State Bar of Michigan

Workers' Compensation Section Newsletter

Summer 2006

Contents

From the Chair

On behalf of the Section, I thank Rick Warsh for his service on the Section Council and as the 50th Chairperson of the Section. Rick was instrumental in returning the Section to financial stability. He re-energized the Section, increasing member participation and attendance. He enhanced Section communication and cooperation with the Workers' Compensation Agency. He encouraged greater diversity in our specialty by coordinating the Section's sponsorship of statewide Workers' Compensation Agency seminars.

I have enjoyed getting to know and working with Rick and hope that he remains involved in Section activities in the future.

Going forward, the Section will continue to serve you, its members, hopefully "adding value" to your specialty practice in workers' compensation.

Under the able leadership of its editor, Murray Feldman, the Section will continue to publish a quarterly newsletter. The newsletter will continue to serve as a forum for providing information on proposed statutory and rule changes, new decisions, and news from the director of the Agency and chairpersons of the Appellate Commission and Board of Magistrates.

The traditional Detroit fall seminar will be co-chaired by Section secretary Murray Feldman, and new Section member Chuck Palmer. The seminar is scheduled on December 1, 2006, and will occur at the Detroit office of the Agency/ Board of Magistrates.

By bylaw amendment, the Section's annual meeting has been moved from the September State Bar Annual Meeting to the Section's spring meeting in June. The change was made to eliminate duplication of effort, to reduce costs, and to take advantage of the large attendance at the spring meeting. Next year's annual/spring meeting of the Section will take place at Crystal Mountain in Thompsonville, Michigan, June 14 -16, 2007. Please mark the dates on your calendar and plan on attending.

The Section continues to coordinate efforts with the Agency in seeking workable solutions to Medicare and Medicaid delays of redemption settlements.

We thank Denice LeVasseur for organizing the past chairperson's golf outing and dinner at Oak Pointe Country Club in Brighton on May 25, 2006. We also welcome Ms. LeVasseur as a new member of the Section Council and hope that she will chair the golf outing in 2007.

If you wish to become active in the Section, please contact me or any member of the Council. ⚒

Len Hickey

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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Final Thoughts from the Former Chair

A few months ago I was asked by a non workers' comp law firm to show a young associate around the Bureau so that she could get a "feel" of what the practice of workers' compensation law was really about. After several mind-numbing hours of introductions, redemptions, vocational rehab hearings, and adjournments (JRs, not CDs), I inquired as to her impression of our unique little world. Not surprisingly, she commented on the friendliness of the lawyers and the frenetic pace of the practice. It stirred my own reflection on workers' compensation law and the special bonds that we have formed with one another. It is with these thoughts that I reflect on the past year.

The state of our practice and the general health of our system appear to be good. Our Section is healthier than it has been in a number of years, with a surplus of available money and a hard-working, dedicated Section Board. I owe much of this good health to my predecessor, Alan Helmore. At the start of Alan's involvement as Section chairs, we made a promise to each other that we would restore the Section to financial stability and now, five years later, it has come to pass.

Together we raised dues and curtailed spending, rearranged Board meetings, and eliminated some past wasteful practices. The end result was a more financially stable Section that was able to retain some of our more rewarding programs like our Spring/Summer meeting (now elections), the Past Presidents Dinner (and golf outing), the winter trip (still primarily a west Michigan event), our Annual Meeting in Fall/Winter (for southeast Michigan), and the ability to sponsor amicus activities like we have in *Van Til*. We have even initiated new activities such as our series of seminars to increase minority involvement in workers' comp law. We have had Section meetings across the State, including the Upper Peninsula, and closer cooperation with the administration on a number of issues. We have teamed with the Negligence Section and the Defense Trial Bar to co-sponsor a Las Vegas trip, and have provided the Section with a number of speakers, including Justice Maura Corrigan, Justice Marilyn Kelly, Justice Steven Markman, and Chief Justice Clifford Taylor for Section events.

We all know that it is our closeness and willingness to discuss that makes us different. Those of us who occasionally practice negligence law are keenly aware of the differences between the two areas of practice. A favorite rabbinical quote of mine reads, "One who abuses his neighbor publicly is compared to a shedder of blood . . . As we see in the man who becomes ashamed, the red color of his face disappears and he becomes white." (putting people to shame) This is the spirit that the young lawyer was commenting on as I led her around the Bureau; respect for one's peers and sensitivity not to embarrass or shame. These qualities have allowed us to stay in good health over the years; now let it continue. It was an honor to serve as your Section Chair over the past year. Good luck to Len Hickey, whom I have had the privilege to get to know over the past year. I am convinced that Len is the right person to keep our Section moving in a positive direction. 🛠

Richard L. Warsh

Director's Message

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

First, I want to extend my thanks to Rick Warsh and all the outgoing Section officers that have been so helpful in the past year. I look forward to working with Len Hickey and the new team in the coming year.

There has been a change in the administration at the Department of Labor and Economic Growth. Bob Swanson is now the director of the department and he has appointed Doug Kalinowski as acting deputy director with responsibility for oversight of the Workers' Compensation Agency and several others such as Unemployment, Wage & Hour, etc. Doug has served as the Director of MIOSHA for some time. I look forward to working with both Bob and Doug.

I would like to encourage the use of e-mail and expansion of the use of fax machines. These are marvelous inventions. It seems strange that there are still attorneys out there that have decided against these technologies. If you do use e-mail and are not on my email list, please send me a note at *janolis@michigan.gov* and you will be included. I do respond to e-mail and am happy to receive communications that way. If you don't use e-mail, it is time for a little update.

Since my last report, several things have been going on at the Agency.

1. All opinions by Workers' Compensation Magistrates mailed after January 1, 2006, can now be viewed on the Workers' Compensation Agency website *(www.michigan.gov/wca)*. A link to the opinions is listed under "Quicklinks" on the right side of the page. The listing of opinions is updated monthly and does not include any orders ("green sheets") without opinions.

   To find a specific opinion, you may search on any one or all of the following fields: Plaintiff, Defendant, Magistrate, or Mailed Date. When the search results appear, click on the "Plaintiff" name to view the entire opinion. You may also click on any column heading to sort the results by that field.

2. We are pleased to advise that our data base computer system, WORCS, has regained much of its old functionality. We are now able to generate docket aging reports and other information that will assist in administration. Several things have emerged from the data:

   a. As of 5/31/06, we had 15,481 cases pending on the docket statewide. Of those, 1,237 are in the "await" category, which covers CMS, Friend of the Court, 3rd party cases, etc.; 10,069 of the cases are 12 months old or less with only 472 cases over 24 months (not including "await cases"). It appears that the docket is moving along at a reasonable pace.

   b. We have noticed an increase in the Kalamazoo docket in cases less than 12 months old, but there is no obvious reason for the increase in new cases. Having magistrate Harris there for a ¼ docket should take care of the problem. We are aware that the Pontiac docket seems to be increasing and will look at those figures over the next several months.

   c. Now the bad news: the number of new case filings continues to decline. Although we don't have an accurate count for 2005, the first five months of 2006 do not look promising. At the rate of filings for the five months, we will end-up the year with just over 10,100 new cases. Each case represents an individual injured worker. Any 104b or c forms filed in a particular matter do not increase the new case number. This 10,100 figure compares to 15,221 in 2004. Looking way back, there were 21,777 filed in 1996 and 22,496 in 1993. This information indicates that we are going to see a big change in the pending case docket in the next year or so.

3. The demise of the "Judicial Review." Since Magistrates are part of the executive branch of state government, they are not part of the judiciary and do not do judicial reviews. We will be using "Control Date" for those dates between pre-trial and trial. The computer printouts will use that phrase and "JR" has met its end, other than Magistrate John Rabaut, who is still authorized to us, "JR" but it will be a "JR CD," not a "JR JR." This will also help to eliminate many of the phone calls the Agency

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Director's Message
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offices receive from injured workers or employers asking if they need to appear before the "judge" on a JR.

4. In our continuing efforts to deal with the privacy concerns related to social security numbers and other personal information, we have sent to State Office of Administrative Hearings and Rules (SOAHR) a new Magistrate's Rule on Subpoenas. A copy of the new proposed rules is in this bulletin and will be posted shortly. The key difference in the procedures is that records will no longer be sent to the Agency offices in response to a subpoena. They will go to the party requesting the subpoena, and each will be expected to provide the other side with copies or the opportunity to make copies. Each party requesting a subpoena must promptly furnish the other side with a copy of the completed subpoena so there will be no record fishing behind the back of the opposing party. Failure to comply with the rule can be the basis of an objection to the records. The Agency will not accept records until they are properly introduced at a hearing, and they will not be part of the file until admitted (including those used at redemptions). Once this new procedure is finalized, we will have to have a transition period in which all the records now sitting in piles in the various hearings offices will have to be picked up by the parties or they will be destroyed.

5. The Agency is seeing cases where the parties are trying to use an Agency issued subpoena to obtain Agency records of previous *uncontested* claims that a present case litigant may have had. Such records are considered confidential. MCLA 418.230.

   MCLA 418.853 is the section that authorizes Agency subpoenas, but limits the scope of what may be subject to subpoena. **MCLA 418.230, dealing with confidential records, prohibits the disclosure of such information unless the subpoena is accompanied by a release from the Plaintiff.** Absent such release, the Agency will not even acknowledge that a Section 230 record exists.

   We are not trying to preclude parties from obtaining the records through other means including furnishing the appropriate release or a subpoena to the parties involved in the uncontested case. This analysis only applies to the Agency's own records. This does not require a rule or policy since these provisions have been in statute since 1991.

In closing, I continue to appreciate the cooperation among the practitioners as we go through these changes. As always, please feel free to contact me regarding any of these items or any other issues of concern.

DEPARTMENT OF ~~CONSUMER AND INDUSTRY SERVICES~~ LABOR AND ECONOMIC GROWTH

WORKER'S COMPENSATION BOARD OF MAGISTRATES

GENERAL RULES

Filed with the Secretary of State on

These rules become effective immediately upon filing with the Secretary of State unless adopted under sections 33, 44, or 45a(6) of 1969 PA 306. Rules adopted under these sections become effective 7 days after filing with the Secretary of State.

(By authority conferred on the director of the department of labor and economic growth by section 213 of 1969 PA 317, and Executive Reorganization Orders No.1996-2, 2002-1, and 2003-1, MCL 418.213, MCL 445.2001, MCL 445.2004, MCL 445.2011 of the Michigan Compiled Laws)

R 418.56 of the Michigan Administrative Code is amended as follows:

R 418.56 Subpoena; provision to opposing party; submittal of subpoenaed records**; disputes.**

Rule 6. ~~A copy of a subpoena issued in accordance with section 853 of Act 317 of Public Acts of 1969, as amended, being §418.853 of the Michigan Compiled Laws, shall be provided to an opposing party upon issuance. All subpoenaed records shall be submitted to the board of magistrates.~~ **(1)All subpoenas shall be on an agency approved form.**

(a) The party requesting a subpoena shall certify that the matter about which the subpoena is requested is pending before the agency.

(b) A subpoena shall be fully completed before submission to a magistrate for signing.

(c) The return date indicated on the subpoena shall provide a reasonable time for compliance.

(d) Magistrates shall have the discretion to sign a subpoena for a case that is assigned to another magistrate.

(2) A copy of a subpoena issued by a magistrate in accordance with MCL 418.853 shall be provided to all parties, or their legal counsel, at the time of issuance.

(3) The party for whom a subpoena is issued shall immediately do 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.

(4) All subpoenaed records shall be returned directly to the party requesting the records.

(5) Only those records admitted into evidence by a magistrate at a hearing, shall be placed in the agency file or maintained by the agency.

(6) Any dispute arising under this rule shall be brought by motion before the assigned magistrate and shall have a copy of the subpoena attached. A copy of the motion and the subpoena shall be served on all parties, or their counsel, and proof of service filed with the agency.

Medicare Redemptions $25,000 and Under and "The Medicare 2 Step" (Leaving Medical Open)

By Chief Magistrate Gorchow

Redemptions $25,000 and Under

As you know, the Center for Medicare and Medicaid Services (CMS) announced in July 2005 that it will not be issuing set-aside letters where the redemption amount is under $10,000. CMS announced in April that effective April 25, 2006, CMS will only review new set-aside proposals where the total settlement amount is greater than $25,000. However, this does not mean that plaintiffs eligible for Medicare can ignore Medicare. CMS was careful to point out that this is a "workload review threshold" for CMS and "not a substantive dollar or safe harbor" for the parties to the redemption. Medicare's interests must still be considered, or it may not pay for plaintiff's medical care in the future. Further, the parties must still deal with United Government Services (UGS) or other CMS coordination of benefits contractors (COBC) regarding any prior conditional payments.

If you want to present a redemption to a Magistrate for a Medicare-eligible plaintiff, you will need to have/do the following before you can present the case for redemption:

1) A copy of the letter from UGS stating the amount of conditional payments, if any, to be reimbursed. This is essential.

2) Make a record at the redemption hearing showing what was done to protect/consider Medicare's interests. Counsel should make a record demonstrating that Medicare's interests have been considered, e.g., that, if true, plaintiff no longer treats, no longer needs to treat, is at maximum medical improvement (reference medical reports), and/or has not seen a doctor in however long, etc. If true, it would be good to establish that the parties are redeeming out a closed period case, because plaintiff has recovered and/or is working again, so that there is little likelihood of a need for future medical care, and therefore no need for a set aside for future treatment. If none of that is true, make a record based on and referencing the medical records that there is a serious issue of work relationship with a high or significant risk or likelihood that the condition is not compensable. In any event, I recommend that any significant liability dispute, whenever it can be documented, be referenced on the record.

3) If the parties want to do so, they can agree to some reasonably appropriate self-administered set-aside amount that is also paid to plaintiff on a separate direct payment line on the Redemption Order (e.g., "$500 to Plaintiff for a Medicare Set Aside"), just the same as if it were a set-aside amount approved by CMS. This way, plaintiff gets the same money, but the record and the order show that Medicare's interests were taken into account. Plaintiff should be advised on the record that, if and when it ever became necessary, plaintiff needs to use that amount of money for medical treatment for the alleged work-related condition and keep a record of doing so, just as he or she would do with a set-aside that CMS has approved.

4) As with Social Security allocations over plaintiff's life expectancy, it would be appropriate to get plaintiff's understanding on the record that ultimately it is Medicare/CMS that makes the final determination regarding whether its interests have been adequately considered and protected. That is, there is "no guarantee" being given that CMS will later agree that its interests were adequately considered should CMS ever decide to review the case.

This is the approach taken by the Director/Chief Judge of Workers' Compensation in New Jersey. I am advised that CMS has given its verbal, although not written, approval to the New Jersey approach. See *www.nj.gov/labor/wc/forms081805_medicare_setaside.pdf*

"The Medicare 2 Step" (Leaving Medical Open)

There, I said it! "Leave the medical open!" It may sound like heresy to even suggest a case be redeemed with medical left open. However, there is nothing in the Workers' Disability Compensation Act that prohibits the parties from redeeming all other benefit rights, but leaving medical open. True, it is part of the culture of workers' compensation in Michigan, and understandably so. However, when it is in the interest of both parties to do so, it makes sense, and can be accomplished fairly easily. That circumstance is clearly presented when benefits are currently being paid. The parties have agreed on a figure to redeem out all liability, and the employer/carrier may even have agreed to also fund the Medicare set aside

and pay off the conditional payments if they only knew the amount. The employer/carrier wants to stop paying weekly benefits, and avoid paying another $25,000 or even $35,000 or more in weekly benefits while waiting 12 months or longer for CMS to respond. Plaintiffs want the redemption money, and would like to get things over with and get on with their life.

The answer is the "Medicare 2 Step." Medicare does not care about and has no interest in any redemption where medical is not being redeemed. My first example is a $100,000 redemption, assuming defendant agrees to later fund the set-aside and pay any conditional payments. In the first redemption, the parties leave medical open and redeem for $100,000. When the parties later receive the set-aside and conditional payment letters, they come back for a second redemption and redeem the medical in the amount of the set-aside + conditional payments + $100 Redemption fee + $1 for plaintiff.

In my second example defendant has not agreed to fund the set aside or pay conditional payments. The parties make an educated estimate of those amounts based on whether defendant has paid for any treatment and whether plaintiff has been treating in the last few years, and whether plaintiff has used Medicare for treatment in the past. The same considerations are used in making a proposal to CMS. Assuming the worst case scenario is that $20,000 would be the most CMS/UGS would require, redeem now for $80,000, leaving medical open. Once the exact amounts are ultimately provided by CMS/UGS, you can return for the second redemption and redeem out the medical for the $20,000 balance left over from the agreed upon $100,000. If there is any money left over after CMS/UGS gets theirs, plaintiff receives the balance less redemption fee and any attorney fee. There is always the possibility that the amount held back from the first redemption might turn out to be insufficient to take care of Medicare. The parties should reach agreement ahead of time how that is to be handled. The best way to avoid a shortfall is to overestimate how much of the settlement to hold back for the second redemption.

Whenever medical is left open, the paperwork at the first redemption must be "clean." The form or boilerplate language on the Redemption Order, Agreement to Redeem Liability, Affidavit in Support of Redemption, and any Release and Waiver must be changed to remove language referring to redemption of "all liability, including medical." The words "medical left open" must be added and used instead.

Several carriers and self insured employers have already successfully redeemed cases under both of the above examples and saved tens of thousands of dollars doing so. I urge you to try it. I would be happy to speak with counsel and answer any questions you may have to help bring about a successful "Medicare 2 Step" Redemption. 🛠

Sudoku

By Theresa Pinch

2	4			3	5			1
6	3		4	8	1	2		7
		5	9		2	8		3
3	7	2		9		5	8	
	9	1	8		4			
8					3			2
4	5	6	3	1	8	7		9
	2	7			9	4	3	
9		3					6	5

Workers' Compensation Appellate Commission

By Martha M. Glaser, Chairperson

On June 1, 2006, the Supreme Court denied defendant's motion to bypass the Court of Appeals and grant immediate leave on the case of *Stokes v DaimlerChrysler 2006 ACO #24*. But the Court did not just deny defendant's motion. On its own motion, the Court ordered that our decision in the *Stokes* case is "stayed" pending resolution of the appellate proceedings [relying on authority of MCR 7.302(H) and 7.209(D)], and noted that *Boggetta v Burroughs Corp*, 368 Mich 600 (1962), remains controlling authority until reversed by that court. The order was supported by a 4-3 majority with Justice Cavanagh writing a dissenting opinion.

The consequence of the Court's order, whether intended or not, has been to cause yet another bottleneck of cases stuck here at the Commission, unable to be released. The problem is that any case that potentially could be affected by the ultimate outcome of *Stokes*, must now be held in abeyance.

Fortunately for everyone, the Court also ordered the Court of Appeals to grant leave and issue a decision by October 1, 2006. Well, that is, fortunately for everyone except the Court of Appeals panel and the parties arguing the case before them. Oral argument before the Court of Appeals has been scheduled for August 8, 2006.

The October deadline will not necessarily resolve our problem. *Stokes* is "stayed" pending resolution of the appellate proceedings. If there is an Application for Leave filed from the Court of Appeals' decision, we will then be in limbo until the Supreme Court makes a ruling.

Even with our hands tied, as noted above, we will continue to make every effort to reduce the backlog and get your cases decided. 🛠

Harold Dean WC Open

By Murray Feldman

On June 30, 2006, the 18th Annual Harold Dean WC Open was held at the Golden Fox. Although not a formally sponsored Section event, as always, golf, fellowship, renewal of old acquaintances, and seeing those we don't often get to see were the highlights of the day.

Spotted in the crowd were Ted Felker, Sr.; Bruce Roberts; Tom Chuhran; Bill Listman; and Tom McNally, as well as former Magistrates Susan Cope and L'Mell Smith. Also spotted were Director Jack Nolish and the "birthday boy," Chief Magistrate Murray Gorchow.

A wonderful day was had by all.

Congratulations again to Ray Bohnenstiehl for his hard work and dedication in making the day a great success! 🛠

Poetry

By Michael Barney

Anyone with even a passing familiarity with 20th century world literature will recognize the name of the Czech writer, Franz Kafka, and what "Kafkaesque" has come to mean: an atmosphere of aimless menace, brooding threat, and powerful but irrationally posited accusation. Such works as "The Castle," "The Trial," and "The Metamorphoses" (all published posthumously) deal with the human fascination for all things dark and mannered. Thus, it should not surprise anyone too much (especially in our field) to learn that for many years during his non-literary career (Kafka published little during his lifetime, earning his living in non-literary pursuits) Mr. Kafka was a workers' compensation insurance adjuster, first at a private company (the Assicurazioni Generali, an aggressive Italian insurance firm) and then for several years as an investigator/adjuster for the state-run Workers' Accident Insurance Institute for the Kingdom of Bohemia. In this capacity he investigated accidents, adjusted claims, and calculated the costs and probabilities of all sorts of human misery and calamity. He was both proficient at and proud of his work, receiving several promotions throughout the many years he spent in this position.

Nonetheless, he was always aware that his day job cut into time spent (better spent) writing, and was impatient on occasion over his day duties. Which brings us to today's poem, by the American poet Ray Carver, who (selfishly, as a writer would) reimagines what Kafka's watch might tell us during its work day:

Franz Kafka

Ray Carver

Kafka's Watch

I have a job with a tiny salary of 80 crowns, and an infinite eight or nine hours of work.

I devour the time outside the office like a wild beast.

Someday I hope to sit in a chair in another country, looking out the window at fields of sugarcane or Mohammedan cemeteries.

I don't complain about the work so much as about the sluggishness of swampy time. The office hours cannot be divided up! I feel the pressure of the full eight or nine hours even in the last half hour of the day. It's like a train ride lasting night and day. In the end you're totally crushed. You no longer think about the straining of the engine, or about the hills or the countryside, but ascribe all that's happening to your watch alone. The watch which you continually hold in the palm of your hand. Then shake. And bring slowly to your ear in disbelief.

Mr. Carver subtitles this poem "from a letter"; I suspect that the letter dates from the year Kafka worked for the Italian firm, for by all accounts he worked valiantly and joyfully in his various positions with the Bohemian state agency until his death from tuberculosis on June 3, 1924. I also suspect a good deal of good natured writerly contempt on the part of Mr. Carver toward us 9-5 wage slaves. Ah, well, we can't all be geniuses. ⚒

Looking for Something?

Find back copies of the newsletter and other Section information at *www.michbar.org/workerscomp*

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

Stokes

The Supreme Court has issued an order regarding *Stokes v DaimlerChrysler Corporation,* 2006 ACO #24. The Court has stayed the Commission's decision. The stay will continue "pending resolution of the appellate proceedings." The Court added that "*Boggetta v Burroughs Corp* 368 Mich 600 (1962), remains controlling authority until reversed by this Court." *Boggetta* is the Supreme Court case that approved use of discovery in workers' compensation proceedings. The Court denied the employer's request to grant leave before consideration by the Court of Appeals, but the Court directed the Court of Appeals to grant leave to appeal and issue a decision before October 1, 2006. The Court's ruling was a 4-3. The full text of the Stokes Supreme Court order, including the dissent, is as follows:

> On order of the Court, the motions for leave to file briefs amicus curiae are GRANTED. The application for leave to appeal prior to decision by the Court of Appeals is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals. On the Court's own motion, pursuant to MCR 7.302(H) and &.209(D), we order that the decision of the Workers' Compensation Appellate Commission in this case is STAYED pending resolution of the appellate proceedings, and note that *Boggetta v Burroughs Corp.,* 368 Mich 600, 118 NW2d 980 (1962), remains controlling authority until reversed by this Court. We DIRECT the Court of Appeals to grant the application for leave to appeal in this case and issue a decision on the appeal before October 1, 2006.
>
> We do not retain jurisdiction.
>
> CAVANAGH, J., dissents and stats as follows:
>
> I do not agree with this Court's order stating that *Boggetta v Burroughs Corp.,* 368 Mich 600, 118 NW2d 980 (1962), is still controlling authority without an appeal and an analysis from the parties of whether *Boggetta* is indeed still controlling authority. The Workers' Compensation Appellate Commission (WCAC) explains somewhat convincingly why the Legislature's actions may have rendered *Boggetta* no longer controlling authority, and I am reluctant to sign an order that states otherwise without full briefing.
>
> Thus, I prefer a straight denial of leave to appeal. The Court of Appeals is more than capable of assessing the importance of a case and managing its docket. I do not believe that this case warrants this Court's arbitrary deadline. I also note that defendant has not moved for immediate consideration in the Court of Appeals, which undermines the necessity of mandating a deadline for an opinion. More importantly, the vast majority of workers' compensation cases will not be affected by the WCAC's decision. The only cases that *may* be affected are limited in number, for example cases in which a magistrate may decide whether it is necessary to order the employee to meet with the employer's vocational rehabilitation expert or those involving interrogatories from a defendant. Notably, the effect on these cases is also minimal because a defendant can still present the testimony of vocational experts to rebut the causal connection between wage loss and disability.
>
> For those reasons, I see no need to intervene at this juncture and would simply deny leave.
>
> WEAVER, J., would deny leave to appeal
>
> KELLY, J., joins the statement of CAVANAGH, J.

The day after entry of the above order, the Court of Appeals faxed the parties an order granting leave to appeal, setting abbreviated briefing deadlines, and directing that the case be orally argued in August.

Other Supreme Court Cases

A number of other cases remain pending before the Supreme Court as of this writing. Two cases submitted together involve subject matter jurisdiction; the cases are *VanTil v Environmental Resources Management* and *Jacobs v Technidisc, Inc.,* Supreme Court Nos. 128283 and 128715, respectively. These cases should be decided before July 31, 2006, when the Court's current term ends. The common question in these cases is whether the circuit court can resolve issues under the Act that arise in the context of a circuit court case or whether the circuit court must refer resolution of those questions to the Workers' Compensation Agency. The circuit court bar, including both the Michigan Trial Lawyers Association and the Michigan Defense Trial Counsel, advocate for circuit court authority to resolve such ques-

tions. The director of the Workers' Compensation Agency has intervened to argue to the contrary. Similarly, the insurer in *Jacobs* and the section in an *amicus curiae* brief are arguing for exclusive subject matter jurisdiction in the Agency. Following oral argument in these cases, the Supreme Court asked for supplemental briefs on the practical consequences of the Court's overruling *Sewell v Clearing Machine Corp.* 419 Mich 56; 347 NW2d 447 (1984). *Sewell* held that the circuit court can resolve certain workers' compensation questions, particularly the question of whether the plaintiff is an "employee" (as that term is understood in workers' compensation law) for exclusive remedy purposes.

Also pending before the Supreme Court as of this writing is the application for leave to appeal, which has been orally argued, in *Paige v City of Sterling Heights,* SC Docket No 127912. The main issue in this case is the correct understanding of the phrase "the proximate cause" for purposes of determining the work relatedness of death claims under MCL 418.375(2).

The Court also has pending before it the case *Karaczewski v Farbman Stein & Company*, SC Docket Number 129825. The issue in *Karaczewski* is the viability of the Michigan residency requirement in the provision of the Act that addresses Michigan jurisdiction over outstate injuries, MCL 418.845. The case will be heard in the Court's next term, which begins August 1, 2006.

Court of Appeals

Res Judicata

The Court of Appeals has released a published decision on *res judicata* in *Banks v LAB Lansing Body Assembly* _____ Mich App _____; _____ NW2d _____(2006)(CA Number 259934, released for publication June 1, 2006).

The plaintiff in this case filed an application alleging a 1995 elbow injury. He returned to work for the employer after the elbow injury. His case did not come to trial until 2002. At the 2002 trial, plaintiff incidentally mentioned an additional injury in 2001 to his neck. He did not seek to amend his application to add the neck claim.

The Magistrate denied plaintiff's elbow claim. Shortly thereafter, plaintiff filed a second application based solely on the 2001 neck injury. The Magistrate and Workers' Compensation Appellate Commission ruled that plaintiff's second claim was barred by *res judicata*.

The Court of Appeals reversed. The court noted, first, per Supreme Court case law the broad rule of *res judicata* applies to workers' compensation proceedings. The broad rule of *res judicata* says that a workers' compensation adjudication is "conclusive of all matters adjudicable at that time." By contrast, the narrow view of *res judicata* holds that only those matters actually adjudicated are barred from relitigation.

After noting the broad rule applies, the Court of Appeals explained the broad rule only bars claims arising out of "the same transaction which plaintiff could have brought, but did not." The court explained that whether or not a factual grouping constitutes the "same transaction" depends on pragmatic considerations, such as whether the facts are related in time, space, origin, or motivation.

The court said the Magistrate and Commission erred in their view of the breadth of *res judicata.* The court said that "all claims that accrue before entry of a final award" are not necessarily barred. Nor must the plaintiff "raise every issue that arises before final judgment or be barred from raising it in the future."

Applying this understanding to the case at hand, the court said plaintiff's two injuries were not "conveniently packaged for one trial." The court mentioned, for example, that if plaintiff had amended his application to add the second 2001 neck injury, the case would have required an adjournment. For these reasons, the court reversed the decisions below barring plaintiff from proceeding.

Judge Murray issued a concurring opinion saying "it is important to point out what the limitations are, at least in my estimation, in the decision issued today." Judge Murray said he did not view anything in the lead opinion as detracting from the Supreme Court's decision in *Gose v Monroe Auto Equipment Co.,* 409 Mich 147, 162; 294 NW2d 165 (1980) that had warned against construing *res judicata* in a manner allowing for piecemeal compensation. Judge Murray said all claims should be pursued in one proceeding unless, as in this case, the two claims are so unrelated that they could not have properly been joined.

The Court's decision in *Banks* reflects the same approach recently taken by the Court of Appeals in *Williamson v City of Livonia and Second Injury Fund,* CA Docket No. 260274, an unpublished Court of Appeals' reported in our last newsletter.

Workers' Compensation Appellate Commission

Burden of Proof on Medical Expenses

In *Daldos v Grand Rapids Gravel Company*, 2006 ACO #105, the Commission addressed the question of which party bears the burden of proving that medical care is reasonable and necessary under MCL 418.315.

The Magistrate had granted plaintiff an open award of benefits for a work-related cervical disability. Among the issues defendants argued on appeal was whether the Magistrate committed legal error in ordering payment for mileage to and from plaintiff's treating physician, given that plaintiff "occasionally mixed medical treatment with pleasure on those trips."

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The Commission undertook a historical review of the medical expense provision, MCL 418.315, and its predecessor. The Commission then concluded:

> There is nothing in the language of section 315(1) that places an obligation on the injured employee to obtain an order from the Magistrate for medical treatment as there was prior to 1965. If the legislature intended such an obligation, it would have so stated as it had prior to 1965. In fact, the statute clearly places the obligation on the employer to establish why medical treatment should not be paid for by the employer. In addition to establishing an automatic right to medical treatment for work related injuries, the statute also places the burden on the employer to dispute and establish that it should not have to pay for such treatment.

As a result, the Commission said "the employer is obligated to pay for all medical treatment for the employee's work related injuries until such time as it can establish good cause why it should be relieved of its obligation."

Post-*Stokes* Remand Decision

In *Vaughan v City of Detroit*, the Commission had occasion to resolve a disability question two weeks after the Supreme Court stayed the *Stokes'* decision, as reported above.

The Commission affirmed the Magistrate's award. The lead opinion was authored by Commissioner Grit. In resolving the disability questions under *Sington v Chrysler Corporation,* 467 Mich 144; 648 NW2d 624 (2002), Commissioner Grit applied the pre-*Stokes* model for implementing *Sington* that the Commission had used prior to *Stokes,* i.e. the guideline expressed in *Riley v Bay Logistics,* 2004 ACO #27. The controlling opinion of Commissioner Ries, with Commissioner Will concurring, does not reference any prior Commission case. The majority resolved the case with citation to *Sington* saying that plaintiff's disability claim was affirmed because "plaintiff's inability as a result of the work-related injury to perform any of the work the record identifies as being suitable to her qualifications and training establishes that she has a limitation in her capacity to perform such work."

Attorney fees on Medical Expenses

In *Hafner v JARC and Star Insurance Company*, 2006 ACO #110, the Magistrate awarded plaintiff's counsel an attorney fee based on future medical treatment for the employee's work injury, namely knee replacement surgery. Defendant challenged that finding on appeal as legally incorrect. The majority of the Commission agreed with defendant. The majority held that an award of attorney fees depends on "proof that a medical bill has been paid before any attorney fee can be assessed." In this case, plaintiff had not presented an unpaid medical bill. The Commission noted that while the Magistrate identified many equitable arguments for assessing an attorney fee, the legislature has provided no authority to assess attorney fees under such circumstances. Chairperson Glaser in dissent would have affirmed the assessment of the attorney fee on the prospective medical treatment.

Another attorney fee dispute with respect to medical expenses arose in *Musselman v International Engineering & Manufacturing, Inc.,* 2006 ACO #109. The question arose in the context of awarding attorney fees on unpaid medical bills already incurred. The Magistrate awarded attorney fees to the plaintiff's counsel with respect to such bills but did not outline his reasoning. Consequently, the Commission said:

> …we must remand for additional analysis regarding the attorney fee issue. Although we agree that the magistrate correctly concluded that plaintiff properly presented the issue at the start of the hearing, the magistrate failed to provide any analysis to support the discretionary grant of attorney fees. *Beattie v Wells Aluminum Corp.* 2005 ACO #157, requires that analysis.

Recall that the *Beattie* case had said the Magistrate must consider whether there was neglect or a breach of duty by the employer/carrier in not paying a medical bill. Included in that inquiry is whether the employer had appropriate notice of the medical expenses.

No Fault Carrier's Right to Pursue a Workers' Compensation Claim on its Own

In *Dowd-List/Progressive Insurance Company v Hagler Bailly and Hartford Insurance Company,* 2006 ACO #112, the Commission addressed the question of whether a no-fault automobile insurance carrier can initiate, rather than just join, a workers' compensation action. The Magistrate held that the carrier could not. The Commission reluctantly reversed.

The Commission said that "no court has ever addressed the issue of whether the no-fault carrier could initiate a claim for benefits under the act." However, the Commission said MCL 418.847(1)'s language stating "any party in interest" may file a claim means a no fault carrier can initiate an action. The Commission said it was "less than overjoyed" to order reinstatement of the carrier's application.

Appellate Procedure after Remand

In *Stewart v Banchero Cement Company, Inc.,* 2006 ACO #113, the case returned to the Workers' Compensation Appellate Commission following the Commission's earlier remand requesting an additional analysis of the

Announcing the State Bar's Newly-Launched Practice Management Resource Center

By Thomas W. Cranmer, President, State Bar of Michigan

As president of the State Bar of Michigan, I am proud to introduce a new membership benefit: the Practice Management Resource Center (PMRC). This new program will assist members in effectively and efficiently managing the business component of practicing law. It is designed to help attorneys manage everything from outfitting an office with the latest software that integrates time accounting, billing, and account management, to effectively marketing one's practice.

The PMRC is accessible through the State Bar's website at *http://www.michbar.org/pmrc/content.cfm.*

The PMRC contains different sections of information. The Resources section provides electronic access to articles, features, and forms on a variety of topics, such as business development, financial management, and calendaring and docket control. The Legal Software Directory contains links to dozens of vendors offering software applications to assist members in the day-to-day management of a law practice. And in the near future, a lending library will be available for members to search law practice management publications, tapes, CDs, and other resources. Those resources can then be requested online or at the State Bar of Michigan building in Lansing.

The PMRC also includes a Helpline, which is accessible by phone at 1.800.341.9715 or via email at *pmrcHelpline@mail.michbar.org.* The PMRC Helpline is a confidential, informal service designed to quickly assist SBM members with practice management issues. Those accessing the Helpline can get practical guidance, suggestions, referrals, and information about a variety of practice management topics from a practice-management advisor.

In addition to the website, the PMRC has an onsite Educational Center located in the State Bar of Michigan's headquarters at 306 Townsend in Lansing. The Educational Center offers programs on a variety of topics, including hands-on software demonstrations on an informal, individual basis. For example, members and their staff can test-drive legal software in areas such as case management, time accounting, billing, and calendaring functions. We have made efforts to ensure that members statewide can avail themselves of this new service by taking the programs on the road in both Grand Rapids and Marquette. Bar associations interested in scheduling a program in their area should contact the PMRC Helpline.

The State Bar strives to be responsive to its members' needs. The PMRC was established in direct response to lawyers asking for help in keeping up with changes in technology, streamlining the way they practice, and enhancing the service they provide their clients. Many members in larger firm settings are simply trying to keep abreast of what tools are available. Others have undertaken career moves as a result of market changes or quality of life choices, placing many in the position of beginning solo and small firms midway through their legal careers. The PMRC is designed with both sets of needs in mind, providing practical guidance and useful resources.

I invite you to visit our website, and call or send an e-mail to let us know what you think. 🛠

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disability issue. In remanding the case, the Commission had retained jurisdiction meaning the case automatically returned to the Commission for review after the Magistrate's supplemental decision.

Following the Magistrate's supplemental decision, the defendant failed to raise any issue critiquing or criticizing the Magistrate's supplemental decision. The Commission therefore declined to review the issue and affirmed the award post-remand. The Commission said the defendant waived any disagreement it may have had with the magistrate's decision by not specifically challenging it after remand.

This case underscores the importance of filing post-remand briefs with the Commission if the party remains aggrieved with the supplemental decision. 🛠

Summer Seminar was Super

By Murray Feldman

The Section's Summer Seminar, held at Shanty Creek Resort June 22-24, 2006, was a great success. In addition to the good fellowship among all attendees, much important Section business was conducted.

The annual election of officers occurred. Congratulations to Leonard Hickey, our new chairperson; Paula Olivarez, our new vice chairperson; Murray Feldman, our new secretary and Joel Alpert, our new treasurer. Re-elected to the Section Council were Brian Goodenough and John Sims. Elected to replace Deb Strain (term limited) and Joel Alpert (elected treasurer) were Chuck Palmer and Denice LeVasseur. Congratulations to all. On behalf of the entire Section, our thanks to Rick Warsh and Deb Strain for their service.

Highlights of the business conducted included presentations by Director Jack Nolish on important issues including a legislative update, information on the Bureau computer system, an update on case filings, and other issues of note. Martha Glaser, chairperson of the WCAC updated us on pending cases, including the *Stokes* decision and the current caseload at the WCAC. Chief Magistrate Murray Gorchow updated us on Bureau activities and reassignments, which included the fact that Magistrate Harris would be sitting one week in Kalamazoo in future months, and that Magistrate Alex Ornstein has resigned effective June 1, 2006. Jerry Marcinkoski provided his usual excellent and thorough update on pending and decided cases. Our guest speaker, Kathie Vaught, Workers' Compensation Specialist, CWCP, CWCC, Michigan Economic Development Corporation, provided an excellent description of services available to employers. Her presentation was excellent and very well received by all in attendance.

Finally, new chairperson Len Hickey announced next year's Summer Seminar will be held at Crystal Mountain June 14-16, 2007, with the golf tournament scheduled on June 15, 2007. Please mark your calendars.

If you missed this year's Summer Seminar, you missed a lot! Your officers and council encourage you to attend next year's Summer Seminar and all Section programs. 🛠

Sudoku Solution

2	4	8	7	3	5	6	9	1
6	3	9	4	8	1	2	5	7
7	1	5	9	6	2	8	4	3
3	7	2	1	9	6	5	8	4
5	9	1	8	2	4	3	7	6
8	6	4	5	7	3	9	1	2
4	5	6	3	1	8	7	2	9
1	2	7	6	5	9	4	3	8
9	8	3	2	4	7	1	6	5

Save the Date

The Workers' Compensation Section Annual Winter Seminar is scheduled for December 1, 2006. The seminar will be held at the Detroit hearing site. While the schedule of events is still being determined, anticipated speakers include Director Jack Nolish, chairperson of the WCAC Martha Glaser, Chief Magistrate Murray Gorchow, an update on the state of the law, and a guest speaker. The Seminar will run from approximately 8:30 a.m. to noon. Coffee and donuts will be provided. We look forward to seeing you there. 🛠

Scenes from the Summer Seminar at Shanty Creek

A

B

E

F

C

D

G

I

H

J

K

A. Don Waldron (LNS) and Len Smit (St Joe) (In the background Chief Magistrate Murray Gorchow, Phil Churchill, and Jerry Marcinkoski)

B. Jim Brakora and Director Jack Nolish

C. Magistrate Carol Guyton

D. Magistrate Val Jarvis

E. Joel Alpert, Mrs. Grunewald, and Dave Grunewald

F. Kathie Vaught (MEDC, guest speaker) and Murray Gorchow

G. Len Hickey and Rick Warsh

H. Magistrate Mary Brennan

I. Ken Oosterhouse (GR) and Tim Kragt (St. Joe)

J. Melody Paige

K. Murray Feldman

SBM e-Journal Gets High Ratings from Subscribers

Now in its seventh year of operation, the State Bar of Michigan daily electronic e-Journal publication is still getting rave reviews from member subscribers. It has been described as "the single best service provided to its members by the Bar." A recent online readership survey found that 99 percent of e-Journal subscribers find the summaries helpful to their practice, and of those, 77 percent use them to stay current in their preferred area of practice.

The e-Journal updates the legal profession daily on changes in the laws and summarizes cases to help attorneys stay up-to-date with the law as it emerges from the courts. To date, more than 27,000 appellate and district court opinions and orders have been summarized.

Survey highlights also show the following:

- 73 percent read the e-Journal on a daily basis and another 21 percent read it several times a week. Fewer than 6 percent of the subscribers read the publication once a week or less.
- 50 percent of subscribers have been reading the e-Journal for more than five years.
- 93 percent of the subscribers consider the length of the summaries to be just right, and 97 percent read the full-text opinions after reading the summaries.
- 87 percent of readers are interested in the development of an online searchable index of past summaries.

Besides the summaries, members also read News from the Bar (21 percent), Public Policy (13 percent), Classifieds (14 percent), Fields of Practice and In Memoriam (11 percent).

Staff and members of the Publications and Website Advisory Committee will be assessing readership comments for future enhancements to the publication. Specific areas that will be addressed include building a searchable index of past summaries and re-evaluating content offerings and delivery options for reaching a wider segment of members.

The e-Journal currently goes to 17,000 member subscribers free of charge. A total of 1,634 completed the questionnaire online for an overall response rate of 9.6 percent. To subscribe to the e-Journal, visit *http://www.michbar.org/publications/signup.cfm*.

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