

# Workers' Compensation Section Newsletter

Spring 2014



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## From the Chair

By Charles Palmer



I can't believe that my term as your chairperson is coming to a close. It's been a busy year in our workers' compensation world. We continue to struggle with how much job search is required in order to obtain full wage loss benefits, how to conduct effective case facilitations, and medical liens from everywhere complicate our ability to promptly resolve claims.

One goal I had which I have not been able to accomplish is to deal with costs of medical records and, I promise to continue to work on that issue after my term on the Council has ended. It seems outrageous that we continue to pay per-page rates for electronically maintained medical records. I did a survey of statutes and regulations from around the country and it seems that no one has addressed this issue yet.

Please join us at the **Summer Meeting at Crystal Mountain Resort, June 19-21**. In addition to updates from Director Kevin Elsenheimer, Deputy Director Jack Nolish, Chief Magistrate Lisa Klaeren and Commissioner Jack Wheatley, we have an interesting panel selected to discuss Evidence-Based Medicine and the ODG guidelines. We also will elect new officers and members of the WC Section Council.

After the inductions into the Hall of Fame and Dinner on Thursday night, we will hold an after party in a wonderful house provided by the resort. Crystal Mountain Resort is a beautiful place, with great golf and lots of family-friendly activities, not to mention its close proximity to Sleeping Bear Dunes National Lakeshore and the lovely resort town of Traverse City. Bring the family and spend some well-deserved time just relaxing in this beautiful resort.

Last month I forgot to mention and thank Commissioner George Wyatt for participating in the Winter Meeting panel discussion on partial disability. Sorry about that!

## Workers' Compensation Law Section Council

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Ella S. Parker, Newsletter Editor

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# A Word from the Editor

By Ella S. Parker

Although the weather indicates otherwise, it is time to celebrate Spring and Summer once again with our annual meeting. As Chuck Palmer advised, our annual meeting will be held in Thompsonville at Crystal Mountain Resort. Chuck has some wonderful speakers lined up and I am looking forward to their presentations.

As many of you know, our Thursday night dinner also includes inductions into the Michigan Workers' Compensation Hall of Fame. I am honored to announce that two wonderful people have been selected this year: John Charters and Paul Lazar. I have the utmost respect and admiration for both of these gentlemen and I am so glad that their years of dedication to this Section and to our practice are being recognized this year.

Please join us in celebrating their induction at the dinner on June 19, 2014. For further information, please see the Meeting Registration Form and the Hotel Reservation Form included in this newsletter. You must register for both as the hotel reservation alone does not register you for the Section events. While we strive to make accommodations for late registrants, we cannot guarantee a seat.

As I indicated in the winter Newsletter, this newsletter would not be possible without articles from our members. I would like to thank Chris Morris for his contribution regarding subpoenas and contempt hearings in Workers' Compensation. While Chris' article deals with a recent case where an IME doctor's records were subpoenaed under a different statute, his article also applies to those situations where counsel subpoenas a treating doctor's records as well. I know a lot of us have been having a great deal of difficulty obtaining this information from certain providers so I hope you find his article helpful.

Magistrates Chris Slater and Robert Timmons also contributed a noteworthy article on Section 315 and medical bill payments—*Demystifying Section 315*. Both of these magistrates put a lot of hard work and effort into their article. While both were very careful to include the general disclaimer that this article is to be interpreted generally and should not be used to predict the findings in a specific case, I recommend you familiarize yourselves with the issues they address.

Finally, I would like to personally urge our members to review Murray's article about Kid's Chance of Michigan and the wonderful opportunities there.

I hope to see you all at the annual Section Meeting. ✂



## Magistrate Update

The following information was borrowed from Governor Snyder's web page announcing the appointment of Luke McMurray, of Flint, to the Workers' Compensation Board of Magistrates.

"Housed within the Department of Licensing and Regulatory Affairs' Michigan Administrative Hearing System, the 15-member commission chairs hearings on workers' compensation cases statewide.

Luke has extensive experience in workers' compensation issues and will make great contributions to the board," Snyder said.

"McMurray has specialized in workers' compensation law for the past 34 years. Before starting his own firm in 1999, McMurray spent 12 years with Reliance

Insurance Co., managing the staff counsel in various states. He previously spent six years working on workers' compensation and negligence cases with private law firms. He received a bachelor's degree and a master's degree from Central Michigan University and he earned a degree from the Detroit College of Law. McMurray replaces John Buehler.

McMurray will serve the remainder of a four-year term expiring Jan. 26, 2015, and his appointment is subject to the advice and consent of the state Senate."

Our understanding is that Luke's appointment will expire on January 26, 2017 but apparently getting this information corrected is taking longer than anticipated. However, we wanted to congratulate Luke on his appointment. ✂

## Michigan Compensation Appellate Commission Update

### Margaret L'Mell Smith



Age 64, of Lansing, MI, died suddenly on April 16, 2014. She was born in New Orleans, LA on August 9, 1949.

She earned a BA Degree from Louisiana State University where she was a member of the Sigma Chapter of the Delta Zeta Sorority. She later earned her Juris Doctorate from Thomas M. Cooley Law School. L'Mell's legal acumen was recognized throughout her tenure in state

government as demonstrated by her appointments to adjudicative positions by three Michigan Governors. In 1988, L'Mell was appointed by Governor James Blanchard to the Workers' Compensation Appeal Board with the Michigan Department of Labor. She was appointed by Governor John Engler to the Workers' Compensation Board of Magistrates in 1991 and was reappointed to the Board twice—serving through 2006. In 2011, she was appointed by Governor Rick Snyder to the new Michigan Compensation Appellate Commission (MCAC), a position she ably filled until her passing. As a Commissioner and a Magistrate, L'Mell used her extensive knowledge of administrative and workers' compensation law to serve the state and its citizens. She was a former Board Member of the University Club, and a member of the U Club Ladies Golfing Gals who will dearly miss her.

Surviving are her husband of 40 years, Kimbal Robert Smith, III; a son, Kimbal R. Smith, IV; 3 grandchildren; sister, Victoria Spurlock; and nieces, nephews, and cousins.

A Memorial Visitation was held on Wednesday, April 23<sup>rd</sup> from 3-6 p.m. at the Estes-Leadley Greater Lansing Chapel.

### ATTENTION: Appellate Commission has relocated

The Michigan Compensation Appellate Commission has relocated. Our *mailing address* is:

#### REGARDING UNEMPLOYMENT:

Michigan Compensation Appellate Commission  
P.O. Box 30475

Lansing, MI 48909-7975

Telephone numbers: 1-800-738-6372 or 517-284-9300

Facsimile: 517-241-7326

#### REGARDING WORKERS' COMPENSATION:

Michigan Compensation Appellate Commission  
P.O. Box 30468

Lansing, MI 48909-7968

Telephone numbers: 1-800-738-6372 or 517-284-9300

Facsimile: 517-373-6734

The Michigan Compensation Appellate Commission's *physical address* is:

Michigan Compensation Appellate Commission  
525 West Allegan Street

Constitution Hall, Atrium Level, North Tower  
Lansing, MI 48909

STATE BAR OF MICHIGAN  
**Workers' Compensation Section**  
**Annual Summer Meeting**

June 19-21, 2014

Crystal Mountain Resort • Thompsonville, MI



**Thursday, June 19**

6:30 pm      Cocktail Party  
7:30 pm      Dinner & Hall of Fame  
                 Induction Ceremony of  
                 Paul Lazar and  
                 John Charters

**Friday, June 20**

7:00-9:00 am      Breakfast  
9:00-12:00 pm      Business Meeting  
                 Elections, Reports,  
                 Panel Discussion of  
                 Evidence-Based Medicine  
Noon-6:30 pm      Golf and Free Time  
6:30-8:00 pm      Cocktail Party

**Optional Friday Afternoon Activities:**

**Golf:** Contact David DeGraw at 616-446-7200 or [ddegrow@shrr.com](mailto:ddegrow@shrr.com).

**Additional resort activities:** Pool, biking rentals and trails, Crystal Mountain coaster alpine slide, Climbing wall, tennis, paintball, disc golf, croquet, Michigan Legacy Art Park.

**Offsite activities:** Sleeping Bear Dunes National Lakeshore, Betsie or Platte River canoeing/kayaking, Fishing charters, ATV Trail tours, Traverse City area activities

**Register with attached form or at <http://e.michbar.org>**



WORKERS' COMPENSATION LAW SECTION

Registration

Register online at <http://e.michbar.org>  
 Resort Registration deadline May 20, 2014  
 Conference Registration deadline June 12, 2014

**Annual Summer Meeting • June 19-21, 2014**

Crystal Mountain Resort- Thompsonville, Michigan

**Agenda**

**Thursday, June 19**

6:30 p.m. Cocktail party  
 7:30 p.m. Dinner and Hall of Fame induction ceremony

**Friday, June 20**

7:00 -9:00 a.m. Breakfast Main Dining Room  
 9:00 -12:00 p.m. General business meeting and EBM panel discussion  
 12:00 -6:00 p.m. Golf Outing, Free time  
 6:30 -8:00 p.m. Cocktail party  
 Dinner on your own – no scheduled section dinner.

**Optional Friday Afternoon Events**

**Friday Afternoon Golf** (Contact David DeGraw at (616) 446-7200 or by e-mail at [ddegraw@shrr.com](mailto:ddegraw@shrr.com) to play.)

- **Hotel reservations** cannot be made by using this form. To reserve your room, you must use the form provided by Crystal Mountain Resort --see the attached reservation information and form.
- For additional information about this event contact Chuck Palmer, [cpalmerpc@sbcglobal.net](mailto:cpalmerpc@sbcglobal.net)  
 Bill Housefield, [jhousefield@mcgintylaw.com](mailto:jhousefield@mcgintylaw.com)

P #: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Adult Guest: \_\_\_\_\_  
 Child(ren): \_\_\_\_\_  
 Your Firm/Organization: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 City: \_\_\_\_\_  
 Telephone: ( ) \_\_\_\_\_  
 Enclosed is check # \_\_\_\_\_ for \$ \_\_\_\_\_

Cost:  
 Section members or Attorneys ..... \$75  
 (includes all meetings, events and 2 drink tickets for each cocktail party)  
 Guests:  
 accompanying adult.....\$50 x \_\_\_\_\_ = \$ \_\_\_\_\_  
 (includes dinner & 2 drink tickets for each cocktail party)  
 Child.....\$15 x \_\_\_\_\_ = \$ \_\_\_\_\_  
 (same as guest) [Child is defined as **under 16** years of age.]  
**Total = \$ \_\_\_\_\_**

Please make check payable to State Bar of Michigan  
 Please bill my:  Visa  MasterCard for \$ \_\_\_\_\_  
 Card #: \_\_\_\_\_  
 Expiration Date: \_\_\_\_\_  
 Please print name as it appears on credit card:  
 \_\_\_\_\_  
 Authorized Signature: \_\_\_\_\_

**Mail** your check, or credit card information, with the completed registration form to:  
 State Bar of Michigan  
 Attn: Seminar Registration  
 Michael Franck Building  
 306 Townsend Street  
 Lansing, MI 48933

**Fax** (ONLY if paying by credit card) the completed form and credit card information to:  
 Attn: Seminar Registration at  
 (517) 346-6365

**Cancellations:** All cancellations must be received at least 48 business hours before the start of the event and registration refunds are subject to a \$20 cancellation fee. Cancellations must be received in writing by e-mail ([tbellinger@mail.michbar.org](mailto:tbellinger@mail.michbar.org)), fax (517-346-6365 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.) No refunds will be made for requests received after that time. Refunds will be issued in the same form payment was made. Please allow two weeks for processing. Registrants who cancel will not receive seminar material



**Group Name:** State Bar of Michigan - Workers Compensation Section  
**Dates:** June 19, 2014-June 21, 2014

**Group #:** 45R8W0  
**Issued:** Reissued 4/28/14

Reservations may be made utilizing this form or by booking online at <http://www.crystalmountain.com/grouplodging> utilizing group code **45R8W0**. Reservations must be made by **May 27, 2014**, reservations received after this date will be taken on a space-available basis. If room type requested is not available, the next available room type and rate will be confirmed. Crystal Mountain does it's best to accommodate requests, however cannot guarantee specific rooms/units. Please inquire with reservation staff for additional unit types available beyond those listed.

**Check-in: 5:00pm**

**Check-out: 11:00am**

Room	Includes Taxes & Service Fee*		Tax Exempt**		1 <sup>st</sup> & 2 <sup>nd</sup> Lodging Choice
	Single/Double Rate	Single/Quad Rate	Single/Double Rate	Single/Quad Rate	
Guest Room (one queen bed)	\$ 174.33		\$ 165.39		
Hotel Room	\$ 197.73		\$ 187.59		
Suite	\$ 232.83		\$ 220.89		
One Bedroom Condo	\$ 267.93		\$ 254.19		
Two Bedroom Condo		\$ 326.43		\$ 309.69	
2 Bdrm Cottage/Kinlochert		\$ 443.43		\$ 420.69	
3 Bdrm Cottage/Kinlochert/Bungalow		\$ 618.93		\$ 587.19	
Four Bedroom Bungalow		\$ 700.83		\$ 664.89	
Five Bedroom MountainSide		\$ 700.83		\$ 664.89	

\*Quoted rates include 6% state tax, 2% local assessment and 9% service fee.  
 \*\*Quoted rates include a 2% local assessment and 9% service fee.

- Package Includes: Lodging Only** (per unit, per night)
- Up to 2 children ages 17 & under sleep free when occupying same room with 1 paying adult.
  - **There is a \$20.00 plus tax, per person, per night charge for additional adults above the quoted occupancy.**
  - Credit card imprint is required at check-in for all guests.
  - **There are no refunds on unused portions of lodging or package stays.**

**Deposit / Cancellation Policy:** A deposit equal to the first night's lodging is required with each reservation. Please make check or money order payable to Crystal Mountain or include a credit card number below. Do not send cash. Deposit is fully refundable if cancellation is made 14 days prior to your arrival date. If cancelled or changed within 14 days of arrival, you are responsible for your entire lodging or package stay.

Group #: 45R8W0 Please Print

Arrival Date: \_\_\_\_\_ Departure Date: \_\_\_\_\_ Number of: Adults in Party: \_\_\_\_\_ Children 17 & under: \_\_\_\_\_

Mr. Mrs. Ms. Dr. (circle one): Name : \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_ Telephone #: \_\_\_\_\_ (Home)

e-mail Address: \_\_\_\_\_ (Work)

Conference attendees sharing same room: \_\_\_\_\_

Spectal requests: (handicap accessible, etc.): \_\_\_\_\_

Would you like to be contacted for dining, lesson, recreation, tee time or spa reservations? Yes \_\_\_\_\_ No \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**Tax exempt individual:** If your agency is tax exempt you may qualify for exemption from the 6% state use tax; reservations are not exempt from the 2% local assessment and 9% service fee. Please include a state tax exempt form #3372, (IRS authorized letter with 501(c)(3) or 501(c)(4) organizations) and indicate your method of payment below. (Personal funds do not qualify for exemption from state tax, local assessments or service fee.)

- \_\_\_\_\_ Agency check enclosed.
- \_\_\_\_\_ Agency credit card completed below (MUST include credit card authorization form).
- \_\_\_\_\_ Please use my personal credit card to guarantee the reservation. Payment with agency funds will be provided prior to arrival.

**AUTHORIZATION NOTE:** I authorize and acknowledge that all of the charges below will be processed to my payment card as detailed above.

Credit Card #: \_\_\_\_\_ Expiration Date: \_\_\_\_/\_\_\_\_/\_\_\_\_ Billing Zip Code: \_\_\_\_\_

Agency or individuals name as it appears on Card: \_\_\_\_\_  
 (Agency credit card or copy MUST be presented upon check in)

Please mail or fax to: **Crystal Mountain - 12500 Crystal Mountain Drive - Thompsonville, MI 49683**  
 Fax: 231-378-4879 Phone: 231-378-2000 Reservations Only: 855-520-2974

DK

# Workers Compensation Subpoenas and IME Records

By Christopher D. Morris

Recently the Michigan Court of Appeals announced a ruling which may have confused many practitioners about the availability of records maintained by independent medical reviewers. In an unpublished decision by the Michigan Court of Appeals, *Paul v Glendale Neurological Associates, P.C.*, Docket No. 309927 (February 20, 2014), the appellate court affirmed the dismissal of a lawsuit filed by an injured worker in the Oakland County Circuit Court under the Medical Records Access Act (MRAA), MCL 33.26261 et seq., and the Michigan Consumer Protection Act (MCPA) MCL 445.901 et seq.

In a nutshell, the plaintiff sought an MRI report or study ordered by the IME physician as a "medical record" and sued under the aforementioned statutes seeking actual attorney fees and costs. Some commentators suggested that the holding in the case protects IME records from release to injured workers and their representatives. In my opinion, this decision merely clarifies once again the nature of the IME relationship; however, IME records remain properly subject to a workers compensation subpoena.

The law in Michigan has long maintained that there is no full physician patient relationship established through an independent medical examination. While rights to medical records are granted to patients under the MRAA, examinees are not *patients*, *Rogers v Horvath*, 65 Mich App 644 (1975).

In Michigan, "the IME physician, acting at the behest of a third-party, is not liable to the examinees for damages resulting from the conclusions the physician reaches or reports. The limited relationship that we recognize imposes a duty on the IME physician to perform the examination in a manner not to cause physical harm to the examinee," *Dyer v Trachtman*, 470 Mich 45, 53 (2004). Nevertheless, because claims of injury by an IME examiner raise questions involving medical judgment, the resulting cause of action is for medical malpractice, *id* 55.

In my opinion any record of an IME physician should be produced pursuant to a valid workers compensation subpoena. The subpoena power in the statute establishes a broad subpoena power and consequences for failure to comply: "any witness who refuses to obey a subpoena, who refuses to be sworn or testify, or who fails to produce any papers, books, or documents touching any matter under investigation... May be punished as for contempt of court," MCL 418.853.

The rules specify the responsibility of the subpoenaed party: "the party to whom a subpoena is issued shall immediately due one of the following: (a) Provide a complete copy of the records to all parties when received. (b)

make the records reasonably available for copying when received," R 418.56.

Both the language of the statute and the rule are mandatory, and applies to "any papers, books, or documents" and shall be provided "immediately". The only reasonable interpretation of this language is that upon receipt of a valid workers compensation subpoena, an IME physician must supply "any papers" "immediately"; failing to do so may be punished for contempt of court.

The procedure for enforcing a subpoena is also set forth in the rules: "any dispute arising under this rule shall be brought by motion before the assigned magistrate," R 418.56 (6).

The appropriate contempt of court procedures to apply in workers compensation proceedings are outlined in detail by the Court of Appeals in *In re Contempt of Robertson*, 209 Mich App 433 (1995). Because the failure to provide subpoenaed records occurs outside the presence of the magistrate, proof of the facts must be made by affidavit or other method and the party must have an opportunity to defend.

The due process safeguards that apply in civil contempt proceedings also apply in workers compensation contempt proceedings. The rules of evidence apply and the standard of proof of contempt must be clear and unequivocal, *id*.

In practical application, a workers compensation litigant would, by motion, seek an order of show cause from the assigned magistrate. In granting the motion, a magistrate must issue an order providing for a future show cause hearing date to the party and the notice must be served upon the party being charged with contempt. Following a show cause hearing, the magistrate may issue an order of contempt, which is enforceable by applying to the appropriate Circuit Court.

Alas, unlike the MRAA or the MCPA, actual attorney fees are not available for enforcement of workers compensation subpoenas. Nevertheless, failure to comply with an appropriate subpoena could result in unpleasant consequences since the circuit court may punish by fine or imprisonment, or both. ✖

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## But Did You Know . . .

By Martin L. Critchell

All practitioners know that the director of the workers' compensation agency can hear an appeal from an order by the workers' compensation board of magistrates deciding an agreement to redeem liability under MCL 418.837(2), first sentence. But did you know . . . the director can hear an appeal from an order by the board of magistrates deciding a claim to an attorney for recovering the costs of medical care and a dispute about the charge by a doctor.

The second and third sentences of MCL 418.858(1) allow the board of magistrates subject-matter jurisdiction to hear and decide a claim for a fee of a lawyer hired by an employee in addition to the cost of medical care and the charge by the doctor by saying that, "the payment of all fees for all attorneys and physicians under this act shall be subject to the approval of a worker's compensation magistrate. In the event of a disagreement as to such fees, an interested party may apply to the bureau for a hearing." However, the next sentence allows direct review by the *director* by saying, "After an order of the worker's compensation magistrate, review may be had by the *director* if a request is filed within 15 days." (emphasis added)

The last sentence of §858(1) bars the Michigan compensation appellate commission from direct review of the decision by the board of magistrates about a claim to a lawyer's fee or a doctor's charge. The last sentence of §858(1) only allows the appellate commission to review the decision by the director by saying "Thereafter, the director's order may be reviewed by the appellate commission on request of an interested party, if a request is filed within 15 days."

The appellate commission recently recognized that it could not conduct direct review of a decision by the board of magistrates about an attorney fee from an employer in deciding the case of *Lewandowski v OEM Resourcing, Inc.*<sup>1 2</sup>

Practitioners should be attentive to the subjects of decision by the board of magistrates as well as the result when considering an appeal. ✖

### Endnotes

- 1 2014 Mich ACO 3 at 7.
- 2 Martin L. Critchell represented the defendants-appellees before the appellate commission.

## Section 315–The Medical Bills Provision–Demystified

By Chris D. Slater, Board of Magistrates; Robert C. Timmons, Board of Magistrates

*Disclaimer: The views and opinions expressed in this article are those of the authors and do not necessarily reflect the official policy or position of The Board of Magistrates, a member of the Board of Magistrates, the Michigan Administrative Hearing System, or any other agency of the State of Michigan. The views and opinions expressed in this article are general in nature, and should not and cannot predict the findings and conclusions of any adjudicator, including the authors, in a given administrative contested case in which a specific factual record is compiled.*

Proving medical bills under section 315 of the Michigan Workers' Disability Compensation Act (the "Act") can be problematic in our experience. Medical expense issues are almost always negotiated and compromised so that formal proofs are seldom required. Consequently, many practitioners are unfamiliar with the substantive rules and proofs required to litigate these issues. Moreover, the text of section 315 is complex and difficult to translate into actual litigation in medical bill disputes. Finally, there are widely held misconceptions that require debunking and correcting, such as "all medical bills must be cost contained"

Section 315 is the medical benefits provision of the Act. It consists of two primary subsections: subsections 315(1) and 315(2). The remaining subsections, designated (3) through (9), provide regulation and direction for cost containment procedures and rules. Understanding the two primary subsections and how they relate to one another is critical to litigating medical expense payments and reimbursements under the Act.

The vast majority of workplace injuries are processed voluntarily under the Act and are not contested.<sup>1</sup> Section 315(2), the cost containment provision, is designed to govern the routine processing and payment of workplace medical bills for

the every day voluntarily paid claim. A small percentage of cases are contested, however, and section 315(1) is designed to govern those cases. We believe that section 315 is not well understood and thus requires demystification.

In most *contested cases* where medical bills are to be paid, the Magistrate enters an order requiring a party to pay “reasonable and necessary” medical bills arising out of proven compensable injuries. In many cases, the lawyers request the Magistrate to “reserve” ruling on medical bills so that once a decision and order is rendered, the parties can determine which bills to pay (if any) and how much to pay without further involvement of the Magistrate. Medical bills are “reserved” in the anticipation of a voluntary resolution, and to avoid *res judicata* issues should the parties find themselves unable to reach an amicable agreement regarding medical bills. The parties may then wish to enlist the assistance of the Magistrate to resolve lingering disputes. This procedure enables the parties to avoid expending case costs for proving medical bills in cases that are ultimately found not compensable. The Welch and Royal handbook describes and explains this process far better than we could. We refer the reader to the handbook and avoid plagiarizing their good work. Welch & Royal, *Workers' Compensation in Michigan: Law & Practice* § 14.8 (ICLE 2012).

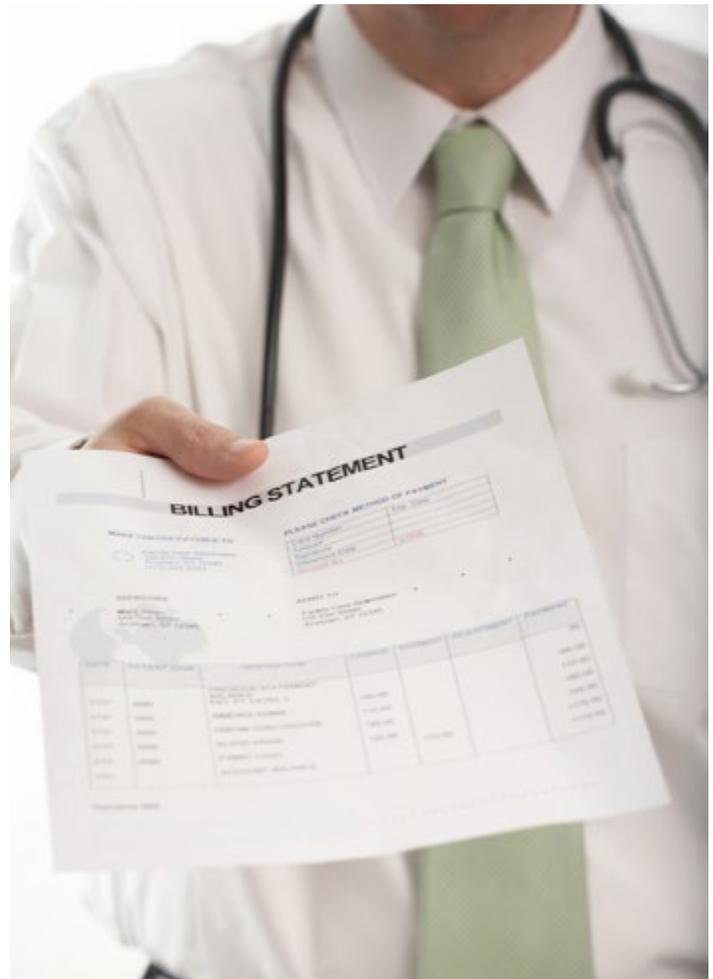
The primary inquiry is to determine which subsection to use in a given case. Section 315(1) applies to contested cases. Under this section, medical bills are paid in full subject to a reasonable standard. Subsection 315(1) likely applies to employees and their equitable subrogees who seek payment of unpaid bills or reimbursement of paid bills.

Subsection 315(2) applies to uncontested cases, which proceed through a process that initially avoids the Board of Magistrates altogether. This is the cost containment provision. Subsection 315(2) likely applies to providers seeking payment of unpaid bills.

When the issue of medical bills reaches the Board of Magistrates in a contested case, the specific proofs required are not burdensome. The standard is “necessary,” “reasonable,” and “legal.”<sup>2</sup> One need not prove each medical bill or charge individually:

We should not impose a burden on the employee to comprehensively detail each and every medical bill from each and every provider in each and every case. We do not believe that such a process is necessary and wise, given the cost containment provisions. Nor should we require magistrates to utilize their valuable time sorting through the nuances of medical bills, procedure codes and reimbursement amounts. *Sarazin v Freedland Industries Corp.*, 2000 ACO #168; *Lovely v Ridge Company, Inc.*, 2013 ACO #70, p5.

In a contested case, where there is a dispute over compensability and an application for benefits has been filed, medical



Medical expense issues are almost always negotiated and compromised so that formal proofs are seldom required. Consequently, many practitioners are unfamiliar with the substantive rules and proofs required to litigate these issues.

bills are paid under section 315(1) of the Act. Under this subsection, the standard for payment is “reasonable.”

In subsection 315(2), a different standard for payment applies which is the “maximum cost contained amount” or “the usual and customary amount” whichever is less. The reason for this distinction is to encourage insurance carriers and self-insured employers to voluntarily pay medical expenses. When medical expenses are paid voluntarily (without a dispute), the carrier or employer pays wholesale pursuant to section 315(2). If the carrier or employer chooses to dispute the claim, then it risks payment of medical expenses at the retail rate under section 315(1) and attorney’s fees as well.

Continued on next page

**Contested cases--MCL 418.315(1).** Section 315(1) is the contested case medical bill provision of the Act, and is sometimes referred to as the “retail” provision. The key text states that:

If the employer fails, neglects, or refuses [to pay medical expenses], the *employee* shall be reimbursed for the *reasonable* expense paid by the employee, **or** payment may be made *in behalf of the employee* to persons to whom the unpaid expenses may be owing, *by order* of the worker's compensation magistrate.<sup>3</sup> (emphasis added)

Under section 315(1), if the *employee pays* the medical bills and successfully seeks reimbursement, the employer or carrier reimburses the employee for the amount actually paid, if reasonable. If someone or *some entity pays* the bills on the employee's behalf, then that person or entity is entitled to reimbursement of the full amount paid, if reasonable. And, if the employee files an application seeking all benefits, including *unpaid* medical bills, then those bills are potentially payable at the retail rate subject to proof of reasonableness “to persons to whom the unpaid expenses may be owing, *by order* of the worker's compensation magistrate.”

When a person or entity pays medical bills on behalf of an injured employee, that person or entity may “stand in the shoes” of the injured employee and seek an order for repayment of those expenses. In legal terms, that person or entity may become an “equitable subrogee” of the employee. Examples of equitable subrogees of the employee under §315(1) include first party no fault carriers that have paid medical bills in compensable cases<sup>4</sup> and Blue Cross Blue Shield (BCBS).<sup>5</sup>

BCBS enjoys special status under the Act.<sup>6</sup> BCBS is obligated to initiate payment of potentially compensable medical bills and may seek repayment from the workers' compensation carrier or self-insured employer. MCL 418.230. Section 230(2)(d) provides, in part, the following: “*In a dispute over who assumes liability for the payment of benefits for a particular claim, the nonprofit health care corporation [BCBS] shall initiate payment of benefits pending resolution of the dispute.*” The enabling legislation for Blue Cross provides:

A health care corporation [BCBS] shall have the right to status as a party in interest, whether by intervention or otherwise, in any judicial, quasi-judicial, or administrative agency proceeding in this state for the purpose of enforcing any rights it may have for reimbursement of payments made or advanced for health care services on behalf of 1 or more of its subscribers or members. MCL 550.1401(6).<sup>7</sup>

In *Blue Cross Blue Shield of Michigan v Eaton Rapids Community Hospital*, 221 Mich App 301, 561 NW2d 488 (1997),

the court of appeals held that when BCBS intervenes in a case, it becomes a party and is bound by the decision in that case. By inference, then, if BCBS does not intervene, a final order in that case may not bind it. Consequently, the best practice is to require BCBS to intervene if for no other reason than to promote administrative economy by completely resolving all claims in one hearing. Of course, once BCBS has intervened as a party in a contested workers' compensation case, it must consent to a proposed redemption.

Another question is whether the no-fault PIP carrier/BCBS “equitable subrogee” status will apply to other health care insurers who do not enjoy “health care corporation” status under Michigan law. It is likely that any health insurer or plan that obtains a payback agreement from the patient, or an assignment, will enjoy an enforceable equitable subrogee designation in a contested workers' compensation case. This result is suggested by R 408.44(8) and MCL 418.821, but may be inconsistent with R 418.10104(3) (suggesting cost containment rule are applicable).

When proving medical expenses under section 315(1), the record, at a minimum, should include the actual bills at issue, medical records or testimony describing how the bills relate to compensable treatment, testimony that the treatment in general was necessary, and that the bills are reasonable.<sup>8</sup> These requirements are not burdensome, and medical bills can be proven *en masse* as opposed to one-by-one. *Lovely v Ridge Company, Inc.*, 2013 ACO #70, p5 (citing *Sarazin v Freedland Industries Corp.*, 2000 ACO #168, p9).

**Uncontested claims. MCL 418.315(2).** Section 315(2) is the cost containment provision, which is sometimes referred to as the “wholesale” provision. It mandates that all fees and charges are subject to the cost containment rules and that the standard for payment is the “usual and customary charge” or the maximum cost containment charge whichever is less. In Welch, *Worker's Compensation in Michigan: Law and Practice*, § 14.5 (ICLE 2012), the authors create a 20 point roadmap for navigating the cost containment system created by section 315(2) and associated rules and regulations. It is not until the parties reach *turn 9* that the Board of Magistrates becomes involved.

Section 315(2) is the uncontested medical bill payment provision of the Act. If there is no dispute over the compensability of an injury and there is no application pending, medical bills are processed under section 315(2). Cost containment rules apply and nobody talks to a Magistrate. If the provider and carrier wish to litigate medical bills only, the place to begin is the cost containment rules under section 315(2). One must keep in mind that in section 315, subsection (2) is expressly declared to be “subject to” subsection (1). Section

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315(1) trumps section 315(2) and both subsections trump the rules. Consequently, any real or perceived conflict between the two provisions must be resolved in favor of section 315(1).

For those who wish to become immersed in the processing of medical bills through the cost containment provisions, we highly recommend a close read of Magistrate Ognisanti's opus in *Gress v MCP Building Co.*, a 2012 opinion, and the appellate commission's congratulatory commendation of his travails.<sup>9</sup> As this monograph is being written, Magistrate Ognisanti is once again fighting the dragon known as cost containment.

By the way, you will need expert witnesses—lots of them—to guide you through the cost containment process and to explain what “usual and customary” means in a given case. Pay close attention to the “usual and customary” element. The health care rules define usual and customary charge:

“Usual and customary charge” means a particular provider's average charge for a procedure to all payment sources, and includes itemized charges which were previously billed separately and which are included in the package for that procedure as defined by these rules. A usual and customary charge for a procedure shall be calculated based on data beginning January 1, 2000. R 418.10109(x).

This element is not established by announcement by counsel or by stating as much in a brief. There must be testimony or exhibits establishing the usual and customary element, as well as the maximum cost containment amount. Stay tuned for how evidence-based medicine will complicate this process.

The parties cannot stipulate their way into or out of cost containment. Section 315 determines where these bills go to be paid. If they are paid or payable under section 315(1), then there is no cost containment and the standard is *reasonable*. Section 315(2) is the cost containment section of the Act and the standard is the *maximum cost containment amount or the usual and customary charge, whichever is less*. If counsel conclude that medical bills are subject to cost containment, they must initiate the process and proceed as required by section 315(2). Proceed with caution—there are forms to be completed and precise time lines to be followed; and when you get to the edge of the form there be dragons!

Understanding section 315 is a multi-step process. First, one must understand the substantive provisions of sections 315(1) and 315(2). Second, one must determine the differences between the two subsections, including the different standards to be applied and whether cost containment applies. Third, one must remember that 315(1) trumps 315(2) so that a real or apparent conflict between the two subsections is always resolved in the favor of section 315(1). Now go forth and get those medical bills paid properly. ✖

## Endnotes

- 1 Welch, *Workers' Compensation in Michigan: Law & Practice* § 1.2 and §15.1 (ICLE 2012).
- 2 This monograph does not address the “legal” portion of the standard.
- 3 The appearance of the words, “magistrate” who is signing an “order,” is a tip-off that section 315(1) pertains to contested cases.
- 4 *Auto-Owners Insurance Company v Amoco Production Company*, 468 Mich 53, 57-60, 658 NW2d 460 (2003)(holding that the no fault carrier is an equitable subrogee of the employee)
- 5 *Harvie v Jack Post Corporation*, 2006 ACO #69 (“*Blue Cross Blue Shield's reimbursement is not subject to cost containment.*”) (If cost containment does not apply, then you are in subsection 1 of section 315), *affirmed*, *Harvie v Jack Post Corp.*, 280 Mich App 439, 760 NW2d 277 (2008).
- 6 This status is derived from BCBS's statutory designation as a “non-profit” organization. As of January 1, 2014, BCBS is no longer a “non-profit” organization, leaving the legal status of BCBS as an equitable subrogee uncertain until the Act is amended.
- 7 The “or otherwise” provision may cause problems. It is likely intended to pertain to joining the litigation by stipulation or agreement as opposed to formal intervention.
- 8 The employer's statutory obligation is to supply medical goods and services to the injured employee that are “*necessary to cure, so far as reasonably possible, and relieve from the effects of the injury.*” MCL 418.315(1).
- 9 Including the inevitable remand. *Gress v MCP Building Co.*, 2013 ACO #24.



## Kids' Chance of Michigan Update

By Murray Feldman

We want to thank all of you who have contributed to the success we have had since starting Kids' Chance of Michigan.

The generosity of the workers' comp community, including individuals, firms, service providers, carriers, TPAs, and the WC Section have made it possible to establish the John Buehler Memorial Kids' Chance of Michigan Scholarship. We are now working on establishing a Memorial Scholarship in honor of L'Mell Smith's recent unexpected passing. KCOMI is accepting donations in her memory to establish a scholarship in her name.

We would appreciate your help in identifying potential scholarship applicants. Graduation is just around the corner for many high school seniors and is an opportune time to look for potential candidates.

For those of you who are plaintiff attorneys, please review your files to see if you can identify anyone who might have a kid(s) who could benefit from the Kids' Chance scholarship.

For those of you who are defense attorneys, please contact your carriers or third-party administrators or self-insureds to determine if they are aware of any kids that might benefit from a Kids' Chance scholarship.

If you know of anyone who might qualify for one of our scholarships, encourage them to go to our website to confirm the qualifications and, if appropriate, submit an application. Look at [www.kidschanceofmi.org](http://www.kidschanceofmi.org) for details and invite them to contact either our Executive Director, Sue DeLong, or myself with any questions.

I also want to remind everyone of our upcoming events, a complete list of which is on our web site. KCOMI will be receiving ½ of the proceeds from the Acclaimed Mingle 5, scheduled for July 31, 2014, which promises to be a wonderful event and great fundraiser for us. The Acclaimed Mingle is



Front Row: Aaron Dickerson, Azurely Kerr, and Brittany Richardville

Back Row: Carrie Barrett, Denise Pretzer, Rick Warsh, Susan Azar, Michele Rowland, and Brooke Blower

Photo courtesy of Kids Chance of Michigan

on the Ovation Yacht on the Detroit River.

Also, on September 19, 2014, we have our first golf tournament and our second rock & roll concert scheduled. The golf outing will take place at The Links of Novi.

And, on November 14, 2014, we will have another bowling event based upon the great success we had at our recent bowling event, KCOMI 1. On February 28, 2014, we held Bowling for KCOMI 1 at the Drakeshire Lanes in Farmington Hills. Over 120 people attended the fundraiser and we raised over \$5,000.00! Everyone had so much fun, we are planning Bowling for KCOMI 2. We have not yet finalized a venue for the bowling event but will keep you updated. Please visit our web site to see pictures from this event.

Please direct any questions or concerns to either Sue DeLong or myself, or any of our officers. ✖



# Caselaw Update

By Martin L. Critchell

## United States Supreme Court

A conference has been scheduled for Friday, May 2, 2014 at which the United States Supreme Court will discuss and decide the request for review of *Jackson v Sedgwick Claims Mgt Services, Inc (On Reh)*<sup>1</sup> that bars an employee from suing an employer, claims administrator, or doctor under the Racketeer Influenced Corrupt Organizations Act<sup>2</sup> after a suspension of workers' compensation. Any decision will be reported at the Section meeting on June 19-20 at Crystal Mountain.

## Michigan Supreme Court

The Michigan Supreme Court did not decide a workers' compensation case since the last Caselaw Update. The Court has not accepted a workers' compensation case for plenary review during the 2013-2014 Term.

## Michigan Court of Appeals

After the last Caselaw Update, the Michigan court of appeals published two opinions about workers' compensation, *Thomai v MIBA Hydramechanica Corp*<sup>3 4</sup> and *Younkin v Zimmer*.<sup>5</sup>

Naum Thomai slipped on some oil, caught a shirt sleeve in the machine that he was running, and was injured.<sup>6</sup> He then sued his employer, MIBA Hydramechanica, saying that MIBA had committed an intentional tort as defined in MCL 418.131(1), third sentence, by requiring him to work with the machine that MIBA knew was dangerous and certain to injure him.<sup>7</sup>

The court of appeals ruled that these claims were enough to describe an intentional tort by MIBA.<sup>8</sup> The court of appeals said that Thomai did not have to name the individual supervisor or manager who was the person who actually knew of the danger and that an injury was certain to occur, but could pursue discovery and establish that later.<sup>9</sup> And the court of appeals said that prior episodes could be presented as evidence that MIBA had actually known of the danger<sup>10</sup> but were not prerequisites to establishing an intentional tort.<sup>11</sup>

All of the rulings by the court of appeals in deciding *Thomai* were based on the pronouncements by the supreme court in the case of *Travis v Dries & Krump Mfg Co.*<sup>12</sup> What is remarkable is the attention to what had injured Thomai – the machine – and the utter disregard of *why* he was injured – slipping on some oil accumulating on the floor from the machine – which is the focus of an intentional tort.

The decision has been appealed to the Supreme Court.

Lawrence Younkin filed a claim for workers compensation from General Motors with the Flint office of the workers' compensation agency.<sup>13</sup> Later, Michael Zimmer announced the decision to close that office and transfer the case filed by Younkin for hearing in Dimondale.<sup>14</sup> Younkin then sued Zimmer to keep the venue in Flint.<sup>15</sup>

The court of appeals ruled that the statute in the workers compensation act about venue – MCL 418.851, second sentence – required the hearing in Flint or greater Flint as the “locality of the injury” and not Dimondale, because “while reasonable people might disagree as to whether the relevant locality is Flint itself, greater Flint (i.e. Flint and its surrounding communities), or even Genesee County, ... Dimondale is not sufficiently close to qualify as the ‘locality where the injury occurred.’ \*\*\* Dimondale would not qualify as the appropriate ‘locality’ for any injury that occurred in Genesee County.<sup>16</sup>

The court of appeals did not say what constituted *the hearing*. This is important for it may allow for administering of case before the actual hearing – filing, pre-trial conferences, motions, facilitation, redemptions – in Dimondale – and *the hearing* – the stipulations and presentation of evidence – in Flint.

The decision may pose a more serious problem for claims based on an injury sustained by an employee outside of Michigan. While Michigan could have subject-matter jurisdiction because the injured employee was hired or resided in Michigan, MCL 418.845, there would be no venue to actually hear the case in Michigan because venue under §851 would be at the locality of the injury outside of Michigan. This would pose problems for counsel who may or may not be qualified to practice in Ohio or Canada.

## Michigan Compensation Appellate Commission

The Michigan compensation appellate commission considered the relationship between disability and wage loss and criminal conduct in deciding the case of *Cole v Consumers Energy Co.*<sup>17 18</sup>

Robert Cole was employed by Consumer's Energy and served as the treasurer of the local union there. He embezzled from the local union over several years<sup>19</sup> and was then injured at work.<sup>20</sup> After the injury, Cole was convicted.<sup>21</sup>

Continued on next page

The workers' compensation board of magistrates considered how the conviction itself affected the jobs that were or were not available to Cole in deciding disability and wage loss under *Stokes v Chrysler LLC*.<sup>22</sup>

The commission reversed for the failure by the board of magistrates to consider the commission of the crimes saying "The magistrate did not even mention the impact of [Cole's] commission of a crime. This was in error. [Cole's] ability to conceal his crime does not eliminate the impact on [his] wage earning capacity. \*\*\* We find that the ability to conceal either the crime or the conviction does not relieve [Cole's] burden of proving that it did not adversely impact his wage earning capacity."<sup>23</sup>

### Endnotes

- 1 731 F3d 556 (6CA 2013).
- 2 18 USC §1964(c).
- 3 303 Mich App 196; \_\_\_ NW2d \_\_\_ (2013).
- 4 Martin L. Critchell represents an amicus curiae in the case before the Michigan supreme court.
- 5 \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2014).
- 6 303 Mich App at 202.
- 7 *Id.* at 213.
- 8 *Id.* at 214.
- 9 *Id.*
- 10 *Id.* at 215.
- 11 *Id.*
- 12 453 Mich 149; 551 NW2d 132 (1996).
- 13 \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2014).
- 14 *Id.* at \_\_\_ .
- 15 *Id.*
- 16 *Id.* at \_\_\_ .
- 17 2014 Mich ACO 4.
- 18 Martin L. Critchell represented Consumers Energy
- 19 *Id.* at 1.
- 20 *Id.*
- 21 *Id.*
- 22 481 Mich 266; 750 NW2d 129 (2008).
- 23 2014 Mich ACO 4 at 7.

## 2014 Economics of Law Practice Survey

The Economics of Law Practice Survey is conducted every three years by the State Bar of Michigan. As referenced by the Michigan Supreme Court in *Smith v. Khouri*, it is the primary resource used by trial courts to determine attorney fees. The 2014 State Bar of Michigan Economics of Law Practice survey is being conducted between May 1 and May 23. Information provided by attorneys from all practice areas and all firm sizes is important and will ensure that credible and accurate survey results are obtained.

The survey is designed to capture information relevant to the various occupational areas of Michigan attorneys. Private practitioners will be asked questions about their specific practice areas, and those in non-private practice occupations, such as those working in government service, in-house counsel, non-profit organizations, academia, legal services and more, will be asked for information about salaries, benefits, hours worked and job satisfaction.

When members participate in the survey, their privacy will be fully protected and their replies will remain strictly confidential. Results will be reported in the aggregate only—no individual results will be identifiable. The State Bar will not have access to any respondent's financial information, and attorneys will not be asked to provide a P-number or any other identifying information to take the survey. The survey will be conducted by a third-party vendor on an independent website. However, to help members find the survey, a link to the survey will be provided on the State Bar website.

To sweeten the pot and make participation in the survey a little more fun, participants will be eligible to enter a drawing for prizes, including an iPad, two \$250 gift cards, and two \$150 donations to the Access to Justice Fund in the name of the prize winners.

Please click one of the following links to participate in this important survey. The survey should take less than 5 minutes to complete.

- **Private practice attorneys** take the survey here: [www.surveymonkey.com/s/privatepractice14](http://www.surveymonkey.com/s/privatepractice14)
- **Non-private practice attorneys** take the survey here: [www.surveymonkey.com/s/nonprivatepractice14](http://www.surveymonkey.com/s/nonprivatepractice14)