State Bar of Michigan

Workers' Compensation Section Newsletter

Spring 2010

Contents

Making the Case for Compromise of Medicare Conditional Payments

By Charles W. Palmer

One of the most maddening things about Medicare's recovery of conditional payments, other than the fact that they don't pay plaintiffs' lawyers, is the failure of Centers for Medicare Services (CMS) to compromise their conditional payment recovery in cases where the injured worker is compromising his/her claims. A review of the statute and regulations, however, suggests that we need to push CMS and the Medicare Secondary Payer Recovery Contractor (MSPRC) to recognize that their right of recovery must be based on the real-world problems with the plaintiff's case and compromise their recovery accordingly.

It must first be pointed out that nothing in the Medicare Secondary Payer Act (MSP) (42 USC 1395y(2)(B)) or the regulations *requires* CMS to compromise their claims. A conditional payment is payment by Medicare for a medical service which "payment has been made *or can be reasonably made* under a workmen's compensation law or plan." 42 USC 1395y(2)(A)(2). The responsibility for repayment can be demonstrated by "a judgment, a payment conditioned upon the recipient's compromise, waiver, or release" regardless of whether the settlement admits or denies liability. See 42 USC 1395y(2)(B)(ii) and 42 CFR411.46(b). These provisions make it clear that the parties to any settlement cannot avoid Medicare conditional payment liability.

However, the MSP and regulations *do* provide CMS and MSPRC the *discretion* to compromise or waive recovery under certain circumstances. Since it's unlikely that CMS will totally waive their recovery whenever the Medicare recipient is receiving money in a workers' compensation settlement, this article will deal only with the arguments for compromising conditional payments.

The MSP provides, at 42 USC 1395y(2)(B)(v):

> **Waiver of rights.** The Secretary may waive (in whole or in part) the provisions of this subparagraph in the case of an individual claim if the Secretary determines that the waiver is in the best interests of the program established under this *title [42 USCS §§ 1395* et seq.].

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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

By Joel Alpert, Chairperson

"Budget shortfall" "...the Board of Magistrates will be reduced to 17 members." New Cases opened 1998 - 21,368; 2008 - 10,368. Michigan's unemployment rate: December 1998 - 3.8 percent; December 2008 - 14.6 percent. There's just not enough money to go around. How do we protect the Agency's finances?

In the fall of 2009, Governor Granholm asked Ed Welch to investigate. The Worker's Compensation Efficiency Initiative was formed. Denice Levasseur and John Charters will report on that program elsewhere in this newsletter. Can anything else be done to raise money to run the Agency and make the system work more efficiently for all stakeholders?

On February 20, 2010, Governor Granholm issued Executive Order 2010-1 which formed the Office of Health Services Inspector General. The governor will appoint a health services inspector general who will work to prevent, detect and investigate fraud, waste and abuse in the state's Medicaid, mental health, MIChild and Children's Special Health Care Services programs. Could a similar program work for the Agency?

All stakeholders agree that fraud has no place in the Worker's Compensation system. We've seen swindlers on TV engaging in physical activities they say they can't perform. Workers who feign injuries and file false claims of disability illegally create tens, or perhaps hundreds of thousands of dollars of undue expense for business and insurance interests, and bring disrepute to all involved with the system. Medical practitioners who bill for services that were never provided cost carriers and employers millions. Unscrupulous attorneys who advise their clients to push beyond the envelope and greedy insurance salespeople who cast a blind eye to the cunning behavior of their customers contribute to the problem. Employers who misclassify workers, under-report the number of people that they employ, or claim that their workers are independent contractors when they are actually employees, gain an unfair advantage over their competitors. They obtain lower insurance premiums, fail to pay the employer's portion of Social Security contributions, fail to pay Medicare premiums, and avoid unemployment insurance taxes for those workers. They cheat carriers out of valid premiums. Further, several studies have indicated that, on average, workers who have been misclassified as independent contractors do not report 30 percent of their income.

Workers and business owners who operate in this "shadow economy" pass the cost of their illegal ways on to the rest of us. "Premium scams milk workers' comp insurers out of untold millions," says James Quiggle at the Coalition Against Insurance Fraud, "depressing profits and forcing comp premiums higher for honest businesses." But there aren't enough cops to nab crooks. Jeffrey Korte, head of Florida's workers' comp fraud bureau, says his 26 investigators can't keep up. One federal study concluded that employers illegally passed off 3.4 million regular workers as contractors, while the Labor Department estimates that up to 30 percent of companies misclassify employees. Ohio's attorney general estimates that his state has 92,500 misclassified workers, which has cost the state up to $35 million a year in unemployment insurance taxes, up to $103 million in workers' compensation premiums and up to $223 million in income tax revenue. (See "US Crackdown on "Contractors' as a Tax Dodge," *New York Times*, February 18, 2010) "It's a very

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Making the Case . . .
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This statutory language is repeated in the regulations at 42 CFR 411.28.

The pre-conditions required for a waiver "in part", or compromise, are found in 42 CFR 411.376(c), which provides:

> **Basic conditions.** *A claim for recovery of Medicare overpayments* against a debtor *may be compromised*, or collection action on it may be suspended or terminated, by the Centers for Medicare and Medicaid Services (CMS) **IF**: (1) *The claim does not exceed $100,000*, or such higher amount as the Attorney General may from time to time prescribe, exclusive of interest; and (2) *There is no indication of fraud, the filing of a false claim, or misrepresentation* on the part of the debtor or any director, partner, manager, or other party having an interest in the claim. (Emphasis added).

The conditions required for compromise are further elaborated in 42 CFR 411.376(d):

> **Basis for compromise.** A claim may be compromised for one or more of the following reasons: (1) The debtor or the estate of a deceased debtor does not have the present or prospective ability to pay the full amount within a reasonable time; (2) The debtor refuses to pay the claim in full and the United States is unable to collect the full amount within a reasonable time by legal proceedings; (3*) There is real doubt the United States can prove its case in court*; or (4) The cost of collecting the claim does not justify enforced collection of the full amount. (Emphasis added).

Workers' compensation claims are often settled because there is "real doubt" plaintiff can prove the medical condition is work-related. Since CMS is subrogated to plaintiffs' claims (42 USC 1395y(2)(B)(iv)), they stand in the shoes of plaintiffs. Therefore, if the parties have "real doubt" about plaintiff's ability to prove their case, so should CMS.

Most litigated workers' compensation claims have causation or other issues that make trial risky, or at best, uncertain. Where there is a significant risk that the magistrate could rule that the medical condition is not work-related, CMS must recognize that fact when they request repayment of conditional payments. The MSPRC must learn that if CMS had to litigate the underlying workers' compensation claim and "there is real doubt the U.S. can prove its case in court", the conditional payments should be compromised accordingly.

Despite the statutory and regulation authority for compromise, no one appears to be making these arguments. The hope is this article will motivate the workers' comp bar to begin filing requests with MSPRC to compromise conditional payments in appropriate cases. By requesting compromises, we can begin to educate MSPRC and CMS that they can't demand full conditional payments in every redemption settlement. While there are always financial pressures to get the settlement completed, especially considering the unconscionable delays in obtaining conditional payment letters, that does not preclude plaintiffs from raising the issue, settling the case, and then appealing the conditional payment decision after paying the conditional payments under protest. (See my previous article about CMS appeal procedures.) In time, we can hopefully set some precedents that will force CMS to realize that if plaintiffs have to compromise their claims to get paid, so should CMS.

If we believe in vigorously representing our clients, we should take the time and make the effort to pursue these arguments. If enough of us appeal the conditional payment letters, CMS may begin to recognize the concept of compromise of conditional payments. The defense bar can also assist in this process by providing defense analysis of the issues that create "real doubt" about plaintiff's claim. It is also in the interests of employers to work with plaintiff lawyers on these issues, since it is ultimately the employers and their carriers that end up paying the conditional payments as part of the redemption settlement.

Workers' Compensation Efficiency Initiative

Last October, director Jack Nolish issued a memo reciting the budget issues and stating, "I believe that we should quickly develop a plan for working with representatives of all stakeholders in the workers' compensation community to find ways to streamline the work of the magistrates, implement procedural efficiencies, devise cost savings, and locate additional revenue sources to support the board and agency in the future."

Ed Welch was retained by the administration to assist in this effort and produce a report containing recommendations. Mr. Welch formed four work groups to assist him in this effort: the litigation group, financing group, funds group, and data collection group. Each group has met with Mr. Welch twice and much progress has been made toward reaching a consensus of adjustments that can be made to accomplish the goals of greater efficiency and reduced cost. Certain issues will need additional discussion, particularly the issues to be dealt with by the financing group. It is anticipated that a report will be completed by Mr. Welch soon.

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significant problem," said the attorney general, Richard Cordray. "Misclassification is bad for business, government and labor. Law-abiding businesses are in many ways the biggest fans of increased enforcement. Misclassifying can mean a 20 or 30 percent cost difference per worker."

Some argue that there can be legitimate issues over classification of workers. As attorneys, we know that there's no question that such circumstances do exist. Those instances can be dealt with in the appropriate forum, and if there is no misclassification or fraud, then there will be no consequences.

Carriers cheat too. New York officials concluded that AIG had, over several decades, provided false reports of its workers compensation premiums to the NCCI and state tax authorities. AIG issued a formal report detailing its unlawful conduct and acknowledged the unreported workers compensation premiums totaled between $300 million and $400 million. AIG's own report admitted that AIG's reporting practices were unlawful and exposed it to civil liability and potential criminal prosecution. AIG entered into settlement agreements in 2006 with several enforcement authorities, including a $1.6 billion (yes "billion") settlement with New York and federal authorities. Also see: *National Council On Compensation Insurance Inc. v American International Group Inc.*, case number 1:07-CV-02898, in the U.S District Court for the Northern District of Illinois, dismissed based on AIG's claim of lack of the Plaintiff's standing – but AIG did not defend on the basis that it had not acted fraudulently.

I propose that the State of Michigan appoint a prosecutor devoted solely to uncovering and prosecuting Worker's Compensation fraud perpetrated by workers, medical providers, attorneys, insurance sales people, employers, and carriers. Michigan law already provides for fines and penalties, both civil and criminal, for these violations. Sums collected as a result of those efforts should be used to help fund the Agency. This has been successfully pursued in other states. It could work here.

Joel L. Alpert, Chairperson
Workers' Compensation Law Section
State Bar of Michigan

The opinions expressed in this article are those of the author and not necessarily those of the Section Council.

Spring Workers' Compensation Section Meeting

June 17-18, 2010
Crystal Mountain Resort

The Workers' Compensation Section of the State Bar of Michigan will hold its annual section meeting June 17-18 at Crystal Mountain Resort. This year's meeting will follow the tried-and-true format of years past. A social gathering will occur on Thursday evening. The formal meeting will be held Friday morning, where all manner of important business and information sharing will occur. Friday afternoon will once again include a golf outing and/or free time for relaxation. Another social gathering takes place Friday evening, where you can share details of your latest case with your friends and their families. Formal registration materials will be sent out soon, but please get this date on your calendars and tell your families to get ready for the fun.

A hotel reservation form can be found on the next page.

CRYSTAL MOUNTAIN

Group Name: State Bar of Michigan - Workers Compensation Section
Dates: June 17, 2010-June 19, 2010

Group #: 45E6MY
Issued: 3/11/10

Reservations may be made utilizing this form OR by booking online. Reservations must be made by **May 19, 2010.** Reservations received after this date will be taken on a space-available basis. To make an online reservation, go to http://www.crystalmountain.com/grouplodging. Use **45E6MY** for your group code.
Accommodations: Please indicate your 1st and 2nd lodging preference below. If room type requested is not available, the next available room type and rate will be confirmed. **We cannot guarantee specific rooms/units.** Additional unit types are available beyond those listed. Please inquire with reservation staff for additional options.

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Room	Single/Double Rate	Single/Quad Rate	Indicate 1st & 2nd Choice
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Hotel Room	$ 165		
Suite	$ 205		
One Bedroom Condo	$ 205		
Two Bedroom Condo		$ 229	
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Group #: 45E6MY

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DK

What are We doing Now?

By Ken Birch

By now, everyone is appreciating the effects and dealing with the changes brought on by Executive Order 2009-53. This order saw six magistrates lose their positions and increased the remaining magistrates' caseloads by more than 50 percent. While I will leave it to others to comment on implications to our section, I thought many of you would like to know the fate of these six people.

In Detroit, **Jan Laventer** was appointed in January to an administrative judge position which may include hearing Medicaid appeals. She commented that she has inherited a backload of appeals and just when she was getting used to workers' compensation trials and issues, she must learn about eligibility and other Medicaid issues. After nine years as a productive and efficient magistrate, **Carol Guyton** is pursuing job leads. She is grateful for her experience on the Board of Magistrates and wants to pass on her appreciation to the people who have provided her with moral support. The Pontiac agency lost **Victor McCoy**. Victor, as always, has landed on his feet and is helping Davison, Breen, and Doud as one of its staff attorneys. He is upbeat about his situation and wanted to thank all those people who made being a magistrate a positive experience.

In Dimondale, **Garry Goolsby** was appointed to the Unemployment Board of Review and has returned to downtown Lansing where he is within walking distance of his home, a good place for lunch during spring, summer, and fall. Both **Jim Kent** and I took early retirements. As many of you know, Jim has taught law on a part-time basis in the past and has returned to teaching several more classes in the Lansing area to fill the time when he used to commute to the Saginaw agency. Before I was appointed to the Board of Magistrates in 2006, I worked with the firm of White, Schneider, Young & Chiodini, PC in Okemos. The firm has graciously allowed me to return as of counsel, and I resume my old general practice concentrating in disability law.

Needless to say, each and every one of us misses the challenge and satisfaction of sitting as workers' compensation magistrates. Even more than the work itself, all of us miss the relationships we formed working with our colleagues in this section. 🛠

Road Warrior Fitness

By Mike Harris

If you're like most workers' compensation lawyers these days, you're spending more time in your car than you are at home or the office. You're leaving earlier, getting home later, earning less, and enjoying it less, too. You're too young to retire, too old to start a new career, and too exhausted to really enjoy what you're doing—even on the weekends. You are wearing down. You are the ultimate road warrior, plagued by traffic stress, lousy coffee, bad roads, and three or four judges 150 miles apart who ALL expected to see your smiling face at 9 a.m. sharp!

Well, I paid that price myself for a time, and I have the surgical scars and memories to prove it. But today, I have in place a daily plan to reduce the stress, to fuel and build up the body, and to do something regularly that's important, but not work-related. This plan keeps me sane—even joyful most days! Here's how I do it:

1. I start every work day with a half-hour walk early in the morning.
2. I always eat an early and good breakfast.
3. In addition to breakfast, I eat a minimum of five small meals during the day equally portioned between protein and carbohydrates. I don't overeat or eat sugary or fatty foods except on one "free day" a week.
4. In addition to my walk, I exercise strenuously every day, never for more than 40 minutes at a time. I lift weights and alternate between upper- and lower-body workouts.
5. I do at least one "good deed" a week, usually more. This involves helping someone who cannot pay me back. The best way to be blessed to overflowing is to regularly bless others first.

How is it going? I get my blood pressure taken every other week while donating blood platelets, and my readings average 110/60 with a pulse of 60 beats per minute. My total cholesterol is 150 and my LDL cholesterol level is considered optimal. I have a body fat percentage of about 12 percent right now.

Anyone can do this. I once weighed 210 pounds—I'm 160 now at 63 years old. I'm not naturally lean or athletically talented at all, yet I won a national fitness contest in 2007 that paid $50,000 in cash and prizes! You don't have to WANT TO do this for it to work—you just have to DO IT! After a while, you'll find you WANT TO!

Want more information? Stop by and see me or e-mail me at miketharris@comcast.net. 🛠

Board of Magistrates Update: Our Changed World

By Christopher P. Ambrose, Chairperson, Board of Magistrates

"There is a certain relief in change, even though it be from bad to worse! As I have often found in travelling in a stagecoach, that it is often a comfort to shift one's position, and be bruised in a new place."

—Washington Irving

The above passage struck me as apropos, at least in accurately summarizing the comments of many attorneys I have spoken with over the past few weeks following the reduction of magistrates, which became effective Jan. 26. Most practitioners are quickly realizing that the way our cases are handled each day will also need to change.

I continue to be amazed by our current Board of Magistrates and how amenable they have been to change, including larger caseloads and significantly more travel in some cases. I also appreciate the continued courtesy, respect, and understanding that the Bar has demonstrated over the past month since the reduction. The board will convene on April 23 to discuss our procedures, docket management, and a host of other relevant issues. I certainly invite attorneys to call or e-mail me with comments or suggestions prior to the Magistrate College.

I also want to take this opportunity to congratulate Bea Logan on her reappointment to the Board of Magistrates. Bea has taken the term which was left vacant as the result of Murray Gorchow's transfer to the WCAC. The term expires in January 2011.

As we continue to adjust to our new, changed world, I have some suggestions for practitioners.

1. Please prepare and copy documents in advance of the hearing date. This includes redemption papers when possible, as well as green sheet orders, voluntary payment forms, etc.
2. Please do the same with respect to trial exhibits. Furthermore, to the extent possible, secure agreement of opposing counsel as to which exhibits will not be objected to. Do not burden the court's time with matters that are not disputed.
3. Make every effort to have all witnesses available and ready to go on trial dates. It is my goal to avoid trials that last more than one day unless absolutely necessary. Running out of witnesses at 2 p.m. and asking for another date to come back is a waste of the court's time.
4. Keep testimony brief and relevant. Spending an hour on an issue that is not providing information to the court or using 50 pages of a deposition to the same end are not examples of judicial economy and efficiency.
5. Check, recheck, and triple-check addresses and calculations on redemption papers and other documents.

Using the above guidelines will help the court run more efficiently. Magistrates are handling approximately 25-30 percent more files than they were prior to Jan. 26. I am looking at ways to improve the way we do our work. I would ask that the Bar follow suit. I thank you in advance for your anticipated cooperation.

Section Note

Anyone who receives a e-mail message from the Council via Google, must select 'opt in' in order to continue receiving such notifications. This does not pertain to or effect receipt of Newsletter, however.

Michigan Workers' Compensation Agency Update

By Jack Nolish, Director

I have just returned from Phoenix, where I attended the ABA Tort Trial and Insurance Practice Section seminar on "National Trends and Emerging Issues in Workers' Compensation" and was inducted as a fellow into the College of Workers' Compensation Lawyers (see article by Jim Reiter). It was quite a few days.

Jim has done a good job in his article describing the college and the induction. I will only add that I am honored to be selected and will strive to meet the goals and objectives of the college. It was a great opportunity to meet with other attorneys from all over the country who practice in the field. Since induction as a fellow requires at least 20 years of WC practice, we had a room full of very experienced practitioners from both sides of the counsel table. Such meetings are always a hotbed of war stories and, for me, a chance to find out how other states have invented their WC practice and process wheels. Although we hear rumors from time to time about federalization of WC, it remains a highly diverse practice with each state having its own substance, procedure, and nomenclature. No other state uses the "redemption of liability" label like we do.

Several of the days involved the ABA Tort Trial and Insurance Practice Section seminar on emerging trends. I have found that whenever I attend such a meeting, I come away with new ideas and, more often than not, concerns about issues we may not have been discussing.

1. The panel presentation led by our own Jim Reiter, "The Erosion of the Exclusive Remedy", included an extensive discussion of the Michigan cases brought in federal court under RICO by Marshall Lasser, including *Brown v. Cassens Transport*. Greatly oversimplified, the case centers on allegations of RICO violations between the adjuster and an examining physician to deny WC benefits. Additional theories of recovery outside of the exclusive remedy being argued in other cases were also discussed, including an action for false accusation of WC fraud, a remedy in Massachusetts for "unfair claim handling", and a case in Florida where an employer who denied that a case was WC was estopped from raising the exclusive remedy in a civil action for negligence. An important point was raised as to whether or not typical business liability insurance covers such actions since they are generally founded on intentional conduct and the standard business policy forms started excluding coverage for such actions starting a few years ago.
2. The presentation on ethical issues raised some considerations of note in several areas affecting the WC practice. The presentation used hypothetical situations viewed through the ABA Model Rules. One dealt specifically with a complaint that I deal with frequently as director: client communications. I am well aware of difficult clients who require a great deal of care and while in practice, I had my share of missed phone calls and contacts.

   However, Rule 1.4, "Communication", indicates: "A lawyer shall … keep the client reasonably informed about the status of the matter; promptly comply with reasonable requests by the client for information." It is my practice now to respond to such complaints by contacting counsel and asking that the client be contacted as soon as practicable. This rule adds some formality to the obligation.

   Another area of extensive discussion had to do with representing a "falsely documented" worker. This was addressed through Rule 1.0(f), "Informed consent". The problem centers on filing a case for an undocumented worker and/or involving unreported wages. The consent issue discussed advising the client of the potential immigration, tax law, and other law violations that surround such employment and the liabilities of counsel for filing the case. The federal liabilities extend far beyond losing a WC case or having limited benefits provided per *Sanchez*. Also, such questions about how much information is presented to the injured worker in making the decision to accept a settlement would fall into this same category. The basis of many a request for a redemption review filed by the worker is that they did not understand the impact of the settlement on some other benefit or entitlement.

   Another part of the discussion concerned Rule 4.1, "Truthfulness in Statements to Others". This is a particularly difficult one to apply in the field. In the heat of negotiations or argument, zealous advocacy by any side in the case should not be confused with making " … a false statement of material fact or law." All of these issues deserve greater discussion than time and space permit here.
3. "Mediation Strategies" and "Negotiating Tactics" were presented by a panel that featured two experienced, full-time mediators from Wisconsin and

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Florida. Both do mediations of WC cases and are paid hourly/daily rate by the carrier/employer. Their mediations are outside of the litigation system and take place in private offices. These are very much like our magistrate facilitations but do not take place on trial dates or at WC facilities. They noted that as mediators, they can provide legal information to the parties but cannot provide legal advice. Several pointers given were to make sure: 1) the case is "ripe" for negotiation with records exchanged; 2) the parties know what they are giving up and getting; 3) you are aware that there may be cultural issues involved in the decision process; 4) the "everybody unhappy" approach is not brought to the table; and 5) the parties focus on interests before addressing the options. Whether or not there is an agreement, make sure there is a commitment to a timeline for the next steps.

4. "Examination of an Orthopedic Surgeon" was presented as live testimony (as opposed to by deposition) of an IME doctor for plaintiff. The matter was professionally presided over by Magistrate Val Jarvis and the defense cross examination was conducted by Dan Hebert. Magistrate Jarvis did a very good job explaining Michigan law, including *Singleton*, *Stokes*, and *Rakestraw*. It was interesting to see the reaction of the audience. A couple of things in the testimony caught my attention: Dr. James Davidson (an orthopedic surgeon in active practice) indicated that he thought "open" or independent, small office-based MRI results were often more difficult to interpret then those from the major facilities. He indicated that 50 percent of those over 55 have some shoulder tears, etc. When questioned why the treating surgeon in the hypothetical did more of a procedure than the initial diagnosis would suggest, he indicated that when operating, the surgeon should do "as much as necessary but as little as possible" to achieve the desired result.
5. "ADA/FMLA/WC: How has the Bermuda Triangle Been Affected by the ADAAA and the Over 750 Pages of Revised FMLA Regulations?" I have not heard the triangle analogy before, but it seems to fit. The panel indicated that there have been significant changes in the ADA by a series of amendments that were put in place to undo some of the limitations imposed in the last several years by the U.S. Supreme Court. Again, oversimplifying, the changes mean that more individuals will qualify as disabled under the Americans with Disabilities Act. You can no longer assume that once someone has exhausted his FMLA leave, he still does not have a claim under ADA. Return-to-work policies can be found to violate FMLA or ADA. Requiring an injured worker to return to work while on FMLA leave can be a violation if the worker cannot perform the essential functions of his/her job. And there is a lot more in the triangle for practitioners on both sides to review before making final decisions in cases. These issues might even be said to overlap the issues of informed consent under the ethics discussions and perhaps before a magistrate can approve a redemption under our statutory guidelines. Suffice it to say, I heard gasps from counsel for both sides wondering how rights of their respective clients can be protected. A new approach to making claims and signing releases/waivers may be in order.

These descriptions were meant to be brief and I omitted many of the other things discussed so this article did not turn out to be unreadable in length or something that would have ended up on the editing room floor. I urge practitioners to attend future TTIPS meetings and others put on by the WC Section, the agency, Michigan Association for Justice, Defense Trial Counsel, or any other group. You never can tell when you will find a new idea for a plaintiff to pursue or some new need for protection from liability by a defendant. 🛠

Workers Compensation Hall of Fame Nominations

The section council is soliciting nominations for the Workers Compensation Hall of Fame. If any section member has a nomination and a brief summary as to why, please contact Murray Feldman at:

Strobl & Sharp PC, 300 E Long Lake Rd Ste 200, Bloomfield Hills, MI 48304

Phone: (248) 540-2300, Fax: (248) 645-2690, E-mail: mfeldman@stroblpc.com

Michigan Workers' Compensation Appellate Commission Update

By Murray A. Gorchow, WCAC Chairperson

Reflecting the decade-long decline in manufacturing employment with parallel declines in work-related injuries, contested case filings, trials, and magistrate opinions, we continue to see declines in the number of decisions that are appealed to the Appellate Commission.

In 2000, 2008, and 2009, there were 573, 275, and 235 cases, respectively, received at the Appellate Commission. For the same three years, the commission resolved 846, 306, and 251 cases, respectively. Cases pending at year's end were 337, 268, and 256, of which 101, 88, and 65 cases were "perfected" (with transcripts and briefs filed) and ready for review.

The decrease in cases resolved from 306 in 2008 to 251 in 2009 is nearly entirely attributable to the number of *Stokes* remands in 2009 from the commission to the Board of Magistrates because jurisdiction was retained and such cases are not counted as resolved. Those cases still continue on the commission docket as pending cases. In 2009, there were 77 cases remanded with retained jurisdiction by the commission, in large part due to *Stokes*.

During 2009, the commission received 235 new claims. Including reconsiderations and remands from higher courts, the total incoming caseload was 239 for the year. The commission published 214 opinions (140 dispositive and 74 non-dispositive). There were 51 dissenting and 24 concurring opinions written. In addition, 110 other dispositive actions were processed, consisting of 52 redemptions, 14 withdrawals, one dismissal by letter, and 44 orders. There were also 281 non-dispositive orders issued for a total production of 680 dispositions. All orders, including those on motions to withdraw as counsel, those for extensions of time for filing transcripts and briefs from both parties, and the responses thereto require the constant attention and consideration of the staff and each of the three commissioners assigned to the case.

The Appellate Commission continues to be current in handling and deciding the cases that come before the commission. The time from the perfection of the appeal and assignment to the panel for decision continues to be four to five months.

An interesting statistic relates to the relative number of new claims for review filed by employees and employers. In 2009, employees filed 104 appeals while employers filed 131 appeals. Since 1999, both employee and employer claims for review have, of course, steadily declined along with the decline in manufacturing jobs, injuries, contested cases, and magistrate decisions. The interesting stat is that employees filed relatively more appeals than employers from 1999 through 2001 while beginning in 2002, employers have been filing more appeals than employees, with the anomaly being 2006, when the number of filings were identical. No doubt one of the major factors causing the relative switch would be increased appeals filed by employers in light of the changes in the law resulting from the Supreme Court decisions in *Sington* (2002), *Rakestraw* (2003), and *Stokes* (2008).

Odds and Ends From the Appellate Commission

Withdrawal as Counsel at the WCAC

Just as it is improper to withdraw as counsel before the Board of Magistrates without a proper motion and order permitting withdrawal, the same is true for attorneys who have filed as counsel with the Appellate Commission.

You must file a motion (with proof of service on your client and opposing counsel) and comply with WCAC Rule 7 (R 418.7) pertaining to motion practice before the commission. Please see my article regarding the requirements of Rule 7 in the winter 2009 issue of this newsletter. You should also consult the Michigan Rules of Professional Conduct (MRPC 1.16) pertaining to "Declining or Terminating Representation" for helpful guidance regarding such motions, including assurance that reasonable steps are being taken to protect the client's interests as set forth in MRPC 1.16(d).

Without an order permitting your withdrawal, you will continue to be treated as the responsible counsel of record with the corresponding obligation to meet all deadlines. Indeed, the commission has recently treated a mere written announcement of withdrawal as a motion to withdraw and denied withdrawal for lack of good cause shown and lack of compliance with Rule 7.

Briefing Omissions

The commission has all too often been receiving briefs that do not have page numbers. The commission then has to number the pages and announce in its decision that it had to do so and how it did so because the commission regularly makes page references to the arguments found in the briefs.

Another briefing matter involves a table of contents and index of authorities, which are not specifically required

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by the WCAC rules. However, providing these briefing aids to our review, like page numbers, is greatly appreciated by the commissioners. They make it easier for us to review your brief and get us to where you want us to go.

My personal un-favorite frustrating briefing omission is the all-too-frequent failure by some attorneys to cite pages of the transcripts. The act [418.861(8)] requires the parties to specify the portions of the record that support their position. It is beyond me why any attorney would not want to direct the commission to a transcript page to convince us of his point.

Indeed, one member of the commission has written in an opinion:

> *"The filing of a brief ought not to be a prescription for an adventure of discovery through the record to determine whether the record actually says what the party asserts and whether, somewhere else in the record there is a contradiction. … Specific references to the record do more than facilitate our review; they convey confidence that the record persuasively establishes the point the author is attempting to make."*

I would only add that stating an important fact in a brief without telling us where to find it can be an invitation to disaster if we can't find it.

Oral Argument

The commission continues to encourage motions requesting oral argument when the case warrants it because of the legal issues involved.

Baa Baa (or rather) Bye Bye Black Sheep

By James Reiter

It used to be that workers' compensation lawyers were the "black sheep" of the trial lawyer family. Not true anymore!

Thanks in large part to the creation of the College of Workers' Compensation Lawyers, those who practice workers' compensation law are being recognized nationwide for their expertise, compassion, integrity, and contribution to the legal community.

The College of Workers' Compensation Lawyers was created in 2007 and held its first induction dinner that same year in Naples, Fla. Since then, more than 175 lawyers representing claimants, employers, the judiciary, and academia have been inducted into the college as fellows.

To quote the college's web site:

> *"The College of Workers' Compensation Lawyers has been established to honor those attorneys who have distinguished themselves in their practice in the field of workers' compensation. Members have been nominated for the outstanding traits they have developed in their practice of 20 years or longer representing plaintiffs, defendants, serving as judges, or acting for the benefit of all in education, overseeing agencies, and developing legislation. These individuals have convinced their peers, the bar, the bench, and public that they possess the highest professional qualifications and ethical standards, character, integrity, professional expertise, and leadership. They have a commitment to fostering and furthering the objectives of the college and have shown significant evidence of scholarship, teaching, lecturing, and/or distinguished public writings on workers' compensation or related fields of law."*

The 2010 induction dinner was held in Phoenix on Saturday, March 6. There were approximately 65 fellows inducted. Those of us who practice in Michigan should be very proud of the fact that the five inductees from Michigan made up the largest class of inductees from any state. The newly inducted fellows from Michigan were Jack Nolish, Joel Alpert, Murray Feldman, Milt Means, and Mark Pletkovic.

With the addition of these five inductees, the total number of Michigan practitioners who are fellows in the college now stands at 20.

The college was created through a joint effort of the Workers' Compensation Committee of the American Bar Association's Tort and Trial Insurance Practice Section and the Workers' Compensation Committee of the ABA Labor and Employment Law Section. The induction dinner is held annually in conjunction with a national seminar hosted by these two committees. Next year's seminar and induction dinner will be held in Boston in April.

Please join us in congratulating Jack, Joel, Murray, Milt, and Mark and all the Michigan fellows on their induction into the College of Workers' Compensation Lawyers. For more information on the college, please see *www.collegeofworkerscompensationlawyers.org*.

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

The Supreme Court has not released any opinions in workers' compensation cases subsequent to our last newsletter through the time of this submission. However, the Supreme Court has issued a substantive order in a workers' compensation case and two other combined cases have been orally argued and remain pending before the court.

Relevance of Income Taxes

In *Loos v J.B. Installed Sales, Inc.*, ____ Mich ____; 775 NW2d 139 (2009), the Supreme Court in a 4-3 order reversed the judgment of the Court of Appeals and the Workers' Compensation Appellate Commission and reinstated the magistrate's decision. The magistrate had held that the plaintiff was not an employee but, based largely upon income tax records, an independent contractor. Those income tax records disclosed that plaintiff had not been paid wages (W2 income) but rather received non-employee compensation (Form 1099 income). The Supreme Court said such records are directly relevant to the question of employee status and the Appellate Commission and Court of Appeals improperly reversed the magistrate who had relied upon such records.

Justice Cavanagh concurred in part and dissented in part. Justice Cavanagh agreed that tax records are relevant, but would have deferred to the fact finding by the Appellate Commission to the effect that plaintiff was an employee. Chief Justice Kelly and Justice Hathaway joined in Justice Cavanagh's statement.

Injuries Occurring Outside of Michigan

On December 9, 2009, the Supreme Court heard oral argument in two cases in succession addressing that provision of the act which addresses compensation for injuries occurring outside of Michigan, MCL 418.845. The two cases are *Bezeau v Palace Sports Entertainment, Inc.* and *Brewer v A.D. Transport Express, Inc*. The Court's forthcoming decision in these cases will address the twists and turns in § 845 in terms of recent case law changes as well as the 2009 amendment to § 845. The amendment provides that Michigan can now assert jurisdiction if the plaintiff is a resident of Michigan at the time of the injury *or* the contract of hire is made in Michigan.

Court of Appeals

There are again no published Court of Appeals opinions in workers' compensation cases since our last newsletter through the time this is submitted. With the usual caveat that unpublished opinions are not precedent under MCR 7.215(C)(1), here are the three unpublished workers' compensation decisions since our last newsletter.

Scope of Administrative Appellate Review/Injury on Premises

In *Mularczyk v Daimco Contracting, Inc.* CA No. 289140, unpublished decision released Jan. 26, the court disagreed with the Appellate Commission's reversal of the magistrate's open award. The substantive issue in the case was whether plaintiff suffered an injury on the employer's premises. The magistrate ruled he had when he arrived 15-20 minutes early for work at a construction site. The Appellate Commission reversed, however, concluding there was no evidence at all to support plaintiff's contention that he fell on employer premises.

The Court of Appeals agreed with the Appellate Commission that plaintiff offered no evidence to support a finding that defendant *owned* the property where he fell, but the court said plaintiff had offered evidence that the place where he fell was located on the construction site where his work was to be performed. The court noted plaintiff's evidence that at the spot of the fall, there was a porta-potty, a buried silk fence, and banding straps, all of which related to plaintiff's construction work. As a result, the court concluded that the Appellate Commission wrongfully displaced the magistrate's fact finding because it had the requisite support.

Idiopathic Fall

In *Harris v General Motors Corp*, CA No. 285426, unpublished decision released Nov. 24, 2009, the Court of Appeals affirmed the Appellate Commission's and Magistrate's decision denying death benefits to the survivors of an employee who had died from a head injury when he fell in the men's bathroom of the employer's plant.

The sole relevant issue was whether the decedent's fall was work related or an "idiopathic" fall attributable to some cause personal to the decedent. The magistrate found the latter and, after the commission affirmed, the Court of Appeals granted leave and agreed. In so doing, the court reviewed the present state of the law with respect to injuries of unknown or idiopathic origin. The court said in pertinent part:

> An injury of an unknown or idiopathic origin is not compensable simply because it occurred while the employee was in the course of employment on the employ-

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er's premises. *Ruthoff v Tower Holding* (On Reconsideration, 261 Mich App 613, 618; 684 NW2d 888 (2004); *Hill v Faircloth Mfg Co.* 245 Mich App 710, 717; 630 NW 2d 640 (2001); *McClain v Chrysler Corp*, 138 Mich App 723, 730; 360 NW 2d 284 (1984); *Ledbetter*, supra at 334. An injury does not "arise out of" employment under MCL 418.301(1) "unless some casual relationship exists between a work-related event and the disabling injury". *Ruthoff, supra* at 618. As a general rule an injury does "not arise out of employment where the predominant cause of the harm was attributable to personal factors and the circumstances of the employment did not significantly add to the risk of harm." *Ruthoff supra* at 619. In *Ledbetter*, this Court explained:

> In personal risk cases, including idiopathic fall situations, the sole fact that the injury occurred on the employer's premises does not supply enough of a connection between the employment and the injury. Unless some showing can be made that the location of the fall aggravated or increased the injury, compensation benefits should be denied [*Ledbetter, supra* at 335-336].

The commission majority followed the "level floor – idiopathic fall" rule from *Ledbetter* with regard to an unexplained fall on the employer's premises. Plaintiff has not shown any error of law.

Receipt of "SAP" does not bar award

In *McCrorey v General Motors*, CA No. 286022, unpublished decision released Nov. 19, 2009, the employee was off work recuperating from a work related back surgery when he accepted a Special Attrition Plan (SAP) in exchange for $35,000 and voluntary retirement from General Motors. He was awarded weekly benefits. Before the Court of Appeals, defendant argued this was error because plaintiff had voluntarily removed himself from the work force. Specifically, defendant argued that plaintiff is no longer eligible to accept "reasonable employment" from defendant under MCL 418.301(5)(a). Also, defendant argued that plaintiff's wage loss was not attributable to his work-related disability but to his voluntary separation from employment.

The Court of Appeals rejected both arguments. With respect to the reasonable employment argument, the court said that while plaintiff did voluntarily remove himself from defendant's work force, plaintiff might accept post-injury employment elsewhere, which is something contemplated by the reasonable employment provision of 301 (5)(a). With respect to defendant's latter point, the court said that while "[o]ur appellate courts have interpreted this [second sentence of § 301 (4)] provision to require the employee to prove that his disability resulted in wage loss" and while the Supreme Court gave an example of a claimant who retired and would not be eligible for wage loss in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), those exclusionary circumstances did not exist here. The court said in this particular case when plaintiff signed the SAP, he was already unable to work because of his previous work injury and the court noted there was no evidence "that plaintiff intended never to work again as a result of his retirement from defendant."

Workers' Compensation Appellate Commission

In the first two months of this year, the Appellate Commission has reversed or remanded a number of cases due to inadequate analysis of the *Stokes* disability question and the wage loss issue described in *Romero/Epson*. (*Epson* is the *en banc* decision from the Appellate Commission described in the last newsletter, found at 2009 ACO #152).

In *Coulter v General Motors Corp*, 2010 ACO #10, Commissioner Will, speaking for a unanimous panel, reversed the decision of the magistrate and denied wage loss benefits. The commission explained that it had remanded the case for a *Stokes/Sington* analysis and, if plaintiff was found disabled after that analysis, for a determination of whether plaintiff's wage loss was attributable to that disability in accord with *Romero v Burt Moeke Hardwoods*, Inc., 280 Mich App 1 (2008). The magistrate found plaintiff satisfied *Stokes* on remand, but the commission disagreed, saying:

> Pertaining to the first issue, before June 12, 2008, affirmance of the magistrate would have been appropriate pursuant to the Court of Appeals decision in *Stokes*. However, the Supreme Court decision entered on that date demanded significantly greater proofs to establish disability. It clearly is necessary pursuant to the Supreme Court decision to prove plaintiff's qualifications, including jobs the plaintiff may never have performed. Having done that, it is absolutely necessary that the claimant prove that she cannot perform or cannot secure all of the jobs within her qualifications and training that provide maximum earnings.

In *Kleinhardt vs Dowding Industries*, Inc. 210 ACO #24, Commission Przybylo authored the commission's opinion holding that while the magistrate's was affirmed on the ques-

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tion of whether plaintiff sustained a work injury, the case must be remanded because:

> the magistrate failed to provide any real analysis of the disability or wage loss issues. The magistrate failed to find the jobs that constitute the universe of employments suitable to plaintiff's qualifications and training that pay the maximum. He then failed to detail how plaintiff proved that his work injury caused his inability to obtain those jobs. *Stokes* mandates this analysis. In addition, the magistrate failed to consider the wage loss analysis necessary to sustain wage loss benefits. He must perform the analysis that we announced in *Epson*.

In *Lewis v Darling International Inc.*, 210 ACO #17, Commissioner Ries, speaking for a unanimous panel, similarly ordered a remand after finding the magistrate's decision inadequate. The commission said:

> The most difficult issue in this case is deciding whether plaintiff is disabled as a result of the injury at work. That the medical experts seem to agree that plaintiff is restricted in terms of what plaintiff can and cannot do only scratches the surface of the economic injury crafted in *Sington v Chrysler Corporation* 467 Mich 144 (2002), and *Stokes v Chrysler LLC,* 481 Mich 266 (2008). Proof of disability requires more than medical impairment. It requires an evaluation of the economic consequences of the medical impairment to evaluate whether there is a limitation in the employee's wage-earning capacity in work suitable to the employee's qualifications and training at the time of injury. MCL 418.301(4). A medical impairment is necessary, but not necessarily sufficient, to establish disability.

The case was remanded because "it is apparent that the magistrate's finding as to the work suitable to plaintiff's qualifications and training is of the past work plaintiff has performed. … The section [301(4)] further requires the magistrate to consider all "'work *suitable* to [plaintiff's] qualifications and training.'" The commission said the magistrate "failed to do" this, "[s]pecifically the magistrate failed to 'assess employment opportunities to which his qualifications and training might translate'" (emphasis in original). Finally, with respect to the relevance of lesser-paying suitable work on the *Stokes* disability issue, the commission said "jobs that paid less will not be relevant unless lesser-paying jobs in the past are, as of the date of injury, jobs that are within the same salary range as the job plaintiff was performing when injured."

Finally, in *Horak v CME Corporation*, 210 ACO #5, the Commission also remanded after reiterating:

> However, the magistrate's disability and wage loss analysis cannot stand. The magistrate's conclusory statements do not provide the necessary analysis. More specifically, the magistrate simply states that plaintiff provided adequate proofs to show the universe of jobs suitable to her qualifications and training. This cannot substitute for an analysis of plaintiff's wage-earning capacity in jobs suitable to her qualifications and training. The magistrate must provide some description of the jobs that are suitable to plaintiff's qualifications and training. He must then determine which jobs pay the maximum according to the proofs presented. Then the magistrate must decide which jobs, if any, plaintiff could both perform with her physical restrictions and could obtain in accordance with the proofs presented.

Invite someone to join the section

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