State Bar of Michigan

Workers' Compensation Section Newsletter

Summer 2004

From Your New Editor

Murray Feldman, Strobl Cunningham & Sharp, PC

Contents

As many of you already know, I have become the new editor of the Workers' Compensation Section Newsletter. Ms. Theresa Pinch of my office will be acting as associate editor. In addition, Ms. Sue DeLong, my legal assistant, will also be assisting.

On behalf of the entire Section, I would like to thank Mr. Tim McAree, who served as editor, for his hard work, dedication, and effort on behalf of our Section. Thanks, Tim, for a job well done.

As you will notice from this newsletter, much about the newsletter will be changing. While it will still include highlights of recent cases and other prior features, it is my intention to broaden its scope into areas which I hope will be informative, interesting, and useful to you.

As examples, I hope you enjoy Magistrate Mike Barney's poetry, columns by Chief Magistrate Jack Nolish and Chair of the Appellate Commission Bill Reamon, and the other features we've included. I will also be inviting various guest columnists, including attorneys whose areas of practice often relate to workers' compensation issues to submit articles as well. As an example, you will note an article included in this newsletter written by Attorney Robert Finkel regarding drug testing.

I invite your comments, ideas, and suggestions for future columns and areas to be addressed by the newsletter. I will be actively soliciting your participation and I am pleased to report that many of you have already volunteered to become involved. It is my goal to have the newsletter reflect the ideas, impressions, and areas of interest of our entire Section and from attorneys throughout the entire state. Together, I look forward to working with you to create a newsletter of which we can all be proud.

Your editorial staff can be reached at 248-540-2300 or by e-mail at *mfeldman@stroblpc.com, tpinch@stroblpc.com,* and *sdelong@stroblpc.com.*

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

Murray Feldman, 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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Article submissions for the Fall issue are due October 15, 2004.

Report from the Board of Magistrates

Jack A. Nolish, Chairperson, Board of Magistrates
Michigan Workers' Compensation Agency

I want to begin this first "Report from the Chair" by expressing my gratitude to Governor Granholm for appointing me to the position of Chairperson of the Board of Magistrates. It has already proven to be both an honor and a humbling experience. By no means is this position the semi-retirement that everyone told me it would be. There is a great deal of work to do and more to be done.

I also would like to thank all of the practitioners in the Workers' Compensation world who not only have expressed their support but demonstrated it by helping me go through the transition from one side of the bench to the other and on into the Chairperson's position. It has, at least, been an exhilarating ride worthy of Cedar Point. With your continuing support, my tenure should be a roller coaster and not a "Demon Drop."

You may not remember that this year marks the 92nd anniversary of the Workers' Compensation system. I suppose we could make a little test out of how many present day practitioners remember the various names of the Agency and the labels that were attached to the adjudication officers through the years. This may demonstrate age better than the "P" number system! "The Act," as we so affectionately call it, is one of the earliest tort reform systems. If you look at it in the abstract, it has eliminated juries, capped both economic and eliminated non-economic damages and placed the adjudication process into arbitration with limited court review.

It is not my role as Chairperson of the Board of Magistrates to upset the fundamentals of the system that have been in place for so long. It is, however, my objective to move the system towards two things, which I have begun to call my mantra: *Certainty of Trial and Certainty of Adjudication*. Those cases that cannot be amicably resolved deserve to get to trial as quickly as possible and, once the trial is completed, the decisions need to be made promptly and fairly.

The Executive Order under which we now operate has reduced the number of Magistrates from 30 to 26, including the Chair. It has also changed the role of the Chair to one requiring greater oversight of the dockets of the other Magistrates. Additionally, the Qualifications Advisory Committee, now chaired by Ed Welch, has been charged with taking a more aggressive role in monitoring Magistrate performance. Together with QAC, I am in the process of developing the assessment criteria for both sitting and potential Magistrates. There are nine Magistrate positions up in January 2005, and some of those up at that time are term-limited. More are up in January 2006 with a higher percentage term limited.

In the coming months, this column will bring you information about what is happening at the Board of Magistrates and what you, as the community of Workers' Compensation practitioners can do to help move the process forward. There are rules to write, budget issues to handle, Bureaus to consolidate, electronic handling of cases to implement, fee structures to revise and many other issues.

I look forward to working with the State Bar Section and all the members of the Bar who handle Workers' Compensation matters. Please feel free to contact me with any questions or concerns.

Drug and Alcohol Testing in the Workplace

By Robert J. Finkel and Michael L. Weissman
Finkel, Whitefield, Selik, Raymond, Ferrara & Feldman, P.C.

Many employers have chosen to implement programs to test employees and job applicants for drug and alcohol use. Individuals who test positive for these substances may be denied employment, disciplined, or required to enter a substance abuse program as a condition of continued employment. When adopting such programs, employers should understand the underlying reasons for doing so and carefully craft a policy designed to meet those goals while complying with applicable federal and state laws and regulations.

Reasons for substance abuse testing

Employers in the private sector generally have the right to test for substance abuse. Employers may choose to do so for a variety of reasons:

- To reduce costs resulting from lowered productivity/ performance, absenteeism, accidents, and employee turnover.
- To reduce costs of medical care associated with drug or alcohol use of employees.
- To reduce the likelihood of theft or other illegal activity which may result from employees' use of drugs and alcohol.
- To provide a safe workplace for other employees.
- To ensure general public safety and improve public relations.

When to test/Goals for testing

Employers may choose to test their employees for substance abuse at different times and for different reasons. Generally, these can be summarized as follows:

Pre-employment - job applicants can be tested in order to screen out applicants who are using illegal drugs and therefore reduce the amount of substance abuse by employees. Typically, employers will make an offer of employment to individuals, contingent on passing a drug test.

Reasonable suspicion - employers may choose to test employees when there is reasonable cause to believe they are under the influence of drugs or alcohol (for example, when employees are actually observed using drugs or alcohol, when employees exhibit abnormal behavior, or where there is a significant deterioration in work performance). The goal of "reasonable suspicion" testing is to protect the safety of all employees and, if appropriate, to provide an employee the opportunity for rehabilitation.

Post-accident - employers often test employees after they are involved in an accident or observed engaging in unsafe job practices. Again, the goal is to provide a safe working environment for all employees. Such testing may also be required in connection with workers' compensation insurance.

Voluntary/periodic testing - some employers require testing on a regular basis, usually as part of an annual medical examination. Others may offer voluntary testing in order to provide employees the opportunity to demonstrate their commitment to a drug-free workplace and to set an example for other employees.

Return to duty/follow-up testing - employees are often required to take substance abuse tests in order to return to work after a leave of absence or after completion of a substance abuse rehabilitation program. Follow-up testing may also be required in order to ensure that a relapse has not occurred.

Random testing - some employers may also choose to implement a random testing policy, primarily as a deterrent. Random testing is most often utilized in order to reduce the risks involved with substance abuse by employees in certain designated positions (e.g., safety or security-sensitive positions).

What to include in a testing policy

Substance abuse testing policies should attempt to balance the needs of the employer with the rights of the employees. Although policies may differ based on the circumstances of a particular employer and its workforce, all policies should be as detailed and specific as possible. Policies should include, at a minimum:

- The reason the policy is being implemented (e.g., "because the employer is committed to protecting the safety and health of its employees and customers").
- A clear description of what behavior is prohibited (e.g., what substances will be tested, what constitutes being "under the influence," etc.).
- A clear description of which employees are subject to testing, and under what circumstances.
- An explanation of the consequences of a positive test or a refusal to take a test. This may include discipline up to and including discharge and/or referral to an employee assistance program.

Continued on next page

Drug and Alcohol Testing . . .
Continued

- Procedures for appealing a positive test.

In unionized settings, implementation of a substance abuse testing policy is a mandatory subject of bargaining with respect to an incumbent workforce (but not with respect to applicants). E.g., *Johnson Bateman Co*, 295 NLRB No. 26 (1989); *Star Tribune*, 295 NLRB No. 63 (1989). Employers therefore must notify and bargain with the union representing its employees before they implement a testing policy or make changes in an existing policy.

Employers, of course, should also ensure that the testing procedures themselves are accurate and reliable (most likely by selecting a reputable testing facility), and ensure that confidentiality is maintained when reporting the results and regarding access to records.

Supervisor training

Once a substance abuse policy is implemented, it is important for an employer to train its supervisors. In this regard, an employer should ensure that its supervisors understand the policy, that they can recognize and address situations involving employees who have performance problems that might be related to substance abuse, and that they are able to refer employees to available assistance. If supervisors are expected to recommend employees for testing based on "reasonable suspicion," they must be trained on how properly to make that determination. Supervisors should not be expected to diagnose substance abuse problems or provide counseling to employees.

Employee education

When implementing a substance abuse policy, employers must be sure to provide their employees with necessary education, including the details of the testing program, information regarding the workplace impact of substance abuse, the dangers of substance abuse, and the type of assistance that may be available within the organization or in the community. Employers should explain to their employees the benefits of having a drug-free workplace. Supervisors or a specific contact person should also be available to answer employee questions.

Employee assistance

Some employers create employee assistance programs (EAPs) as a means for addressing substandard workplace performance that may result from an employee's personal problems, including substance abuse. The Department of Labor indicates that EAPs "also offer an alternative to dismissal and minimize an employer's legal vulnerability by demonstrating efforts to support employees."

Even if they do not have formal EAPs, employers should at least maintain information for their employees regarding community-based resources, treatment programs, and substance abuse help lines.

Legal issues

Although the substance abuse testing programs of public employers have often been challenged on grounds of privacy, unreasonable search and seizure and/or due process, most private employers as a general matter have the right to test for illegal drugs or alcohol. A number of states, however, have enacted laws governing the testing of employees in the private sector for drugs and/or alcohol. Federal laws such as the Americans with Disabilities Act, Family and Medical Leave Act, and the Fair Credit Reporting Act also could be implicated.

Additionally, employer testing policies and actions taken in connection with such policies have been challenged on many common law grounds, including invasion of privacy, violation of public policy, defamation, infliction of emotional distress, negligence, and false imprisonment.

Counsel should be aware of all potential causes of actions and review the case law and statutes in the appropriate jurisdiction when advising clients in the implementation of a substance abuse policy.

Robert Finkel can be reached at 248-855-6500 with any questions.

Don't forget that back copies of this newsletter can be found on the Section Web page at *www.michbar.org/workcomp/home.html*

Appellate Commission holds Historic Oral Argument in Upper Peninsula

By William G. Reamon, Chairperson, WCAC

The Workers' Compensation Appellate Commission held what is thought to be its first oral argument ever in the Upper Peninsula. On Thursday, June 17, a panel including chairperson William G. Reamon and Commissioners James Kent and Rodger Will traveled to Sault Ste. Marie to conduct an oral argument on a case before the Commission. The argument was scheduled on the Commission's own motion and reflects the view of Commission members that oral arguments can be useful in several ways.

First, oral arguments can help focus the issues presented in cases that pose questions of keen interest to practitioners and others affected by the developments of workers' compensation law. Secondly, it gives the parties an additional opportunity to be heard and to dialogue with Commission members concerning the facts and issues of the case in a lively, interactive way that a written brief, by its very nature, cannot. Finally, it gives Commission members an invaluable opportunity to include the workers' comp Bar in a process of exchanging ideas and views in a setting that enhances the level of understanding, collegiality and cooperation between bench and Bar.

One of the foundational elements of Governor Granholm's seven-point plan to grow Michigan's economy is to attract and retain good jobs in Michigan. A companion goal articulated by Department of Labor and Economic Growth (DLEG) Director David Hollister places high emphasis on the strength of DLEG's commitment to better support people with disabilities in the labor market. One of the practical functions of the Commission is to balance on a case-by-case basis the competing interests of business and labor in the area of workers' compensation disputes. We believe the better way of carrying out that function is by reaching out to our partners, including the workers' compensation Bar, in the format of regional oral arguments. We believe this will enable us to stay better informed and in better touch with our partners in the future. We further believe that this process will inevitably enhance the quality of our decisions.

From Left to Right: Atty. Thomas Moher, Commissioner Rodger Will, Chairperson William Reamon, Jr., Commissioner James Kent and Atty. Timothy Hass

The attorneys involved in the oral argument were Thomas Moher of Sault Ste. Marie and Timothy Hass of Gaylord. Both came away with positive impressions from their experience. Mr. Moher felt the procedure was "very enjoyable, very helpful… and was a good tool so far as framing the issues was concerned." Mr. Hass indicated that he was "pleased and surprised that the Commissioners were so well-prepared" and added that this led to "very direct questions on the real issues of the case". He also appreciated what he termed the "dialogue style" of the hearing.

Commissioner Kent noted "in appropriate situations holding the oral arguments at sites close to the location of the attorneys seems to facilitate a more relaxed atmosphere leading to a better debate of the issues". Chairperson Reamon was encouraged by the thorough preparation of both attorneys, noting that this enabled both counsel "to be ready for detailed questions from our panel, which maximized our time and energy in quickly coming to grips with the issues of this interesting case".

Chairperson Reamon notes that one of the major goals of the Appellate Commission is to include the workers' compensation bar in the dialogue concerning the formulation of Commission policy and procedure.

Another major goal is to produce consistent, high-quality decisions. By extending to the workers' compensation bar the extra dimension of oral argument in appropriate cases, we fully expect to deepen our understanding of each case. This will in turn assist the process of full and fair analysis of the appeal record enhancing the quality of our opinions. "We believe that the process of dialogue with the Bar is foundational to whatever success we as a Commission hope to experience. We sincerely hope that our emphasis on oral arguments will solidify our relationship and understanding with workers' compensation practitioners throughout the state."

Chairperson Reamon wishes to emphasize to those who practice before the Commission that oral argument can be requested and will be granted liberally on cases that are deemed appropriate and may also be scheduled on the Commission's own motion. Additionally, where the location of counsel makes travel by the Commission logistically feasible, the chairperson expresses the firm commitment of Commission members' willingness to travel to those sites to conduct oral arguments.

Recent Decisions

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

The Supreme Court has not issued any new decisions since our last newsletter through the date of this submission, but the Court has issued an important order summarized below. And, expect that by July 31, 2004 (the last day of the Court's present term) the Supreme Court will have issued its decision in the illegal alien cases: *Sanchez v Eagle Alloy, Inc and Second Injury Fund/Vazquez v Eagle Alloy, Inc* (SC Nos. 123114 and 123115, respectively).

Pocus v Detroit Coke Corporation

In *Pocus v Detroit Coke Corporation*, ____ Mich ____; ____ NW2d ____ (2004) (SC Docket No. 124000, decided June 25, 2004), the Supreme Court issued the following order in a Chapter 4 case:

> On order of the Court, the application for leave to appeal the May 16, 2003 order of the Court of Appeals is considered, and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals for the reasons stated in the majority and concurring opinions of the January 15, 2003 decision of the Worker's Compensation Appellate Commission and REINSTATE the WCAC's February 13, 2002 decision. The Court of Appeals requirement that the WCAC award benefits "if plaintiff's employment aggravated or accelerated, and thus contributed to, his" lung disease is contrary to the plain language of MCL 418.401(2)(b) because under that provision aggravation or acceleration is relevant only in cases involving mental disabilities and conditions of the aging process. In this case, neither party argued that plaintiff's disease was either a mental disability or a condition of the aging process. Further, even if such arguments were presented by the parties, the Court of Appeals order remanding this case to the WCAC misapplied MCL 418.401(2)(b), which permits an award of benefits where plaintiff's employment aggravates or accelerates plaintiff's mental disability or condition of the aging process in a "significant manner." The WCAC's February 13, 2002 decision was supported by record evidence; therefore, under *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich. 691; 614 N.W.2d 607 (2000), the Court of Appeals was required to affirm the WCAC's decision.
>
> Cavanagh and Kelly, JJ., would deny leave and do not believe peremptory disposition is appropriate.

The two Worker's Compensation Appellate Commission opinions in *Pocus* referred to by the Supreme Court in this order are found at: 2003 ACO #3 and 2002 ACO #30. These decisions reveal plaintiff sought benefits for chronic obstructive lung disease and/or restrictive lung disease. He had been a heavy cigarette smoker. He claimed his work environment aggravated his lung condition. The Magistrate had found plaintiff suffered from an ordinary disease of life, rather than from a condition "due to causes and conditions which are characteristic of and peculiar to the business of the employer", under Chapter 4. The Commission initially affirmed that denial, saying that "the fact work may have either accelerated or aggravated the lung condition does not merit recovery." 2002 ACO #30.

On plaintiff's appeal to the Court of Appeals, the Court of Appeals remanded the case to the Commission for a "determination whether plaintiff's employment aggravated or accelerated, and thus contributed to, plaintiff's chronic obstructive pulmonary disease (COPD) and/or restrictive lung disease (RLD). … While the WCAC concluded that plaintiff's employment was not a *cause* of his COPD (and presumably the RLD), it appears that it determined that plaintiff would not be entitled to compensation even if his employment aggravated or accelerated his lung diseases. However, if plaintiff's employment aggravated or accelerated, and thus contributed to, his condition, then plaintiff is entitled to compensation." (Emphasis is the Court of Appeals'). When the case returned to the Commission, the Commission – although adhering to its original discussion of the law – held that since the workplace "played some role in aggravating, irritating and thus to some minor extent accelerating plaintiff's chronic problems", plaintiff was entitled to benefits per the Court of Appeals' directive. The Court of Appeals then denied the employer's application for leave to appeal. The employer appealed to the Supreme Court with the result being the Supreme Court order quoted at the outset of this summary.

New Case On Leave Granted

Since the last newsletter, the Supreme Court has granted leave in the workers' compensation case: *Cain v Waste Management, Inc and Second Injury Fund* (SC Nos. 125111 and 125180). This is the second time *Cain* has reached the Supreme Court on leave granted. See, 465 Mich 509; 638 NW2d 98 (2002). With respect to the issues now before the Court in *Cain*, the Court said the parties are to include among the issues to be briefed the following:

whether the Commission exceeded the scope of the Court's prior remand by awarding plaintiff total and permanent disability benefits; whether the "loss of industrial use" standard may be applied to claims of specific loss under § 361(2); whether *Pipe v Leese Tool & Die Co*, 410 Mich 510 (1981), should be overruled; and, whether total and permanent disability benefits under § 361(3)(b) [loss of both legs] may be awarded on the basis of the anatomical loss of one leg and the "loss of industrial use" of the other leg. *Cain* will be argued in the Court's 2004-2005 term.

Court of Appeals

Mental Disabilities

In *Wolf v General Motors Corp*, ____ Mich App ____; ____ NW2d ____ (2004), the Court of Appeals affirmed an award of benefits in a mental disability case after concluding the Commission and Magistrate had correctly applied *Robertson v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002).

The plaintiff in *Wolf* was a management supervisor. He claimed stress and pressure associated with the position caused work-related depression. Specifically, he claimed he was humiliated by the behavior of certain co-workers and pressured by production standards.

The work relationship issue centered on whether plaintiff's perceptions of events were reasonable and grounded in reality under an objective standard, as required by *Robertson*. The Magistrate found they were on the strength of plaintiff's testimony. Defendant argued plaintiff's testimony, standing alone, could not suffice to prove the reasonableness of his perceptions. The defendant argued corroboration of plaintiff's perceptions was necessary.

The Court of Appeals disagreed with defendant and affirmed. The Court said *Robertson* requires the Magistrate to determine whether a "reasonable person" would have perceived the events as plaintiff did, *i.e.*, humiliating and stressful. The Court found the Magistrate properly applied an objective review by examining all the facts and circumstances and determining plaintiff's perceptions were grounded in fact or reality.

Injury Sustained While Reaching for a Lunchbox

In *Ruthruff v Tower Holding Corp*, __ __ Mich App ____; ____ NW2d ____ (2004), the Court of Appeals reversed a denial of benefits and remanded for further determination where an employee injured his back while reaching for a lunchbox in his vehicle while in the employer's parking lot.

Plaintiff arrived for work and parked his car in the employer's lot. He then opened his car door, put one leg out of the door, placed his foot on the ground, and turned to grab his lunchbox within the vehicle. In so doing, he snapped his back and herniated a disc.

The Magistrate denied benefits finding plaintiff's back injury neither "arose out of" nor "in the course of" employment. On the latter point, the Magistrate noted the statutory provision saying that injuries sustained on the premises within a reasonable time before and after work are presumed to be "in the course of" employment in § 301(3), but the Magistrate found the presumption did not apply.

On plaintiff's appeal to the Commission, the Commission affirmed the denial of benefits primarily on the other prong, the "arising out of" prong of the formula. The Commission said the injury was not one "arising out of" employment, even if it did occur "in the course of" employment.

On plaintiff's further appeal, the Court of Appeals reversed both the Magistrate and Commission and remanded to the Magistrate for further factfinding. The Court reasoned as follows:

> First, the Court agreed the phrase "arising out of and in the course of employment" states two requirements not one. Second, the Court said plaintiff's injury satisfied the "in the course of" prong because plaintiff was entitled to § 301(3)'s presumption that his injury was sustained "in the course of" his employment. That is, the Court held plaintiff was on the employer's premises within a reasonable time before working hours when the injury occurred. Third, the Court said it was uncertain whether plaintiff met the "arising out of" requirement and, for that reason, the case was remanded to the Magistrate for further determination. In so doing, the Court discussed at length how the "arising out of" determination should be made.

The Court said that on remand the Magistrate should determine whether plaintiff was required to bring a lunch to work. The Court said, "if plaintiff was not required to bring a lunch, then the risk was of a personal nature and the WCAC did not err in … bar[ring] an award of benefits." The Court said that, conversely, if plaintiff was required to bring a lunch, then compensation would likely follow.

The Court concluded by saying the Magistrate should also consider whether this is a "mixed risk case, *i.e.*, one where the personal cause and an employment cause combine to produce the harm." Should the Magistrate find this is a mixed risk case, then compensation follows if the employment contributes in any way toward the injury. The Court allowed both plaintiff and defendant to offer further proofs on remand.

Recoupment And Coordination

In *Everden v Leaseway Motorcar Transport Co*, 259 Mich App 462; 674 NW2d 717 (2003), the Court of Appeals held defendant was not permitted to recoup an overpayment of benefits where defendant had switched from the 5% age reduction under § 357 to coordination of benefits under § 354.

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Recent Decisions
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Defendant had been voluntarily paying plaintiff benefits for years. After plaintiff turned 65, defendant applied the annual 5% reduction to his weekly rate of compensation pursuant to § 357(1). Years later, defendant requested plaintiff disclose the amount of his initial old age social security benefit. Armed with that social security information, defendant decided it would begin coordinating plaintiff's benefits under § 354, rather than apply the § 357 age reduction. After doing so, defendant sought to recoup an alleged overpayment of benefits resulting from not having coordinated earlier.

The Commission ruled the employer can switch between the age reduction under § 357 to coordination of benefits under § 354, per *Stozicki v Allied Paper Co, Inc*, 464 Mich 257; 627 NW2d 293 (2001). But, the Commission held the employer could not recoup any past overpayment of benefits.

The Court of Appeals agreed with the Commission, saying there in effect was no "overpayment" of benefits under such circumstances. The Court said, while an employer can switch amongst different methods to reduce the weekly rate of compensation, that option "should not entitle the employer to recoup the difference from the disabled employee under the facts of this case."

Workers' Compensation Appellate Commission

This is the first issue of the newsletter addressing decisions from the newly constituted Commission created by the Governor's Executive Order. The present Commissioners are: Chairperson William Reamon, Jr., Martha Glaser, James Kent, Richard Leslie, and Rodger Will.

Standard Of Review

The new Commission's first decisions signal it will continue to review factual questions in a limited way and legal questions more broadly. For example, in *Miller v St. Mary's Medical Center*, 2004 ACO #49, Chairperson Reamon said:

> The facts of this case as presented at trial could certainly have, if viewed differently, resulted in a favorable determination for the plaintiff. However, it is not the function of the commission to re-try or re-weigh the evidence. Where the magistrate's decision is supported by competent, material and substantial evidence on the whole record - as is the case here - the commission quite properly should affirm that decision. The magistrate's decision denying benefits is therefore affirmed.

See also, *Manning v Suburban Mobility Authority*, 2004 ACO #51.

Sington and *Riley*

The one post-*Sington* Commission case most consistently cited as the correct method for implementing *Sington* is *Riley v Bay Logistics, Inc*, 2004 ACO #27. *Riley* has been repeatedly cited in subsequent Commission opinions as "the roadmap" for implementation of *Sington*. *E.g.*, *Freigruber v Wal-Mart Associates, Inc*, 2004 ACO #50; *Gould v Delphi Automotive Systems*, 2004 ACO #52; *Samulak v Michigan Seat Co*, 2004 ACO #53; *Jimenez v Dan-Dave, Inc*, 2004 ACO #56; *Streets v Textron Automotive Functional Components*, 2004 ACO #59; *Krastes v Haseley Construction Company, Inc*, 2004 ACO #119.

The portion of *Riley* widely quoted and relied upon is the following quoted here from *Gould*:

> In deciding this matter on remand, the magistrate is asked to follow the roadmap we provided in *Riley v Bay Logistics, Inc* 2004 ACO # 27:
>
> > In reaching her decision on remand, the magistrate should make the specific determinations and findings enumerated in *Kethman v Lear Seating*, 2003 ACO # 205 and *Sington (On Remand)* [2003 ACO #92]:
> >
> > 1. Has plaintiff established the universe of jobs for which he or she is qualified and trained, and how much do they pay?
> > 2. Has plaintiff established his or her work related physical or mental impairment, which does not permit him or her to perform jobs within his qualifications and training causing him to lose wages?
> > 3. Has plaintiff established that he or she was either unable to perform (or obtain because such jobs were not reasonably available) all the jobs within his qualifications and training that pay his maximum wage (for the purpose of establishing his Section 301(4) threshold disability).
>
> At this point, if each question is answered by the fact finder in the affirmative, according to the express language of the Michigan Supreme Court [6] in *Sington*, plaintiff has proven a threshold disability (or stated differently, plaintiff's work injury has caused his Section 301(4) disability):
>
> > If an employee is no longer able to perform any of the jobs that pay the maximum wages, given the employees training and qualifications, a disability has been established under Sec. 301(4). [Emphasis added.]
>
> However, in order to receive benefits, plaintiff also has to establish a wage loss as required by Section 361. He or she does so by proving either

an inability to perform (or to obtain because such jobs were not reasonably available) all the jobs within his or her qualifications and training that pay lesser wages[7], establishing a prima facie wage loss (for the purposes of Section 361).

If the magistrate finds plaintiff has put in a prima facie case as outlined above, the burden of persuasion shifts to the defendant, and she should then determine if defendant has brought forth sufficient proofs to show there did exist jobs (real jobs in the real world) within plaintiff's qualifications and training, and physical ability to perform, which were reasonably available to him or her and paid either the maximum wage (rebutting plaintiff's threshold disability under Section 301(4), or a lesser wage for the purposes of rebutting plaintiff's prima facie showing under Section 361.)

As noted in *Sington (On Remand)*, I believe the Commission lacks the prescience necessary to anticipate all the economic considerations necessary to make decisions about which jobs are "available" or "unavailable" without reference to specific evidence in a particular case. In that case [*Sington*] we wrote:

> We feel, as noted elsewhere in this opinion, that the Supreme Court indicated a starting point would be consider principles spelled out in the pre-*Haske* appellate and Commission decisions, such as those found in the *Braddock/Sobotka* line of cases.

However, as noted above, on remand the magistrate should consider the actual availability of such jobs, and plaintiff's post injury effort in seeking such jobs.

[6] Cited above, but recited here for emphasis. This language is used several times in the Supreme Court's decision in *Sington*, see pages 155, 157 and 159.

[7] This also requires plaintiff to prove he or she made a good faith effort to determine which such jobs were reasonably available within his work restrictions.

Sington Remands

The Commission has continued a policy of remanding cases tried prior to *Sington* for development of a supplemental record on the disability determination. In *Neumann v Macomb Intermediate School District*, 2004 ACO #15, the Commission reviewed an open award of benefits entered prior to *Sington*. The Commission held, "our policy in a case tried and decided prior to the Supreme Court's decision in *Sington* is to remand the case for further proceedings including additional testimony and record development." See also, *Taylor v Crown Vantage, Inc*, 2004 ACO #12; *Cowen v Wal-Mart Stores, Inc*, 2004 ACO #108.

Penalties

In *Leask v Chippewa County War Memorial Hospital*, 2004 ACO #101, defendant appealed the Magistrate's award of a penalty for late payment of a medical bill. This is a case where the parties had entered into a voluntary pay agreement to resolve payment of past weekly benefits and "properly submitted" medical bills. Defendant claimed the Magistrate had erred by imposing a penalty because the medical bills were not submitted on the proper forms and because defendant had filed Notices of Dispute on this point.

The Commission said defendant's failure to submit bills in the Health Care Services Rules format did not impede defendant from making the necessary payment determinations. In so ruling, the Commission distinguished the prior Commission case *Newell v Klett Construction Co*, 2000 ACO #625.

The Commission said the Notices of Dispute had not cited inadequacy of billing information as the reason for the dispute. The Commission said the opposite was true insofar as the charges were paid late without any evidence they had ever been submitted in the Health Care Services Rules format. The Commission agreed with plaintiff that the claimed dispute was, in reality, no dispute at all.

Limitations On Recoupment And Coordination

In *Ross v Modern Mirror & Glass Co*, 2004 ACO #98, plaintiff had been receiving unreduced weekly workers' compensation benefits for many years, despite the fact he had also been receiving a disability pension that could have been coordinated. After approximately ten years, the carrier began reducing the employee's weekly compensation benefits by coordinating the disability pension. The carrier also claimed recoupment of overpaid benefits. The Magistrate granted the recoupment unlimited by the one-year-back rule on the strength of *Autry v Hyatt Corp*, 1994 ACO #492. *Autry* had held that subsection 9 in § 354 created a special recoupment provision and did not limit the retroactive reach of the recoupment; consequently, the total amount of previously unreduced benefits could be recouped.

On review, the Commission said "the vitality of the *Autry* rule is at least debatable." In this case, the Commission said the one-year-back rule should be applied to limit the recoupment because plaintiff had told defendant he was receiving a disability pension.

Hernia

In *Barcewski v Yellow Freight System, Inc*, 2004 ACO #64, the Commission discussed historic case law with respect to herniae. The Commission then concluded a hernia compensable under Chapter 3 is not subject to the statutory conditions recited Chapter 4, which require a hernia be recent in origin and promptly reported.

Continued on next page

Recent Decisions
Continued

Reinstatement Of Employee's Petition

In *Walton v City of Detroit*, 2004 ACO #112, the Magistrate entered an order dismissing plaintiff's petition pursuant to a voluntary pay agreement. There had been a question, however, whether the employee acquiesced in the voluntary pay agreement because she was concerned about a Friend of the Court lien. The voluntary payment form was signed by the counsel for plaintiff, counsel for defendant, and the Magistrate but not the parties themselves.

The Commission, relying upon *Biggers v Cadillac Malleable Iron Co*, 156 Mich App 747 (1986), said that it must regrettably remand the case and instruct the Magistrate to hold an evidentiary hearing to determine whether plaintiff authorized her counsel to withdraw the petition. If she did, then the Magistrate may exercise discretion in determining whether the employee can reinstate the original petition nevertheless. If the employee did not so authorize and if there is no showing of prejudice to defendant, then the original petition is to be reinstated. See also, *Havrelock v GM Tech Center Environmental*, 2004 ACO #80.

Edgardo Perez-DeLeon Injunction

In *Martin/Wanda Velez-Ruiz, M.D. v Reed Sportswear Manufacturing Co*, an order mailed by the Commission on May 7, 2004 in Docket No. 02-0422, the Commission explained it had been holding this case in abeyance pending investigation by the State Bar of Michigan into an allegation of unauthorized practice of law by Edgardo Perez-DeLeon. The Commission said such investigation has culminated in the issuance of an order granting the State Bar's motions for a permanent injunction. The injunction was issued in the Wayne County Circuit Court on April 7, 2004.

The Commission explained that the injunction enjoins Mr. Perez-DeLeon from, amongst other things, "drafting non-ordinary legal documents and court documents on behalf of his employer or any other party not pertaining to a mediation conference." It further prohibits and enjoins Mr. Perez-DeLeon from "making legal arguments, citing legal authority."

In applying the injunction to the case at hand, the Commission said Dr. Velez-Ruiz must file a brief within 30 days and that, along with it, the doctor must file an affidavit stating preparation of the brief in no way involved the work of Mr. Perez-DeLeon in any respect that would violate the Wayne County Circuit Court injunction.

Rakestraw And Dates Of Injury

In *Burnaska v Ford Motor Co*, 2004 ACO #110, the employer was paying weekly workers' compensation benefits based upon a 1987 injury. Plaintiff claimed subsequent work-related aggravation of that injury and a last day of work injury in 2000. The Magistrate agreed with plaintiff. Defendant appealed arguing that *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220; 666 NW2d 199 (2003), should be applied. Defendant argued nothing medically distinguishable occurred after 1987 to differentiate plaintiff's post-1987 problem from the effects of his 1987 injury.

The Commission rejected defendant's argument saying *Rakestraw* did not apply because the case did not involve a pre-existing non-work-related condition. The Commission added that the only pre-last day of work condition in this case was the original work injury at the defendant. The Commission ruled in a similar fashion in *Spiegel v Ford Motor Co*, 2004 ACO #62.

In *Krastes v Haseley Construction Company, Inc*, 2004 ACO #119, however, the Commission did refer to *Rakestraw* when resolving a date of injury question involving successive employers.

Magistrate's Reliance On Medical Text

In *Stefanko v Ford Motor Co*, 2004 ACO #83, the Magistrate in denying benefits relied upon a medical text (*Merck Manual*) to resolve a work relationship question involving a pancreatitis condition, although neither party offered the text into evidence nor laid a foundation for its relevance. Plaintiff argued on appeal that it was error for the Magistrate to rely on the text and that, if the Magistrate is to rely on the *Merck Manual*, then the Magistrate should have relied upon it to resolve another of plaintiff's claims (asthma).

The Commission agreed with plaintiff and remanded the case with instructions the Magistrate re-open the record to afford the parties a full opportunity to develop the proofs with respect to the etiology of plaintiff's conditions. The Commission also instructed the Magistrate to undertake a *Sington* review in accord with *Riley v Bay Logistics*, 2004 ACO #27.

Burden Of Proof On Coordination Of Benefits

In *Krastes v Haseley Construction Company, Inc*, 2004 ACO #119, among the issues decided on appeal was whether defendant could coordinate a disability pension under the terms recited in § 354(14). This provision says coordination of benefits does not apply to payments from a disability pension plan already in existence on March 31, 1982. And, the provision says those disability pension plans entered into or renewed after that date can be made unavailable for coordination if the disability pension plan so provides.

The Commission in *Krastes* said defendant's disability pension could not be coordinated because it was the employer's burden of proving its availability for coordination.

Poetry

By Magistrate Mike Barney

When our new editor bade me write a column on poetry (and after I had, in a moment of madness, agreed) I cast about for a suitable first topic, finally settling on an exposition of lawyers and poetry. Though it might seem more suitable for attorneys with a literary itch to scratch it in the more capacious and unrestricted novel form (latterly, think Grisham, Turow, Patterson), there have been world-class poets who have also practiced law (Wallace Stevens, Archibald MacLeish) and world-class lawyers who've also written at least decent poetry (Joseph Alioto, William Kunstler.) I thought it might be of interest to introduce you to some of these multi-dimensional characters with whom we share the legal brotherhood.

And I will, in the next column (if there is one); for on my way to Lawyer/Poets (for those of you rabid on the subject I commend to you the web page *Strangers To Us All*, the URL of which is *http://www.wvu.edu/~lawfac/jelkins/lp-2001/intro/lp1.html*) I was waylaid and seduced by, not a poet-lawyer, but a poet-librarian named Philip Larkin, a volume of whose Collected Poems I received as a Father's Day gift.

I had known of Larkin for some time, but beyond a couple of poems in anthologies (the most famous and oft-reprinted of which, "This Be The Verse," contains a wonderfully unprintable-in-general-circulation-newsletter first line) I hadn't really got to know him, in the sense a reader intimately knows a favorite author. The Collected Poems gave me that opportunity, and I've taken grateful advantage.

I recommend Larkin's work highly, especially for those of you who tuned poetry out early in your life as a reaction to obscurantist High Modernism. Larkin is never obscure, even when being very erudite; rather, he's clear, highly accessible, and mordantly funny. He is not, however, "light"; his themes are mostly narrowly confined to the horrors of being alive; the agonies of blooming, then fading, love; and the clear-eyed facing down of death, our common end. Like Thomas Hardy (who he greatly admired) Larkin achieves this by investing seemingly insignificant events with great moment, and at the same time strips away with abandon any trace of sentimentality. Here, in its entirety, is his poem "Take One Home For The Kiddies":

> On shallow straw, in shadeless glass,
> Huddled by empty bowls they sleep:
> No dark, no dam, no earth, no grass—
> *Mam, get us one of them to keep.*
>
> Living toys are something novel,
> But it soon wears off somehow.
> Fetch the shoebox, fetch the shovel—
> *Mam, we're playing funerals now.*

In other hands, the description of the common domestic situation above (well-known to those with children of a certain age) could be cloying; Larkin's brusque matter-of-factness gives the poem a wrenching kick.

Larkin's work sometimes verges on the gloomy, fitting for someone who saw life as "…an immobile, locked/ Three-handed struggle between/Your wants, the world's for you, and (worse)/The unbeatable slow machine/That brings you what you'll get…" (A Life With A Hole In It.) Yet he had a sardonic optimism: life may be hard, he told us, but it's all we've got, so we should make the most of it:

> The Trees
>
> The trees are coming into leaf
> Like something almost being said;
> The recent buds relax and spread.
> Their greenness is a kind of grief.
>
> Is it that they are born again
> And we grow old? No, they die too.
> Their yearly trick of looking new
> Is written down in rings of grain.
>
> Yet still the unresting castles thresh
> In fullgrown thickness every May.
> Last year is dead, they seem to say,
> Begin afresh, afresh, afresh.

I would be remiss if I did not point out the technical assurance of these pieces: the (nearly) perfect meter, and especially the diction—common, unadorned, yet highly charged with emotion. And they rhyme, a virtue not unappreciated by neophytes to the art and mavens who know *vers libre* to be but one, among many, forms.

Larkin published only four small volumes of poetry during the 40 years (1945-1985) he was active as a writer, along with two novels, a couple of volumes of essays and a book of jazz criticism (he was a fanatic, or as fanatic as one can be living in Hull, England).Yet his work shines. If he had produced more, perhaps it would not be as brilliant. If there were 10, or 100, times as many stars visible in the sky as there are now, would each one be as remarkable?

Philip Larkin

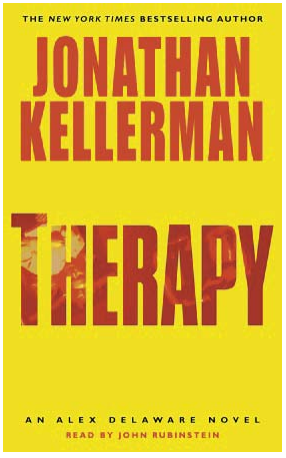
Photograph by Philip Sayer.
From the cover of *Required Writing*

To and Fro

by Alex Ornstein

Dear Section Members, One of the times of low productivity for us is driving between depositions or to and from Court. One of the more entertaining past-times is to listen to CDs or books on tape. This truly helps you to drive and still concentrate on a story line.

Recently, I listened to Jonathan Kellerman's *Therapy*. This is the most recent of his series with LA Homicide Lt. Milo Sturgis and his friend and department consultant Dr. Alex Delaware, PhD (a very effective clinical psychologist). Starting with a double murder in Beverly Hills you take a roller-coaster ride thru theories, witnesses, forensic findings, and interviews and are present every step of the way as the story reaches its conclusion. Psychologists, real estate moguls, parolees, a closed head injury victim, a crooked cop, and more murder victims appear but not necessarily in that order. There are eight tapes good for about 8-hours of driving and listening. It is basically one-half hour to a tape side. Jonathan Kellerman's wife Faye is also an award-winning writer. Random House.



For those of you who are into westerns, I recommend Larry McMurtry's Berrybender series. Larry was the author of *Lonesome Dove*, a very popular TV presentation and a very moving book. He has mastered character creation and is wonderfully descriptive of the old west, the Indian tribes, the traders, and assorted mountain men. The Berrybender series involves a self-centered very, very rich English Lord who came to America with assorted members of his family to hunt buffalo and whatever else was moving on the plains. His eldest daughter Tasman met and married Jim Snow, also called the Sin Killer, one of the most astute hunters and traders alive and feared by all but his wife and father-in-law. The three books trace the progress the party makes as it moves from the St. Louis area westward. You'll come across Kit Carson, Pomp Charbenieu, Daniel Boone, David Boowie, Capt. Clark, and many, many others. It is a beautifully woven story that will suck you in. There are the *Sin Killer*, *The Wandering Hill*, and *Folly & Glory*. Simon & Schuster.

Larry McMutry
Photograph by Diana Lynn Ossana

My last review is of *The Oath* by John Lescroart. This is another murder mystery. The executive of a major health system is struck by a hit and run driver while jogging early in the morning. He is taken to his own hospital and then dies. Later his wife and children are murdered. Doctors, nurses, and others are considered and then ruled in or out as suspects. In the background we have former detective, and now attorney, Desmus Hardy and his rather gruff detective friend. This is a good fiction work that goes nine plus hours on tape. You'll learn about criminal defense strategy, health system compensation for patient care, drug company inducements to health systems, FDA testing procedures, and lots of other interesting doses of reality. I was kicking myself for not figuring out the ending earlier but enjoyed the ride getting there. Brillance Audio. 🛠

Spring Seminar Highlights

by Alan Helmore

The Workers' Compensation Section Spring Meeting was held at Boyne Highlands on June 17, 2004. The following is a brief synopsis of the presentations.

Jack Nolish, Chief Magistrate

The Board of Magistrates has been officially reduced from 30 to 26 with all positions currently filled. This is due to the continuing trend in the reduction in filings of new 104s by seven percent annually. The present goal of the Board is to establish "certainty of trial".

Another serious issue of concern is anticipated additional budget reductions. Travel expenses will be reduced by fifty percent, resulting in consideration of possible hearings by teleconference. Another budget consideration is the imposition of possible filing and trial fees.

A major effort is underway to establish new and modernize existing Board of Magistrate Rules.

Jack Nolish, Chief Magistrate

Sharon Johnson & Carol Hanson, CMS Representatives

Bill Reamon, Chair of Appellate Commission

The new "reduced in size" Commission has its hands full with the backlog in cases awaiting decision. At present it takes 60 days from filing an Application for Review for the filing of the transcript, 30 more days for the appellant to file a brief and an additional 30 days for the respondent to file its brief. At this point (four months after filing) the case is considered "perfected" and awaiting the Commission's review. At the present time it is taking another nine months to get out the final opinion and order. The Commission has issued 91 dispositive decisions and 33 remands.

The Commission is interested in facilitating oral arguments either at the offices of the Commission or at an agreed upon location, even an office of one of the parties.

Craig Petersen, Director

The most significant problem confronting the Agency is the budget. As a result, the Agency is considering imposing fees and fines as a source of funds. Fines would be assessed for failure to file required notices and forms. Fees would be charged for filing and trials.

Charges from medical providers for providing records in response to subpoenas continue to be a problem. Rules are being considered to address this problem.

A new publishing of the "Act" will be out soon.

Requests for redemption files from Sue Jones should be sent by email, fax or letter, but only one of the three means should be used — use of more than one creates confusion.

Questions regarding insurance coverage should be addressed at (517) 322-1195.

Attorney fee disputes should be addressed at redemption hearings and resolved by the Magistrates rather than after the redemption has been completed.

Employer generated Vocational Rehabilitation disputes require a 104-C, not merely a cut off of benefits.

Sharon Johnson & Carol Hanson, CMS Representatives

A 30-page handout was prepared and provided to all attendees. Copies may be obtained from Mike Flynn, Chairperson.

The main thrust of the presentation was to suggest that when all of

Continued on next page

The Workers' Compensation Golf Tour

As many of you are aware, on June 25, 2004 the annual Workers' Compensation Harold Dean Open Golf Tournament was held.

Although not an officially sponsored Section event, this tournament brings together over 100 workers' compensation lawyers to celebrate the fellowship of our specialty. It also gives us a chance to see those we don't often see anymore, such as Ted Felker, Sr., who at 85 years of age, was the winner of a "closest to the pin" prize.

Golf has a way of bringing us all together, old friends and new, to laugh, tell war stories, and meet those that we may talk to regularly by phone, but don't have the opportunity to personally meet.

Harold Dean knew that, as did Roger Rapaport, who created and held, along with Magistrate L'Mell Smith, the Stewart M. Green Memorial Golf Tournament for Lansing area (and some Detroit) lawyers.

As we on the WC Harold Dean Open Committee, led by Ray Bohnenstiehl, plan each year's event, I am reminded of something Roger Rapaport said at his funeral, namely that if we tell stories about them, recall events including them, or merely remember them, our friends never die.

As each of us tees it up, wherever and whenever, this season and every golf season, let's all take a moment to remember Harold Dean and Roger Rapaport, as well as Gary Busch and all of those who have left us, and the legacy they have left us. If there is golf in the next life, I am sure Roger is organizing a tournament, while Harold is getting the prizes together, taking note of the retail price.

On that note, Magistrate L'Mell Smith and Steve Pollok are organizing this year's Stewart M. Green – Roger Rapaport Memorial Tournament. It is presently scheduled for Friday, August 27, 2004. For further information regarding that tournament, please contact either Magistrate L'Mell Smith or Steve Pollok at 517-332-3555. Your participation allows them to make a charitable donation in the names of Stewart M. Green and Roger Rapaport.

Magistrate John Wierzbicki advises me that the Larry K. Good Health Day (Mt. Clemens workers' comp outing) is scheduled for October 7, 2004. Please contact Magistrate Wierzibicki, who sits at the Pontiac Bureau, for details regarding that event.

Spring Seminar Highlights
Continued

the necessary information is submitted in proper format, a 90-day turn around in the requirement for a set aside trust could be expected. Of some interest is the fact that the regional CMS office in Chicago handles six states, and Michigan accounts for eighty percent of their workload. This is most interesting since Michigan does not have the largest number of claimants.

The main cause in delaying the approval of a set aside trust is the lack of recent medical documentation. It is suggested that all of the medical documentation be submitted in chronological order and that the most recent medical be less than a year old. Another common problem is a failure to provide the appropriate release identifying CMS as the agency to which the documentation may be sent and be in accordance with the HIPAA laws.

It is important to note that the Chicago Regional Office does not handle benefits already received by claimants. This will be handled out of Wisconsin or through the United Medical Contractor.

It is important to note that once the set aside trust is established, only those benefits allowable through Medicare can be used to draw from the trust. Claimants should be advised to review the pamphlet " Medicare and You", refer to *www.medicare.gov* or call 1-800-633-4227.

Attorneys can be kept abreast of developments impacting on CMS matters by registering at *www.cms.hhs.gov.*

State Bar Annual Meeting Slated for Sept. 30 - Oct. 1, 2004

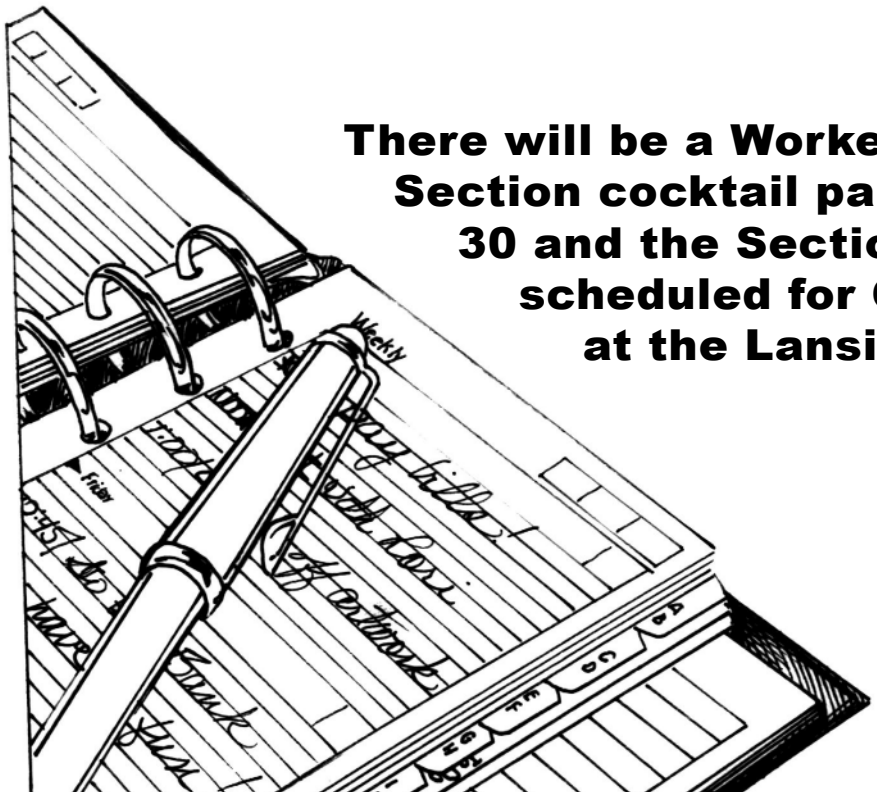
The State Bar of Michigan's 69th Annual Meeting has been scheduled for September 30 to October 1, 2004, at the downtown Lansing Center and Radisson Hotel. This year's program is being held in conjunction with the Governor's Task Force on Children's Justice, chaired by Michigan Supreme Court Justice Elizabeth Weaver. The task force is celebrating its 10th anniversary this year.

The president of the American Bar Association (ABA), Dennis W. Archer, will be the keynote speaker at the noon luncheon on Thursday, September 30. Mr. Archer, who is the chairman of Dickinson Wright PLLC, a Detroit-based law firm, is the first African American and the first person of color to head the ABA.

A special dinner will be held that evening from 6 p.m. to 7:30 p.m. to honor State Bar of Michigan 2004 awards recipients. Afterwards, a Capitol Celebration to commemorate the 125th anniversary of the State Capitol will be held, with tours of the building and opportunities to meet Bar members who are leaders in the Senate and House of Representatives.

Other featured speakers at the Annual Meeting are: Dr. R. Dale Lefever from the University of Michigan Medical School, who has conducted more than a thousand leadership and management development programs for judges, court administrators, prosecuting and defense attorneys and others in the justice system; Dr. Kyle Pruett, an internationally respected child psychiatrist and parenting expert; and Dr. James Garbarino, coordinator of the Family Life Development Center and Professor of Human Development at Cornell University, who has authored or co-authored 18 books.

On Friday, October 1, Michigan Supreme Court Chief Justice Maura Corrigan will swear in the 70th president of the State Bar, Nancy J. Diehl. During the course of the two-day event, Board of Commissioners and Representative Assembly meetings, as well as Section and group programs and university receptions will take place. An added attraction is the return of exhibitors this year after a one-year hiatus. As in previous years, a 5K walk and run, the Race for Justice, will be held in conjunction with the Annual Meeting. For more information about the Annual Meeting, please contact State Bar Events Coordinator, Caryl Markzon at (517) 346-6371.



There will be a Workers' Compensation Section cocktail party on September 30 and the Section annual meeting is scheduled for October 1 at 8:30 a.m. at the Lansing Center in room 203.

Breaking News

As this Newsletter goes to press, your editor has been informed that in the Michigan State Senate, Senate Bill 836 has been referred out of committee to the Senate as a whole.

While your editor has not reviewed the bill in great detail, Officers of the WC Section suggest that the Section interprets the bill as attempting to transfer responsibility for determining the existence of a Friend of the Court lien to the Bureau, plaintiffs' bar, defense bar, and insurance carriers.

The WC Section, through the Council, has responded to the State Bar of Michigan opposing the attempted transfer of responsibility, but recognizing the validity of Friend of the Court liens generally.

For further information on the bill, the position of the WC Section, or the actions the State Bar of Michigan is taking regarding this bill, please contact the Chairperson of the Section, the Vice Chairperson of the Section or the Secretary of the Section, whose names are listed in this Newsletter (See page 2).

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