks why 11 days the mail did take?

The Post Office is not the culprit, sad to say,
For defendant's appeal was *not* sent on the
appointed day.

Dated January 17th on defendant's letterhead,
It was not sent till the 24th instead.

That is fact, missed by defendant and plaintiff alike,
they say.
But Proof of Service, duly signed, shows the appeal held
till the 14th day!

One-day reliance on the U.S. Mail,
Is not good cause, the petition must fail.

Pain and anguish we see ahead,
"Secretarial error" to the Courts will be pled.

But *Meyers v Iron County*[2] lets us know,
Where blame for the secretary's error will flow.

We've weighed the facts, applied the test,
Now we lay this case to rest.

Defendant here seeks delayed appeal,
We deny that motion and apply last our seal.

2. 297 Mich 629

Beitner and Arnold concur.

Dated and entered at Lansing, Michigan, this 14th day of March A.D. 1980.

Workers' Compensation Appellate Commission

Two *En Banc* Decisions

The Commission released two *en banc* decisions since our last newsletter. The first one relates to outstate injuries, and the second one relates to procedures for vocational rehabilitation proceedings under MCL 418.319.

Injuries Outside Michigan

In *Nelson v General Motors Corp/Coleman v General Motors Corp*, 2009 ACO #11, both plaintiffs worked the majority of their careers for General Motors in Michigan. Also, both plaintiffs left Michigan to accept out-of-state work for General Motors. At the time of their last days of work for General Motors, both were legal residents of other states. They both returned to Michigan and took disability retirement pensions. They then filed for workers' compensation benefits in Michigan, alleging cumulative trauma-type injuries. They pled their last days of work in Michigan, not their actual last days of work for General Motors in the other states.

The magistrate denied both plaintiffs' claims. Resolution of the case was influenced by *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007). *Karaczewski* held that, as MCL 418.845 had held prior to January 13, 2009, a claimant must be *both* a resident of Michigan *and* employed under a contract of hire made in Michigan for Michigan to have jurisdiction over an alleged injury.

On plaintiffs' appeals, the Commission remanded the cases to the magistrate for redetermination. The Commission said that, while there is no Michigan jurisdiction over injuries sustained in the other states, a determination must be made as to whether work injuries occurred in Michigan prior to the claimants' last days of work in the other states. The Commission said that in cases of cumulative trauma, "the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death, would necessarily be the last day of work in such employment in Michigan." That is, while a "magistrate would not have jurisdiction to make a determination as to whether the employee was subjected to conditions that resulted in the disability … in another state," the magistrate must make findings based only on "whether the injuries in Michigan contributed to any disability."

The Commission's decision was 3-2. The dissent would hold that, under *Connaway v Welded Construction Co*, 462 Mich 691; 614 NW2d 607 (2000), both of the operative dates of injury in these cases must be the claimants' last days of work outside of Michigan and, therefore, they would affirm the magistrate's rejection of their claims.

Please note: The impact of this holding is limited because on January 13, 2009, the governor signed Senate Bill No. 1596, which amends MCL 418.845. Section 845, as it now reads, holds that Michigan has jurisdiction over outstate injuries if *either* the employee is a resident of the state at the time of the injury *or* a contract of hire was made in this state.

Section 319 Vocational Rehabilitation Proceedings

In the *en banc* decision *Slais and Workers' Compensation Agency v State of Michigan, Department of State Police*, 2009 ACO #10, the Commission considered the question of whether vocational rehabilitation proceedings, undertaken pursuant to MCL 418.319, must be transcribed proceedings with an evidentiary record. The initial steps under § 319 are the proceedings conducted by the director (or the director's designee), and the next step (if taken) is a hearing before a magistrate.

The plaintiff in this case had been a Michigan state trooper who was injured and could not be returned to work. Years ago, defendant began the traditional type of vocational rehabilitation described in § 319. Plaintiff resisted those efforts, insisting he wanted to attend law school as his vocational rehabilitation. The dispute was heard at the initial level by Mr. David Campbell, the state's vocational rehabilitation consultant. No transcript was made of the vocational rehabilitation proceeding held before Mr. Campbell. Mr. Campbell issued his decision in favor of plaintiff. Defendant then applied for a hearing before a magistrate. There, defendant argued that the proceeding before Mr. Campbell should have included a formal record with state-funded transcription of the hearing. Defendant further argued that a formal evidentiary hearing on the record is also required before the magistrate. The magistrate disagreed with the defendant on both points and also ruled for plaintiff.

Defendant appealed to the Workers' Compensation Appellate Commission. The director of the Workers' Compensation Agency intervened and supported plaintiff's position. The Commission decided to hear the case *en banc* with an oral argument.

The Commission then issued a 4-1 decision. All commissioners agreed that the hearing before the magistrate must be an evidentiary hearing on the record. The Commission said to rule otherwise would deprive a party of due process of law, and the Commission said the magistrate is "starting over with the evidence" and not limited to the materials submitted at the initial level. The Commission held in pertinent part:

> As indicated earlier in this opinion, we believe that even before considering constitutional issues, that the Worker's Disability Compensation Act requires that in rehabilitation hearings before a magistrate, stenographic notes or the use of recording equipment is mandatory. Further, to the extent that the Commission's opinion pertaining to constitutional issues is pertinent, we find that failure to grant such a hearing so recorded before a magistrate would deprive the appellant due process of law. The proceeding before the magistrate is a de novo hearing. Essentially the magistrate is starting over with

Continued on next page

Recent Cases
Continued from page 9

> the evidence. The parties are not limited to submitting the exhibits or "testimony" discussed or used at the informal hearing with the director's representative/mediator. Because there is no record of the informal hearing, practically there would be no way for the magistrate to discern what transpired at the informal hearing level.

The Commission then remanded the case to the magistrate for a hearing on the merits, saying a "record shall be made of such proceedings, utilizing stenographic notes or the equivalent thereof."

As indicated, the dissenter agreed with the above but would also require that the hearing at the initial level before the director's representative similarly include "a record of the proceedings before the director."

Paige v City of Sterling Heights

This is the death case that had been decided and remanded by the Supreme Court in *Paige v City of Sterling Heights*, 476 Mich 495; 720 NW2d 219 (2006). The Supreme Court in that decision held that MCL 418.375(2) requires the claimant(s) to demonstrate that work is *the* proximate cause of the death, not just *a* proximate cause. The Supreme Court held that "'the proximate cause'" means "the sole proximate cause, i.e., 'the one most immediate, efficient, and direct cause preceding an injury.'" The case was remanded for a factual determination of whether the work injury was the proximate cause of death.

The magistrate on remand found the death compensable, saying Mr. Paige's fatal myocardial infarction in 2001 was caused by a combination of coronary artery disease and the weakened condition of his heart from the initial work-related myocardial infarction in 1991.

On defendant's appeal, the Commission affirmed. The Commission held that the one most immediate, efficient, and direct cause of death was the deceased's coronary artery disease, and there was detailed medical testimony explaining how the coronary artery disease had been significantly aggravated by the work-related myocardial infarction.

The Commission added that the magistrate's reference to the statutory presumption that applies to firefighters in MCL 418.405 was incorrect, but the magistrate's application of the significant manner requirement in MCL 418.301(2) was correct and adequately supported.

Due Process

In *Murad v Metro Car Co*, 2008 ACO #285, a gunman and one accomplice had entered the business where plaintiff was working, forced him into a car, and then fatally shot him. A complicated federal criminal investigation followed. Defendant asked the magistrate to adjourn the hearing until it could obtain access to the criminal information relating to plaintiff's death. The magistrate refused. reasoning that plaintiff's potential criminal activities were speculative and defendant could have obtained the information from other sources.

The Commission majority disagreed, finding the magistrate abused her discretion. The Commission relied on procedural due process for its holding, saying:

> Procedural due process limits a magistrate's discretion because it forbids depriving a party's property right without sufficient process. Sufficient process in worker's compensation proceedings requires a hearing where the moving party presents sufficient proofs to satisfy the burden of proof and the non-moving party presents its contrary evidence. Each of these principles enjoys direct confirmation from the Supreme Court. In *Williams v Hofley Manufacturing Company*, 430 Mich 603; 424 NW2d 278 (1988), the Court specifically found that defendant possessed a property interest in the money necessary to pay benefits. The Court proclaimed, "It is beyond dispute that a money judgment rendered in this litigation against defendant would deprive it of property." [*Id.* at 611.] With similar conviction, the Court requires a proper worker's compensation proceeding before entering an award. In *Reck v Whittlesberger*, 181 Mich 463; 148 NW2d 247 (1914), the Court stated that parties must be afforded an opportunity to address issues before any decision is rendered.

The Commission therefore remanded the case for additional proceedings, allowing the parties to present additional evidence that addressed the reason why plaintiff was shot, with such additional proceedings to occur after the federal prosecutor finished the murder proceedings.

Death Benefits

In *Seigel v Edward C. Levy, d/b/a Milford Sand and Gravel Co*, 2008 ACO #278, the Commission addressed a number of issues and explained the sometimes sticky interaction of coordination of lifetime benefits and payment of the death award.

The Commission said that the pension benefits decedent received during his lifetime are to be coordinated under MCL 418.354(1) and those benefits, in turn, reduce the maximum payable death benefits under MCL 418.375(2). "However, any benefits which are reduced by coordination are not subtracted from the total remaining maximum death benefit." That is:

> The defendant may reduce its overall liability for death benefits to the widow by the total sum of what it pays in indemnity benefits after coordination. The remaining

maximum death benefits are then paid equally over the remaining weeks in the 500 week limit.

Rakestraw/Fahr

Two recent cases addressing requirements for demonstrating a personal injury under MCL 418.301(1) as explained in *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003) and *Fahr v General Motors Corp*, 478 Mich 922; 733 NW2d 22 (2007) are worth noting.

In *Simpson v Pines Health Care Center*, 2009 ACO #12, a majority of the Commission panel said the following issue has not yet been addressed by the Supreme Court: whether a *Rakestraw* analysis must be performed in every case where there is pre-existing condition. The Commission majority noted that it had "previously held that where there is a specific incident, as opposed to an increase in symptoms without trauma, a *Rakestraw* analysis is not required." However, the Commission majority noted that, "[m]ore recently, some members have held differently."

The Commission majority said, "[e]ven if a *Rakestraw* analysis were required" in the case, the *Rakestraw* requirement was met. The Commission said plaintiff experienced a direct trauma to her knee, a knee where plaintiff had significant pre-existing degenerative changes. The Commission majority said there was no evidence that plaintiff's symptoms were equally attributable to the progression of her pre-existing condition. And, with respect to *Fahr*, the Commission majority said:

> Medical testimony using the phrase "change in pathology," as stated in *Fahr*, is not necessary. Record evidence from which a legitimate inference may be drawn that the plaintiff's underlying condition has pathologically changed as a result of a work event or work activity is sufficient to meet the legal test for a personal injury.

Therefore, the Commission majority affirmed.

A second *Rakestraw*/*Fahr* case is *Warren v Plymouth Township Fire Department*, 2008 ACO #267. This case had previously been remanded by the Commission for reconsideration of the compensability of plaintiff's seizure disorder after release of *Rakestraw*. The case returned to the Commission, but the Commission had to remand it again in light of *Fahr*'s amplification of *Rakestraw*, explaining as follows:

> Following *Rakestraw*, the Appellate Commission cited language from *Rakestraw* and its companion case to support the notion that permanent symptomatic increase satisfied the medically distinguishable standard. However, the Supreme Court rejected that notion when it issued its order in *Fahr v General Motors Corporation*, 478 Mich 922 (2007). In *Fahr*, the Court requires proof of work causing a pathological change in a preexisting condition to establish a work-related injury.

Redemption Review

In *Frahm v Workforce Alternatives, Inc*, 2009 ACO #14, plaintiff redeemed with a defendant for a nominal sum. At the redemption hearing, he testified he was redeeming because he was not an employee of this defendant but rather a different but related entity. After the redemption was approved, plaintiff said he learned he may indeed have had an employment relationship with the defendant with whom he redeemed. Consequently, plaintiff requested a redemption review before the director. Plaintiff did not return the redemption proceeds as part of his appeal of the redemption.

The Director set the redemption aside, saying "'[a]lthough it is possible that the employment relationship information might have been discovered by Mr. Frahm or his counsel earlier in the process of the case development, it was not.'" The Director concluded that, as a consequence, the nominal settlement was not in plaintiff's best interest.

Defendant appealed to the Commission. The Commission remanded the case to the director. The Commission said that its review of the director's decision "does not readily disclose a factual basis for his determination." The Commission noted that plaintiff did not appear at the redemption review hearing before the director and it did not appear that evidence with respect to the question of who is the employing entity "has ever been a part of this record, including, at the time of hearing before the director." Consequently, the Commission remanded the case for the director to "set[] forth his basis for setting aside the redemption in this matter."

The Commission on another issue rejected defendant's argument that plaintiff could not legitimately appeal the redemption because he had not returned the redemption monies. The Commission said that, while it "has consistently held that a plaintiff cannot proceed with a request to set aside a redemption until plaintiff has first returned all proceeds obtained from that redemption," that requirement was waived in this case because it had not been raised before the director at the redemption review. 🛠

ANSWERS to the Editor's Note

1. Saxon Law—reeve/administerial officer
2. Acts that had as their goal to prevent possession of lands by religious organizations.
3. Old English Law—a loud outcry by which felons were pursued.
4. Old English Law—king's highway
5. Bargain between stranger and party to lawsuit, where stranger pursues suit for portion of proceeds of that suit.
6. Old English Law—payment of rent.
7. On the high sea.
8. Goods found, but claimed by nobody.
9. Amount of stock less than established 100-share unit.
10. Sheriff

Top Ten List
Continued from page 5

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

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

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

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

Procedural Reminder—Notification of Settlement Cases on Appeal to the Commission

By Martha M. Gasparovich, Chairperson

The following procedure was established on March 1, 1999. This procedure was put in place due to the receding backlog of cases at the Appellate Commission, making the efficient transfer of files to the Board of Magistrates for redemption hearings increasingly important. In order to ensure the expeditious movement of files, and to avoid unnecessary delay in the resolution of appeals, the Commission would like to remind the parties to provide notice of any settlement agreement to the Commission as quickly as possible, but to send such notice only when an actual settlement agreement has been reached.

The Commission urges parties on appeal not to request return of a file to the Board for a redemption hearing while settlement negotiations are still ongoing or tentative. Such requests serve only to delay resolution of the appeal. It is equally important, however, for the Commission to be promptly informed of actual settlement agreements. When a settlement agreement has been reached, all parties to the appeal should send a stipulation or joint letter (or each party should sent its own letter) indicating that the settlement has been reached. Once this information is provided to the Commission, the file shall be returned to the Board immediately for the redemption hearing. 🛠

SBM
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

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