State Bar of Michigan

Workers' Compensation Section Newsletter

Summer 2008

From the Chair

An ancient Chinese philosopher once said "may you live in interesting times." If someone can find that philosopher, we would probably find he was a WC attorney. Since my election as your chairperson, life has been more than interesting.

Just days before our annual section meeting, the Michigan Supreme Court released the *Stokes* decision. I want to thank Agency Director Jack Nolish for inviting the section to assist in the development of a process and rules to deal with issues raised by *Stokes*.

I also want to thank those who attended the summer section meeting and those who have volunteered to continue to move our section forward, and describe to you our agenda for this year.

Our Medicare Committee continues to address issues of importance to all of us. The committee includes chairperson Denice LeVasseur and members Joel Alpert and Chuck Palmer. If anyone is interested in serving on that committee or has ideas to share, please feel free to contact one of these members.

Last year, we began our scholarship program and have several new ideas for expanding it. Rick Warsh has agreed to be chairperson of the Scholarship Committee, which includes Magistrate Vic McCoy and Dave Gruenwald. If you would like to serve on the committee or have any suggestions or thoughts, please feel free to contact one of these committee members.

None of us who attended the section meeting will ever forget our first Hall of Fame induction ceremony. It was a real honor to participate, and all who attended were deeply moved. This year's Hall of Fame Committee will be co-chaired by Don Ducey and Nort Cohen. If you have any nominations or wish to serve on the committee, please contact either Don or Nort.

We are considering various possibilities for our winter trip. Thanks to Fred Bleakley for volunteering to assist with this project. We will provide moreinformation once details become available.

Next year's summer meeting will take place at Crystal Mountain Resort. Based on past experience, Crystal Mountain is a wonderful location for our purposes. The dates will be confirmed later, but we are presently working with June 18-20, 2009.

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Tom Ruth, Newsletter Editor

Opinions expressed herein are those of the authors or the editor and do not necessarily reflect the opinions of the section council or the membership.

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From the Chair
Continued from page 1

Robert "Klu" Kluczynski retains his position as "minister of fun." If anyone has any suggestions as to how Klu can discharge his duties, please don't hesitate to contact him.

I have recently become aware that the Court of Appeals issued an order in the case of *Arnett v R&L Transfer Inc*, remanding it to the magistrate for additional proofs in light of *Stokes*. The Court did not retain jurisdiction. As a result, if either party is dissatisfied with the magistrate's order after remand, the appeal process will have to start over from the beginning. If the Court had retained jurisdiction, or in the alternative, had remanded to the WCAC to return to the magistrate, a new appeal process would not be necessary and the case would be returned to the court or WCAC for further action after the magistrate's decision on remand. Thus, the unfortunate result of not retaining jurisdiction is that a case that may have been pending for several years is relegated to initial appeal status and goes to the end of the line.

As your chairperson, I have sought counsel on what, if anything, could be done to ask the courts to remand through the WCAC or retain jurisdiction. While we were not able to come up with any plan that addresses all cases, there is nothing to prevent the parties from asking that the case be remanded through the WCAC, so it can retain jurisdiction, in any case where remand is a possibility. If such a request comes from both sides, it makes it very easy for the court to grant.

I would like to conclude my first newsletter article as chairperson with two general comments. First, in addressing issues raised by *Stokes*, we have seen extraordinary cooperation between attorneys, vocational consultants, the agency, the Board of Magistrates, and the Appellate Commission. This kind of multifaceted cooperation is what makes our section great and keeps us strong in the face of these changes and challenges. Second, I encourage you to participate in section events and activities, as our strength comes from each of us participating in whatever way we can.

As I mentioned in accepting the honor of becoming your chairperson at the section meeting, we have shown as a section our ability to work together to overcome a multitude of issues and will continue to do so. I look forward to serving as your chairperson during these interesting times!

Keep watching your e-mail for updates on *Stokes* and other section news and issues.

Summer Section Meeting Highlights

Over 100 members of the section and their guests attended this year's summer meeting at Shanty Creek Resort in Bellaire, Michigan. Many have commented that it was the best section meeting they have attended in many years, as we addressed issues as serious as the *Stokes* decision while sharing camaraderie and the results of the Annual Golf Tournament.

One of the highlights of the meeting was the election of new officers: Murray Feldman, chairperson; Joel Alpert, vice chairperson; Dave DeGraw, secretary; John Simms, treasurer; and new council members Pete Schrock and Ella Parker.

The highlight of Thursday's events, which included a cocktail party and dinner, was the Hall of Fame induction ceremony. Along with the entertaining and humorous presentations by Tom Geil, Steve Pollok, Rick Warsh, and Don Ducey, comments by Bill Listman and representatives of the three other inductees were

truly heartwarming. All who were present were very touched by the presentation. We look forward to the 2009 inductions at next year's ceremony. On a similar note, watch your e-mail for notice of the rededication of the Hall of Fame display of all inductees at the Detroit Bureau.

On Friday, your officers and council held several substantive meetings on *Stokes*-related issues, along with presentations by Agency Director Nolish, Chief Magistrate Gorchow, Appellate Commission Chairperson Glaser, and Marty Critchell.

If you missed the meeting, you missed a lot, and I encourage you to make arrangements to attend our 2009 meeting.

New Form Under *Stokes*

I am pleased to have this opportunity to update you on the actions your officers and council have taken regarding *Stokes* in conjunction with the agency and Agency Director Jack Nolish.

After a series of meetings that included representatives of plaintiffs and defendants, Chief Magistrate Gorchow, and Agency Director Nolish, we have developed a standardized form to facilitate the exchange of information between the parties detailed in *Stokes*. This form, entitled "Work History, Work Qualifications & Training Disclosure Form," will be available from the agency by the time you read this newsletter.

All parties agree that neither the form nor its use will in any way affect the substantive rights of any party under *Stokes*. Rather, this form is a procedural tool for defendants to send to plaintiffs to obtain vocational information. Defendants can then provide that information to a vocational expert, at the appropriate time, to determine whether an in-person interview is necessary.

The use of this form is voluntary, but we hope it will be used by many defendants as an efficient, standardized method of exchanging information in a timely manner. In addition to using this form, the parties are entitled to issue interrogatories to obtain any necessary supplemental information.

In Agency Director Nolish's announcement of creation of this form, he echoed the comments of the officers and council in encouraging defendants to provide plaintiffs with wage, fringe benefit, employment, and personnel records as promptly as possible, as it is everyone's goal to exchange information promptly so appropriate strategic decisions can be made.

Your officers and council continue to work on other issues to assist in creating an orderly process to deal with *Stokes*. Your suggestions or comments are welcomed and should be directed to any officer or councilperson for consideration.

—Murray

Editor's Note

I hope all the attendees and their families enjoyed the spring conference. Because of *Stokes*, the interest level was high and I heard many lively discussions regarding its application and impact on our practice. The section worked hard to come up with a balanced approach to what *Stokes* means to our section. The product of that hard work can be seen in the new form (WC-105) that is contained in this issue. Murray Feldman took the lead in organizing the meetings that culminated, in a significant way, with the new form. Depending on what you think of the form, you can thank him or . . . . well, NOT thank him for his leadership in this area. Thanks to Murray and all the section members who helped. The section would like to hear any comments regarding the form and I would invite comments that can be published in this newsletter (just send an e-mail to me). I already have received one comment: "If the completion of the form is 'voluntary,' how can it be subject to enforcement?"

The mystery quotes from last edition were all attributable to Winston Churchill.

The fall meeting will be held at the Detroit Agency location, December 5, 2008 (details soon). The spring meeting will be at Crystal Mountain June 18-20, 2009. (Place in your calendar now). Have a great Fall. Go Lions!

—Tom Ruth

Stokes, Stokes, and More Stokes: What Now? How to Proceed in Transition

By Murray A. Gorchow, Chair of the Board of Magistrates

I have been called on in recent weeks to speak on the impact of the Supreme Court's decision in *Stokes v Chrysler LLC*, 481 Mich 266, 750 NW2d 129 (2008). I have, and will continue to confine my remarks to the procedural questions concerning my handling of cases at the Board of Magistrates in transition between the pre-*Stokes* world and the new world under *Stokes*. I will leave to the practicing bar and the commentators the debate over the substance of *Stokes* and the details of how, what, and why the Supreme Court arrived at its decision. I will also leave to the parties, their attorneys, and the Board of Magistrates, the resolution, on a case-by-case basis, the myriad of issues, arguments, and outcomes as to the timing of pre-trial discovery, and the order and sufficiency of proofs under the terms of *Stokes*.

Suffice it to say that the *Stokes* decision deals with (1) plaintiff's burden of proof regarding disability under *Sington v Chrysler Corp*., 467 Mich 144 (2002); (2) the nature of plaintiff's burden of proof; (3) the order of production of proofs; (4) pre-trial discovery; and (5) the Magistrate's responsibility and authority regarding pre-trial discovery, and at trial.

The focus of this article will be on the procedural issues surrounding what I have suggested to some of the Magistrates about how I am responding to the effect of *Stokes* on pending cases; trials, continued trials; cases tried to conclusion pending decision; and cases remanded to the Board of Magistrates pre-*Stokes*. Other magistrates may, of course, exercise their discretion as they believe appropriate under the circumstances of their docket and any given case. Given the due process concerns repeatedly expressed by the Supreme Court throughout its decision and in its "remand to the magistrate for a new hearing consistent with the procedures set forth in this opinion," I am exercising my discretion, subject to the special circumstances of any particular case, in the following way:

As to the **Pending Docket**, *requests for adjournment* by either party to develop *Stokes* proofs will be generally granted by me, for now during this transition, without regard to the age of the case. A reasonable amount of time will be granted, but this is not an open-ended grant of additional time. As with requests for extensions for more time for good cause shown to get medical examinations, the same will be true for

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Notes from the Director

By Jack A. Nolish, Director
Workers' Compensation Agency

With the excellent cooperation, contributions, assistance, and persistence of the State Bar Workers' Compensation Section Executive Committee Chair, Murray Feldman, I am pleased to provide for your use the **WORK HISTORY, WORK QUALIFICATIONS & TRAINING DISCLOSURE QUESTIONNAIRE** (Form WC-105).

Issues regarding the use of the questionnaire should be directed to the magistrate assigned to the case.

1. The questionnaire (Form WC-105) is available on the agency website at www.michigan.gov/wca. It is a "fill-in" pdf file that can be downloaded and saved as a blank form. Once filled in, it can be printed, but not saved.*
2. A limited number of forms will be printed and available at the hearing sites.
3. Completion is voluntary.
4. This questionnaire may be used by the magistrate to facilitate exchange of information as required by *Stokes v Chrysler, LLC*, 481 Mich 266 (2008).
5. The time for use of the questionnaire, including the time for completion, will be determined by the magistrate.
6. Use of this questionnaire does not limit the magistrates' or the parties' rights to request further disclosure as provided in the *Stokes* decision.
7. The questionnaire may be offered as an exhibit in a deposition or hearing subject to ruling by the magistrate.
8. Completed questionnaires should be exchanged among all parties and *not* sent to the Workers' Compensation Agency.
9. The questionnaire will not be placed in the agency file unless it has been admitted as an exhibit at a hearing or as part of a deposition transcript.
10. Questionnaires mailed to the agency will be returned and will not be placed in the case file.

It is hoped that this questionnaire will serve as a useful tool to assist in the preparation and presentation of proofs as required by the *Stokes* decision. Again, my thanks to the many practitioners and agency staff that assisted in the preparation of this form.

*A completed form can be saved if you use the full version of *Adobe Acrobat* (not Adobe Reader).

Print Reset

WORK HISTORY, WORK QUALIFICATIONS & TRAINING DISCLOSURE QUESTIONNAIRE

Michigan Department of Labor & Economic Growth
Workers' Compensation Agency
P O Box 30016, Lansing, MI 48909

The information you disclose in this questionnaire may be used by the magistrate to facilitate exchange of information as required by *Stokes v. Chrysler, LLC*, 481 Mich 266 (2008). Completion is voluntary. Completed forms should be exchanged among all parties and not sent to the Workers' Compensation Agency. Use of this questionnaire does not limit the parties' rights to request further disclosure as provided in that decision.

SECTION 1 – GENERAL INFORMATION

1. Name (First, Middle Initial, Last)	2. Social Security Number (Last four digits only) XXX-XX-		
3. Street Address	4. City	5. State	6. ZIP Code

7. Do you have a valid driver's license? ☐ Yes ☐ No

If yes, issuing state _____ Expiration date _____ Special endorsements or restrictions _____

If no, do you have a valid government issued photo I.D. card? ☐ Yes ☐ No

SECTION 2 – EDUCATIONAL/ VOCATIONAL/MILITARY BACKGROUND

8. Indicate the highest grade of school you have completed (0-12): _____

9. Did you graduate from high school? ☐ Yes ☐ No If yes, what year did you graduate? _____

10. If you obtained a GED, what year did you obtain it (either the specific year or best estimate)? _____

11. Do you have any other disabilities that might be a barrier to employment? ☐ Yes ☐ No

If yes, please describe:

12. Can you read and write English? For example, can you read this form, newspapers, magazines etc.? ☐ Yes ☐ No

13. For each school you attended, provide the following information (please attach additional pages if necessary):

	School Name	Address if known or City & State	Grade Completed	Degree/ Diploma	Course of Study	Years Attended
High School						
Vocational School						
College						
Post-graduate						

14. Have you completed any type of special job training, trade or vocational school? ☐ Yes ☐ No

a. Type of training _____

b. Date completed _____

c. Certifications/licenses received _____

d. Expiration date of certification/licenses _____

Name _____

15. *Computer Experience/Access*
Please describe any computer skills/experience/training you have:

a. Do you have access to the Internet? ☐ Yes ☐ No
b. Do you have an e-mail address? ☐ Yes ☐ No
c. Can you send and receive e-mail? ☐ Yes ☐ No
d. Are you proficient in any of the following computer programs:
   i. Microsoft Excel ☐ Yes ☐ No
   ii. Microsoft Works ☐ Yes ☐ No
   iii. Microsoft Word ☐ Yes ☐ No
   iv. Microsoft Money ☐ Yes ☐ No
e. Are you proficient in any computer programs other than those named above? ☐ Yes ☐ No
   If yes, please identify those programs in which you are proficient:

16. For any volunteer activities or hobbies in which you have participated, provide the following information:

Activity/Organization	Years of Involvement	Describe Your Activities

17. Have you been involved in any non-work activities in which you have had a leadership position, such as club president, committee chairperson, etc.? ☐ Yes ☐ No

If yes, please provide the following information (please attach additional pages if necessary):

Activity/Organization	Years of Involvement	Describe your activities

18. Have you served in the U.S. military? ☐ Yes ☐ No

Branch _____ Dates _____

Specialized training _____

If you were in the Army, list your Military Occupational Specialty (MOS) code; for the Air Force list your Air Force Specialty Code (AFSC); for the Navy, Marine Corps or Coast Guard, list your rank and type of discharge: _____

SECTION 3 – EMPLOYMENT EXPERIENCE

19. List in chronological order each and every job you have had since age 18, including any periods of self-employment, and provide the information requested. In addition, you are to complete one "Job Detail Form" for each job you list. If you have had more than five (5) jobs since age 18, please list the additional jobs on another sheet of paper. You may photocopy the Job Detail Form so that you have one form for each job you list.

Employer	Address if known or City & State	Type of Business	Job Title(s)	Dates of Employment
1.				to
2.				to
3.				to
4.				to
5.				to

Please list additional employers on another sheet of paper.

20. *Union Employment*. Do you now or have you ever worked through or out of a union hall? ☐ Yes ☐ No

If yes, please provide the following information (please attach additional pages if necessary):

Union Name	Local Number	Address if known or City & State

The above information, including any attachments, is true to the best of my knowledge. I understand that the information disclosed in this questionnaire may be used by the magistrate in determining my entitlement to workers' compensation benefits.

Signature of Claimant _____ Date _____
(Claimant **must** sign)

Claimant's Name _____
(Printed or typed)

IF YOU HAVE ATTACHED ANY ADDITIONAL PAGES, PLEASE INCLUDE YOUR FULL NAME AND THE LAST FOUR DIGITS OF YOUR SOCIAL SECURITY NUMBER ON EACH ADDITIONAL PAGE.

Completed forms should be exchanged among all parties and not sent to the Workers' Compensation Agency.

DLEG is an equal opportunity employer/program. Auxiliary aids, services and other reasonable accommodations are available upon request to individuals with disabilities.	Authority: 418.205, 418.221, R408.40b(2) Completion: Voluntary Penalty: None

JOB DETAIL FORM

Please complete one Job Detail Form for each job listed in Section 3, question 19.

JOB # _____

Employer's Name (include any self-employment)

Employer's Street Address	City	State	ZIP Code

Dates of Employment

Rate of Pay $ _____ per ☐ Hour ☐ Day ☐ Week ☐ Month ☐ Year

Hours per day _____ Days per week _____

Describe this job. In this job, how many total hours each day did you:

Walk _____ Stand _____ Sit _____ Climb _____ Reach _____

Stoop (Bend down & forward at waist) _____ Crawl (Move on hands & knees) _____

Kneel (Bend legs to rest on knees) _____ Handle, grab or grasp big objects _____

Crouch (Bend legs & back down & forward) _____ Write, type or handle small objects _____

Lifting and Carrying. Explain what you lifted, how far you carried it, and how often you did this.

Check the **heaviest** weight lifted:

☐ Less than 10 lbs. ☐ 10 lbs. ☐ 20 lbs. ☐ 50 lbs. ☐ 100 lbs. or more ☐ Other _____

Check weight you **frequently** lifted: (By frequently, we mean from 1/3 to 2/3 of the workday.)

☐ Less than 10 lbs. ☐ 10 lbs. ☐ 25 lbs. ☐ 50 lbs. or more ☐ Other _____

Did this job require you to work with the public? ☐ Yes ☐ No

If yes, describe:

Did this job require you to use machines, tools or equipment? ☐ Yes ☐ No

If yes, describe:

Did this job require you to use technical knowledge or skills? ☐ Yes ☐ No

If yes, describe:

Did this job require you to perform any duties such as writing, completing reports, etc.? ☐ Yes ☐ No

If yes, describe:

Did this job require you to supervise other people? ☐ Yes ☐ No

If yes, describe:

Signature of Claimant _____ Date _____
(Claimant **must** sign)

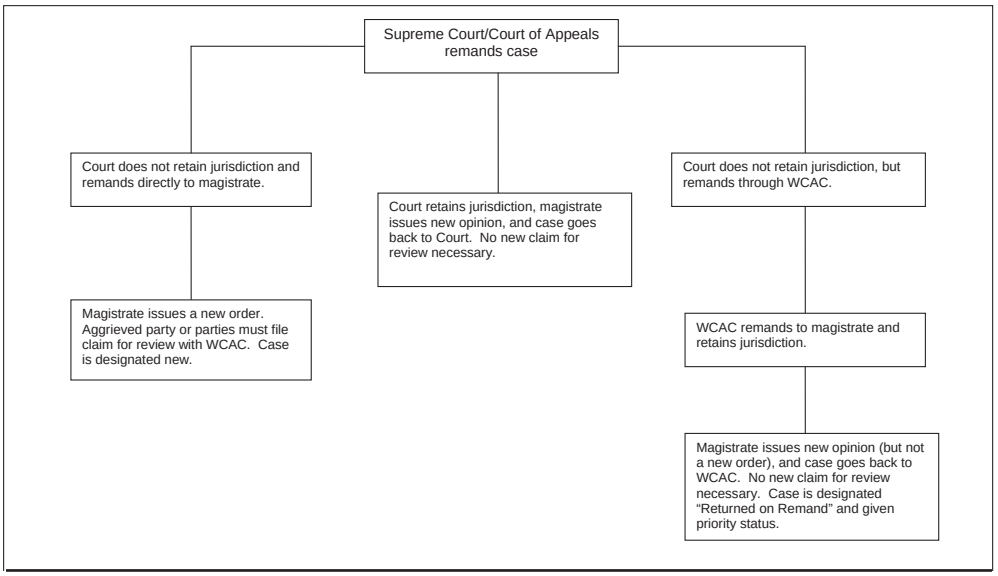
Claimant's Name _____ Social security number XXX-XX-_____
(Printed or typed) (last 4 digits)

WC-105 (8/08)

Workers' Compensation Appellate Commission

By Martha M. Glaser, Chairperson

We recently enjoyed another successful WC Section annual meeting at Shanty Creek Resort. The topic of conversation swirled around the recently released Supreme Court decision in *Stokes v Chrysler LLC,* 481 Mich 266 (2008). As I indicated at the seminar, we expect a significant portion of claims pending to be remanded for additional proof. I would like to join Chair Feldman in cautioning you about the effect "retaining" or "not retaining" jurisdiction, when a case is remanded, can have on your client's case. Long delays can be avoided if you are able to convince a court that if remand is necessary, it should be done through the WCAC. With only very rare exception, any case being remanded to the magistrate by the commission will have jurisdiction retained. (See chart for quick reference.) This applies not only to cases involving the *Stokes* issues, but to any case remanded to the magistrate.



Looking beyond *Stokes*, here are some of the cases that the courts have expressed an interest in:

- *Lynell Johnson v Suburban Mobility Authority, a/k/a S.M.A.R.T.* COA #273010
  On remand from the Supreme Court as on leave granted
  Issue: What is necessary to establish competent, material, and substantial evidence to support a magistrate's termination of benefits, after an open award is entered.

- *Karen Leonard v Wayne State University.* COA #273129
  On remand from the Supreme Court as on leave granted (recently granted request to file supplemental briefs)
  Issue: Disability. An inability to work in a certain location. No evidence of any other work available that would pay maximum wages.

- *Cathy L. Rogers v Delphi Corporation.* COA #278822
  Leave granted
  Issue: Disability. Qualifications and training.

- *David P. Neuhaus v Pepsi Cola Metroplitan Bottling Company, Incorporated.* COA #274960 and *Richard E. Harvlie v Jack Post Corporation.* COA #276044.
  On remand from the Supreme Court as on leave granted
  Issue: Prorated attorney fees on medical

- *Gary L. Alden v General Motors Corporation.* COA # 275822
  Leave granted
  Issue: Prorated attorney fees on attendant care.

- *Annie Swinton v Michigan State University.* COA #280135
  Leave granted
  Issue: Application of *Gardner v VanBuren Public Schools,* 445 Mich 23 (1994) and *Robertson v DaimlerChrysler Corporation,* 465 Mich 732 (2002). Psychiatric disabilities and work relationship.

Stokes, Stokes . . .
Continued from page 4

Stokes proofs. Unlike the extraordinarily lengthy adjournments that are allowed to obtain conditional payment and/or set-aside letters from CMS, over which attorneys have very limited control, the development of *Stokes* proofs is largely within the control of counsel.

As to **Requests to Proceed to Trial**, counsel should ask themselves, and expect that I will ask them, three questions: (1) Have you read *Stokes*? (2) If so, are you ready to proceed to trial under the terms of *Stokes*? (3) If yes, have you *really* read *Stokes*, including each of the elements of plaintiff's *prima facie* disability case? If not, see "requests for adjournment" in the preceding paragraph. If you decide to proceed to trial without requesting additional time to develop and obtain additional *Stokes* proofs, such statements will be taken on the record at the time a trial date is requested.

As chairperson of the Board of Magistrates, I am concerned with the inevitable delays that will occur for pending, otherwise mature and trial-ready cases on the docket. By the time this article goes to press, it is possible we may have available a new "AWAIT" status to monitor the delays. Older cases will take longer in this transition and there will be delays to protect the due process rights of all parties.

As to **Cases Less Than 14-16 Months Old** as of the first docket date after *Stokes* was decided (6/12/08), do not expect "automatic" nor as lengthy a Stokes adjournment. I will exercise my discretion considering the facts, timing and circumstances. For example, for a case that was less than 12 months old when *Stokes* was decided, there would be ample knowledge and awareness of *Stokes*, so that good cause for an adjournment would be necessary as with requests for adjournment to get medical examinations, For cases that were older as of the arrival of *Stokes*, I will exercise my discretion balancing how long counsel have known about *Stokes*, and what you have done or not done to obtain *Stokes* proofs in the interim, as well as any other relevant factors.

As time and experience with *Stokes* sets in, there will no longer be any need for an AWAIT status. There will no longer be any "automatic" adjournments. Good cause shown and this magistrate's discretion will be the controlling factors.

As to **Continued Trials**, and **Trials with the Record Closed, Pending Decision**, the parties, through counsel, have already been contacted by many magistrates, and if not, I would recommend counsel contact the magistrate themselves to discuss whether an adjournment or re-opening of the record is necessary to comply with *Stokes*. Statements that no adjournment or no re-opening of the record are requested or necessary I have recommended be taken on the record.

As to **Remands from the Workers' Compensation Appellate Commission (WCAC) pre-*Stokes***, the question is: What are magistrates to do with existing remands in our hands, or already on their way to us from the WCAC, before the Supreme Court decided *Stokes*? Magistrates are supposed to do only what they are told to do and nothing more or less. Here are the guidelines I have discussed with the Magistrates:

1. The WCAC has repeatedly stated in many cases that the magistrate should always apply the current state of the law from higher courts, unless the court said otherwise. For us, that means *Stokes* from the Supreme Court.
2. **If the WCAC did not retain jurisdiction** (now rare), the Magistrate may inquire, on the record, if the parties want/need to re-open the record for *Stokes* proofs. Magistrates are already doing so on their own given the Supreme Court's mandate to the magistrates in *Stokes*, under Sec. 851, to become "fully informed of all the relevant facts…necessary to the determination of the case…." (*Stokes*, pp. 17, 28). Section 851 states: "The workers' compensation magistrate at the hearing of the claim [all proceedings—not just trial (p.29, fn.6)] **shall** make such

Looking for a past issue?

You can find back issues at
http://www.michbar.org/workerscomp/newsletter.cfm

inquiries and investigations as he or she considers necessary." (p.17, fn. 3, emphasis supplied)

3. **If the WCAC did retain jurisdiction** (almost always now), I do not believe that I may re-open the record on my own. I invite the parties to discuss the issue with me, and if counsel wants to re-open the record, I will recommend that they file a motion with the WCAC requesting same. If the parties stipulate to re-open, they should get a response from the WCAC relatively quickly. Without a stipulation, it will take longer so both parties can file responsive pleadings, with the usual motion/response deadlines at the WCAC.
4. A remand for further proofs or discretion to re-open *on other issues* unrelated to disability and *Stokes,* does not, I believe, give me blanket authority to re-open for *Stokes* proofs. (See #2 and #3 above.)

Given the due process concerns expressed, and the remand precedent established by *Sington* (and its progeny) and by *Stokes*; and given what the WCAC did in response to *Sington*, my expectation is that many remands are in our future.

I would also like to comment on my view of my authority and responsibility under *Stokes*. The Supreme Court set forth the following directives:

1. Plaintiffs must disclose all of their qualifications and training, including education, skills, experience and training. (*Stokes*, p.14, 32)
2. It is the obligation of the magistrate to ascertain whether such qualifications and training have been fully disclosed. (p.14)
3. Since the Court held that the "employer is entitled to discovery *before* the hearing…, (p.32, emphasis supplied), the magistrate "has the authority to require discovery when necessary to make a proper determination of the case," but "cannot ordinarily make a proper determination of a case without becoming fully informed of all the relevant facts." (p.17)
4. Throughout the pendency of the case, and at trial, the magistrate shall make such inquiries and investigations as the magistrate considers necessary to have all of the relevant facts necessary to a determination of the case. (p. 17, fn.3)
5. The magistrate "must ensure that all steps in the presentation of proofs are completed; that all the facts necessary to the determination of the case are presented; that each side has been afforded an opportunity to respond to the other's proofs; and that the statutory burden of proof has been respected." (pp.17-18)
6. It is only then that the Supreme Court believes that "the magistrate can properly determine whether the claimant has proven disability." (p.18)

I believe that the Supreme Court, in *Stokes*, has affirmed the legislative grant of authority, found in Section 851 of the Act.

I will say in conclusion, that the decision in *Stokes* has changed how workers' compensation cases will be handled and decided. There are new responsibilities, authority, burdens, costs, and many unknowns as to how this will all work out. But, I am confident that with a little bit of cooperation, fair-mindedness, and goodwill from all parties, we can achieve our common objective: the prompt and fair adjudication of claims. The collegiality of the workers' compensation community, about which I have previously written, has been given a challenge. It is a challenge, however, I am certain we can meet.

Bar Dues Waived for SBM Members on Full-Time Active Duty in the U.S. Armed Forces

Dues have been waived for up to four years for SBM members engaged in full-time active duty in the United States Armed Forces. The waiver, recommended by the State Bar of Michigan Representative Assembly, is intended to relieve the burden on lawyers whose professional careers have been disrupted by deployments into active military duty.

The American Bar Association has called for all bar associations to consider dues exemptions for military members. Michigan is among the first states to implement such an exemption. The waiver takes effect October 1, 2008 — the same date that dues are payable by SBM members.

Greg Ulrich, a member of the State Bar Board of Commissioners and sponsor of the resolution before the Representative Assembly, hailed the recent Michigan Supreme Court order regarding the waiver.

"The waiver recognizes sacrifices by Michigan lawyers serving in the military," Ulrich said. "They are drawn away from their families and daily lives by their commitment to protect us all."

Ulrich also noted other measures voluntarily undertaken by the legal community to respond to the needs of soldiers and veterans, especially the disabled, such as the University of Detroit Mercy School of Law Veterans Law Clinic and Thomas M. Cooley Law School's Service to Soldiers program.

Conditional Payment Blues — The Saga Continues

By Chuck Palmer

In my last article for the *Workers' Compensation Section Newsletter*, I related my discovery of the three-year limitation on recovery of Medicare conditional payments under the Secondary Payer Act in 42 USC 1395y(2)(B)(vi). Despite that section, CMS continues to pursue collection of additional conditional payments and is ignoring my appeals. However, I've found another basis for getting CMS to consider an appeal of conditional payments.

My client had redeemed her case for $15,000, and I sent in the conditional payment of $2,160.72 to CMS. Two months later, we received a letter acknowledging the receipt of the check, but claiming an additional amount of conditional payments of $2,298.07! When I protested, I got a call two months later from someone in the Chicago CMS office, requesting a copy of the redemption order. Eight months later, my client received a letter from the U.S. Department of Treasury, Financial Management Service, asserting the conditional payment debt plus interest and penalties, for a new total of $2,578.39. I wrote the Department of Treasury a long letter, outlining the history of the dispute and asserting the three-year limitation of 42 USC 1395y(2)(B)(vi). This letter was ignored, and my client then received a letter from a debt collection agency in Iowa. I sent the agency a copy of my prior letter to the Department of Treasury, and again received no response.

My client recently received another letter from the Department of Treasury, advising her that they would reduce her Social Security benefit by up to 15 percent each month to collect the "delinquent debt." The letter included citation to the sections of the U.S. Code that allows this procedure. In researching these sections, I discovered that we can obtain an appeal process of conditional payment disputes if the matter proceeds to an administrative offset. **31 USC 3711(e)(1)** allows the federal government to refer a debt for collection to a private agency if "(C) the head of the agency has notified the person in writing-- …. (iv)of the rights the person has to a complete explanation of the claim, to dispute information in the records of the agency about the claim, and to *administrative repeal or review of the claim*."

The collection agency not only failed to notify my client of her rights and ignored my letter, which clearly disputed the validity of the claim. More importantly, 31 USC 3716 provides in pertinent part:

(a) After trying to collect a claim from a person under section 3711(a) of this *title [31 USCS ß 3711(a)*], the head of an executive, judicial, or legislative agency may collect the claim by administrative offset. *The head of the agency may collect by administrative offset only after giving the debtor--*

(1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) *an opportunity for a review within the agency of the decision of the agency related to the claim; and*

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim. (Emphasis added.)

I have sent the Department of Treasury a letter citing both of the above provisions, and requesting that they return the matter to CMS for consideration of our appeal of the disputed conditional payments. Hopefully, they will return the matter to CMS and we can get some type of administrative review of the claim. If not, my next article will be about filing a federal lawsuit to prevent Social Security from withholding money from my client's monthly Social Security check.

Harold Dean WC Open

By Murray Feldman

This year's Harold Dean Worker's Compensation Open Golf Tournament was held on June 27, 2008. Thanks to all who attended! It was another great day of fun, frivolity, food, and fellowship. Spotted among the golfers were Erv Vahratian, recent WC Hall of Fame inductee Bill Listman, and last year's hole-in-one golfer, Ray Bohnenstiehl. As usual, the event would not be possible without the hard work of Ray and his staff; all who attended continue to be in his debt. This year's contribution in Harold's name to his designated charity, M.D. Anderson Cancer Center in Houston, Texas, brings our total contributions to almost $10,000. We thank all of you for your continuing support.

Scenes from the Annual Meeting at Shanty Creek

June 2008

Mrs. Jim Ryan, Ron Ryan, Tom Geil

Murray Feldman and Rick Warsh —the Birthday Boys

Bill Listman and Don Ducey

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

Stokes v Chrysler LLC

The Supreme Court has released its long-awaited decision in *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). *Stokes* explains in detail *how* to apply the definition of disability described in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002).

Stokes Overview

Before setting forth the Court's guidelines, the following points in the opinion are worth noting:

- The Court disapproved of the administrative "tendency to properly set forth the *Sington* standard, but then to apply the standard in a manner that effectively constitutes a reversion" to pre-*Sington* law. *Id.* at 278. The Court in *Stokes* said: "It is insufficient to merely articulate the *Sington* standard and then overlook necessary steps in its application." *Id.* at 281.

- The Court said that the workers' compensation claimant's burden of proving disability includes the following: "The claimant must make a good-faith attempt to procure post-injury employment if there are jobs at the same salary or higher that he is qualified and trained to perform." *Id.* at 283. And, the claimant is to disclose "the results of any efforts to secure employment." *Id.* at 282.

- In defending the case, "the employer [is] entitled to discovery before the hearing to enable it to meet its burden of coming forward with evidence to rebut claimant's claim of disability." *Id.* at 282. The Court said: "For example, the employer may choose to hire a vocational expert to challenge the claimant's proofs. That expert must be permitted to interview the claimant and present the employer's own analysis or assessment." *Id.* at 284. The "discovery" can occur "throughout the entire process of examining the case," as for example where the need arises for an interview in the midst of the workers' compensation hearing. *Id.* at 295 n 6. The *Stokes* dissent objected to this, saying: "Now, every time an employer requests to have its expert interview a claimant, the magistrate must comply." *Id.* at 315 (dissenting opinion of J. Cavanagh). "I observe that if compelled discovery in this case, it is difficult to imagine the case in which it would not be. *Id.* at 310 (dissenting opinion of J. Cavanagh).

- It is the claimant's burden to prove that all jobs in the same "salary range" suitable to his or her qualifications and training cannot be performed as a result of the work injury or are not reasonable available. *Id.* at 282. The Court said suitable jobs are "'those jobs that afford a plaintiff an opportunity for consideration to be hired because he possesses the minimum experience, education, and skill.'" *Id.* at 277.

Stokes Step-by-Step Guidelines

The Court then sets forth specific procedures to be followed in determining disability under *Sington*. The Court says: "We attempt only to afford guidance in the application of *Sington* so that future claimants and employers will have the benefit of a consistent and workable standard in assessing their rights and obligations under the law." *Id.* at 290. The step-by-step process (with highlighting added for easier reference) is as follows:

> First, **the injured claimant must disclose his qualifications and training.** This includes education, skills, experience, and training, whether or not they are relevant to the job the claimant was performing at the time of the injury. It is the obligation of the finder of fact to ascertain whether such qualifications and training have been fully disclosed.
>
> Second, the claimant must then prove what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. *Sington*, *supra* at 157. The statute does not demand a transferable-skills analysis and we do not require one here, but the claimant must provide

some reasonable means to assess employment opportunities to which his qualifications and training might translate. This examination is limited to jobs within the maximum salary range. **There may be jobs at an appropriate wage that the claimant is qualified and trained to perform, even if he has never been employed at those particular jobs in the past**. *Id.* at 160. The claimant is not required to hire an expert or present a formal report. For example, the claimant's analysis may simply consist of a statement of his educational attainments, and skills acquired throughout his life, work experience, and training; the job listings for which the claimant could realistically apply given his qualifications and training; and the results of any efforts to secure employment. The claimant could also consult with a job-placement agency or career counselor to consider the full range of available employment options. Again, there are not absolute requirements, and a claimant may choose whatever method he sees fit to prove an entitlement to workers' compensation benefits. A claimant sustains his burden of proof by showing that there are no reasonable employment options available for avoiding a decline in wages.

We are cognizant of the difficulty of placing on the claimant the burden of defining the universe of jobs for which he is qualified and trained, because the claimant has an obvious interest in defining that universe narrowly. Nonetheless, this is required by the statute. **Moreover, because the employer always has the opportunity to rebut the claimant's proofs, the claimant would undertake significant risk by failing to reasonably consider the proper array of alternative available jobs because the burden of proving disability always remains with the claimant**. The finder of fact, after hearing from both parties, must evaluate whether the claimant has sustained his burden.

Third, the claimant must show that his work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages. *Id.* at 158.

Fourth, if the claimant is capable of performing any of the jobs identified, the claimant must show that he cannot obtain any of these jobs. **The claimant must make a good-faith attempt to procure post-injury employment if there are jobs at the same salary or higher that he is qualified and trained to perform and the claimant's work-related injury does not preclude performance.**

Upon the completion of these four steps, the claimant establishes a prima facie case of disability. The following steps represent how each of the parties may then challenge the evidence presented by the other.

Fifth, **once the claimant has made a prima facie case of disability, the burden of production shifts to the employer** to come forward with evidence to refute the claimant's showing. At the outset, the employer obviously is in the best position to know **what jobs are available within that company** and has a financial incentive to rehabilitate and re-employ the claimant.

Sixth, in satisfying its burden of production, **the employer has a right to discovery** under the reasoning of *Boggetta* if discovery is necessary for the employer to sustain its burden and present a meaningful defense. Pursuant to MCL 418.851 and MCL 418.853 [footnote omitted], the magistrate has the authority to require discovery when necessary to make a proper determination of the case. The magistrate cannot ordinarily make a proper determination of a case without becoming fully informed of all the relevant facts. **If discovery is necessary for the employer to sustain its burden of production and to present a meaningful defense, then the magistrate abuses his discretion in denying the employer's request for discovery. For example, the employer may choose to hire a vocational expert to challenge the claimant's proofs. That expert must be permitted to interview the claimant and present the employer's own analysis or assessment.** The employer may be able to demonstrate that there are actual jobs that fit within the claimant's qualifications, training, and physical restrictions for which the claimant did not apply or refused employment.

Finally, the claimant, on whom the burden of persuasion always rests, may then come forward with additional evidence to challenge the employer's evidence.

This precise sequence is not rigid, but rather identifies the nature of the proofs that must precede the fact-finder's decision. Should it become evident in a particular case that a different sequence is more practical, the parties may present their evidence accordingly. However, the magistrate must ensure that all steps are completed in some fashion or another, that all the facts necessary to the determination of the case are presented, that each side has been accorded an adequate opportunity to respond to the other's proofs, and that the statutory burden of proof is respected. After that point, the mag-

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istrate can properly determine whether the claimant has satisfied his obligations under MCL 418.301(4).

We reiterate that MCL 418.851 places the burden of proof on the claimant to demonstrate his entitlement to compensation and benefits by a preponderance of the evidence. This burden of persuasion never shifts to the employer, although the burden of production of evidence may shift between the parties as the case progresses. **Because a claimant does not prove a "disability" under MCL 418.301(4) by merely demonstrating the inability to perform any previous jobs, the burden remains on the claimant to demonstrate that there are no available jobs within his qualifications and training that he can perform. Only after the claimant has first sustained that statutory burden of proofs does the burden of production shift to the employer to show that there are jobs that the claimant can perform**. *Id.* at 281-285 (Emphasis added.)

The dissent notes Mr. Stokes worked 28 years essentially as a forklift driver for Chrysler and has a high school diploma and, therefore, "If compelled discovery is 'necessary' in this case, it will be 'necessary' in all cases." The dissent also says:

[A]s a practical matter, the claimant will face even greater risk if he does not hire an expert. The majority clearly assumes that employers will have vocational experts at workers' compensation proceedings to best support their positions. With the employer's expert locked and loaded, the prudent claimant will have like reinforcement. The vocational proofs required virtually ensure that claimants will need experts. *Id.* at 318-319 (dissenting opinion of J. Cavanagh) (Emphasis added.)

The majority opinion was authored by Justice Markman with Chief Justice Taylor, Justice Corrigan, and Justice Young concurring. The dissent quoted above is from the dissent of Justice Cavanagh, with whom Justice Kelly concurred. Justice Weaver joined in Justice Cavanagh's dissent and wrote a separate dissent.

Application of the Guidelines to Mr. Stokes' Case

In applying this template to Mr. Stokes' case, the Court held that Mr. Stokes did not make a *prima facie* case of disability under the *Sington* standard. Mr. Stokes had worked for Chrysler for 28 years as a forklift driver while occasionally also doing dispatch work. He had a high school education and some college courses with no degree. His injury was a cervical injury that led to cervical laminectomy and fusion surgery after his last day of work. The Court found his proofs were "simply insufficient to establish a 'disability'" because:

Under *Sington*, claimant was required to demonstrate that the injury to his cervical spine limited his maximum wage-earning capacity in work suitable to his qualifications and training. Claimant merely testified regarding his employment and educational background. Claimant presented no evidence that he had even considered the possibility that he was capable of performing any job other than driving a forklift. Likewise, the lower court, the magistrate, and the tribunal seemingly assumed that because claimant had driven a forklift for so many years, that was all he was able to do and that he had acquired no additional skills throughout his life that might translate to other positions of employment. At a minimum, claimant was required by the WDCA to show that he had considered other types of employment within his qualifications and training that paid him maximum wages and that he was physically unable to perform any of those jobs or unable to obtain those jobs. There is no evidence in this case that claimant sought *any* post-injury employment or would have been willing to accept such employment within the limits of his qualifications, training, and restrictions. *Id.* at 286 (Emphasis in original.)

The Court said that "given the inconsistent application of the *Sington* standard in the past, we believe that it would be equitable to allow claimant an opportunity to present his proofs with the guidance provided by this opinion." *Id.* at 270, 299. Therefore, the Court remanded the case to the magistrate for that purpose.

Intentional and Wilful Misconduct by the Employee

The Supreme Court in *Brackett v Focus Hope, Inc*, ____ Mich ____; ____ NW2d ____ (2008) (SC Docket No. 135375, entered July 30, 2008) held that the intentional and wilful misconduct provision of the Act, MCL 418.305, applied to bar benefits to the plaintiff. The Supreme Court held the type of "misconduct" contemplated by this provision is not limited to "moral turpitude"-type misconduct.

The facts of the case were that plaintiff, before her hire by defendant, was advised by the co-founder of Focus Hope that its employees are required to attend Focus Hope's annual Martin Luther King Day celebration. Employees are asked before hire whether they will abide by that requirement. Plaintiff was told of this requirement and agreed to these terms of employment.

Months after her hire, the Martin Luther King Day celebration was scheduled to take place that year in Dearborn.

Plaintiff objected to that locale as inappropriate because of a past history of poor race relations in Dearborn, as well as her own past experiences there. For these reasons, plaintiff refused to attend the celebration. Plaintiff advised her immediate supervisor of her decision and he indicated she would be docked a day's pay.

A few days after the event, the co-founder who had hired plaintiff learned of her non-attendance. Plaintiff was called into a conference with her, confronted about her non-attendance, and told it reflected poorly on her commitment to Focus Hope. Plaintiff claimed a psychiatric and emotional problem as a result of these meetings regarding her non-attendance. She was not fired but never returned to work.

Defendants defended the claim arguing, amongst other things, plaintiff's non-attendance constituted "intentional and wilful misconduct" because she deliberately broke a mandatory employer rule. The magistrate, Workers' Compensation Appellate Commission, and Court of Appeals had ruled plaintiff's favor. They primarily reasoned that plaintiff's actions did not reach a sufficient level of "moral turpitude" so as to trigger the intentional and wilful misconduct provision.

On further appeal to the Supreme Court, the Court reversed and denied benefits. The Court said: "Plaintiff's deliberate and categorical refusal to attend this mandatory function constituted insubordination." The Supreme Court said that there is no statutory requirement that the employee "misconduct" rise to a certain level. The Court rejected "the insertion of a 'moral turpitude' requirement into the text of MCL 418.305." The Court said "conduct is 'intentional and wilful misconduct' if it is 'improper' and done 'on purpose' despite the knowledge that it is against the rules." The Court cautioned that the work rule "must be clearly established and consistently enforced in order for the employee to understand the mandatory nature of the rule and for its violation to constitute intentional and wilful misconduct."

The Court's decision was 4-3 with Justice Corrigan authoring the majority opinion and Chief Justice Taylor, Justice Markman, and Justice Young concurring. The dissent was authored by Justice Weaver who said that plaintiff's actions did not equate with the type of misconduct that had occurred in other § 305 cases. And, the dissent said Ms. Brackett had contended she was being singled out for her non-attendance.

Burden of Proof on Duration of Disability

In *Patterson v Delphi Corp* (SC Docket No. 135689, rel'd April 23, 2008), the Supreme Court addressed which party has the burden of proof with respect to the duration of disability.

Unlike *Stokes* and *Brackett*, this ruling from the Court was an order, not a full opinion. In the order, the Court said the case must be remanded to the Court of Appeals as on leave granted to "determine whether the WCAC evaluated the evidence from the perspective that, once a magistrate has determined that a claimant is suffering from a work-related disability for any period, the claimant remains entitled to worker's compensation benefits absent direct proof of recovery from that disability." The Court said that if that was the Appellate Commission's perspective, then the Appellate Commission applied an incorrect standard of proof. The Court said: "Simply because a claimant meets the burden of proof for one period does not mean that he or she necessarily meets that burden for all periods until proven otherwise. Rather, the claimant has the burden at all times of proving his or her entitlement to benefits by a preponderance of the evidence."

Partial Disability

In *Link v Thomas Electric, L.L.C.*, 480 Mich 1035; 743 NW2d 564 (2008), the Supreme Court entered an order in a partial disability case.

The magistrate had granted plaintiff an open award for bilateral carpal tunnel syndrome. The magistrate said plaintiff was partially disabled and "'has [a] residual wage earning capacity albeit at a lower rate than [at] his employment with Thomas Electric.'" 2007 ACO #32. The magistrate set a partial rate based on post-injury wages plaintiff earned on a newspaper delivery route and as a painter/light maintenance worker.

Before the Appellate Commission, plaintiff argued that the magistrate's order of a partial weekly rate "must be modified to provide that benefits can only be reduced when plaintiff is in receipt of actual earnings." *Id.* The Appellate Commission agreed with plaintiff, saying "we find that the plaintiff is entitled to wage loss benefits reduced by actual earnings only." *Id.* The Appellate Commission said the magistrate did not "contemplate a reduction of wage loss benefits unless there are actual earnings upon which to base the reduction." *Id.*

On defendants' appeal to the Supreme Court, the Supreme Court reversed the Appellate Commission's ruling "that the magistrate's order does not provide for an offset to the plaintiff's worker's compensation benefits except in the case of actual earnings." 480 Mich at 1035. The Court said the magistrate's opinion accompanying his order "clearly gives the employer credit for the plaintiff's ability to earn $8.00 an hour, 25 hours per week," and that the Commission "clearly erred in ruling that the magistrate's order did not grant such credit." *Id.* The Court then remanded the case to the Appellate Commission for reconsideration of the issue with this in mind.

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Res Judicata

In *Gee v Arthur B. Myr Industries, Inc*, 480 Mich 1154; 746 NW2d 612 (2008) (SC Docket No. 133762, entered April 9, 2008), the Supreme Court entered an order after oral argument on an application for leave to appeal. In the order, the Supreme Court reversed the Court of Appeals and held that *res judicata* barred plaintiff's second application for attendant care benefits.

In this case, the Workers' Compensation Appellate Commission had denied plaintiff's initial claim for attendant care benefits on the basis that plaintiff failed to present proof on a required element of that claim. That Appellate Commission decision became final. Plaintiff filed another application for benefits without alleging that his condition had changed for the worse since the prior litigation. The Supreme Court said in its order that *res judicata* applied because plaintiff's claim of attendant care was adjudicable and was adjudicated in the initial proceeding. The Supreme Court also noted plaintiff's most recent attendant care application was filed by plaintiff and not by the providers of the care.

Court of Appeals

Aliens

The Court of Appeals in the published opinion *Romero v Burt Moeke Hardwoods, Inc*, ____ Mich App ____; ____ NW2d ____ (2008) (CA Docket No. 271122, rel'd July 29, 2008) addressed a complicated claim pursued by a Mexican citizen who had legally worked in the United States for a period of time before the expiration of his visa and his return to Mexico. The case intertwined facts and issues relating to aliens, a sexual misconduct charge, specific loss benefits, "reasonable employment," as well as a constitutional equal protection argument.

The facts were that Mr. Romero was a Mexican citizen recruited to train as a millwright in the United States. He and his company obtained a temporary visa for him to train here. While here, plaintiff's right leg was severely crushed by a forklift at work, leaving him with injuries, including the alleged loss of the specific use of his leg. Mr. Romero's employer did return him to "odd jobs" at the workplace after his injury and Mr. Romero earned lesser weekly wages for a short period of time at those "odd jobs." And, during that period of time, Mr. Romero was accused of sexual misconduct with the daughter of the company's owner. Plaintiff then returned to Mexico and his temporary visa expired about this time. Defendants alleged that plaintiff fled to Mexico to avoid arrest on the sexual misconduct charge, while plaintiff insisted that he was unaware of the arrest warrant and returned to Mexico only because his visa had expired.

Defendants contended they were unconstitutionally deprived of equal protection of the law because they cannot continue to offer plaintiff "reasonable employment" because he can no longer legally work in the United States. The Court of Appeals disagreed with defendants' constitutional argument. The Court said the employer hired plaintiff knowing his visa was temporary and there is no evidence the employer has offered plaintiff employment within a reasonable distance of his Mexican home.

The Court of Appeals also addressed defendants' argument that the Workers' Compensation Appellate Commission improperly engaged in *de novo* review by finding that plaintiff left the United States because of an expired visa, as opposed to fleeing to Mexico to avoid arrest on the sexual misconduct charge. The Court of Appeals said, although the magistrate made no finding as to the reason for plaintiff's departure from the United States, the Appellate Commission was presented with a sufficient record where it could make its own determination on that point. The Appellate Commission had not concluded plaintiff fled the country because of a criminal charge, but instead because of an expiring visa.

The Court of Appeals also addressed defendants' argument that the specific loss award had been resolved below under recent case law that clarified the specific loss provision. The Court of Appeals rejected the argument. The Court of Appeals said that, although the magistrate used language that was "potentially misleading," the decision below did not reflect a misapplication of the law under the present governing specific loss standard and was supported by sufficient record evidence.

Defendants also argued that the "reasonable employment" provisions of MCL 418.301(5) should not have been invoked because a proper *Sington* analysis under MCL 418.301(4) had not occurred. The Court of Appeals disagreed, saying it is undisputed that plaintiff is unable to perform millwright work as a result of his work injury, that post-injury plaintiff could only peform "odd jobs" for lesser weekly wages, and plaintiff proved he was unable to perform other lesser paying jobs that he had searched for and obtained in Mexico because he "cannot stand for more than an hour, squat, or climb a ladder without severe pain. He walks with a significant limp and falls down on occasion." The Court of Appeals said the WCAC need not have considered the entire universe of jobs suitable to plaintiff's qualifications and training of first-sentence § 301(4) purposes, as opposed to those that produce the maximum income.

Another issue related to the "wage loss" requirement in the second sentence of § 301(4). Defendants argued that

plaintiff's wage loss resulted from the expiration of his visa rather than from his work injury. The Court of Appeals disagreed, saying plaintiff's wage loss is attributable to his work injury, not to the expiration of his visa, as exemplified by the fact that plaintiff "could have worked as a millwright in Mexico had the injury not occurred."

As a result of these rulings, the Court affirmed the award.

Rakestraw/Significant Manner

In the unpublished decision *Rohde v Delphi Corp* (CA Docket No. 267460, rel'd May 22, 2007), the Court of Appeals addressed plaintiff's challenge to a denial of benefits for a shoulder injury.

The magistrate had denied plaintiff's claim on the basis that he suffered from age-related arthritis and his work had not contributed to the problem "in a significant manner" toward that problem, as required by MCL 418.301(2).

On appeal, plaintiff argued that § 301(2)'s significant manner requirements were inapplicable because he had a "medically distinguishable" problem as required by *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003). The Appellate Commission disagreed with plaintiff's argument and the Court of Appeals affirmed. The Court of Appeals said that "although plaintiff's arthritis and impingement were 'medically distinguishable,' they were related to such an extent that they were both 'conditions of the aging process.' Consequently, we find no error in the WCAC's conclusion that MCL 418.301(2) applied, and that plaintiff was not entitled to benefits."

Workers' Compensation Appellate Commission

Partial Disability

In *Kashou v Coca-Cola Enterprises, Inc*, 2008 ACO #89, the magistrate granted plaintiff an open award at a partial disability rate in a case in which plaintiff had not returned to any work post-injury. In so doing, the magistrate relied on vocational testimony showing plaintiff had a post-injury ability to earn that, while not matching his average weekly wage at the time of injury, reflected a residual wage-earning capacity.

On appeal, the Appellate Commission affirmed. The Appellate Commission rejected plaintiff's argument that he was entitled to prevail at the maximum weekly rate of compensation as a matter of law because he had no actual post-injury wages. The Appellate Commission noted the magistrate found that, while plaintiff attempted to obtain employment that was recommended to him by defendant, plaintiff's job-seeking efforts were not successful because of his tendency to exaggerate his impairment to potential employers. Consequently, the Appellate Commission affirmed the open award of partial disability benefits.

Acceptance of Attrition Plan Does Not Preclude Receipt of Wage Loss Benefits

In *McCrorey v General Motors Corp*, 2008 ACO #100, the Appellate Commission affirmed an open award of benefits in a case in which plaintiff accepted an attrition plan.

Plaintiff claimed a disabling work-related injury to his back and underwent two back surgeries. He also took a "buy out" from his employer as well as a regular retirement pension. As part of accepting the money in the buyout (or attrition plan), plaintiff signed a statement that he did not suffer from a disability and was able to work at his regular job. Plaintiff was receiving disability benefits at the time the buyout agreement was signed and had a pending workers' compensation application at that point as well.

The magistrate found that plaintiff's representation in signing the attrition agreement created a "cloud on Plaintiff's credibility[; but] it does not disqualify him from receiving wage loss benefits."

On appeal, the Appellate Commission affirmed. The Appellate Commission noted, first, plaintiff said he did not recall reading that portion of the attrition plan addressing his ability to continue performing his regular job. And the Appellate Commission rejected defendant's "wage loss" argument under the second sentence of MCL 418.301(4). Defendant argued that plaintiff's signing of the agreement meant that his absence of wages was unrelated to his disabling back problem. In rejecting that argument, the Appellate Commission distinguished this case from the hypothetical retiree described in *Sington* by saying this particular plaintiff did not exit the labor market on a *permanent* basis. The Appellate Commission said "there is nothing to stop the plaintiff from reentering the work force if he recovers from his disability." 🛠

Workers' Compensation Law Section Mission

The Workers' Compensation Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, our website, public service programs, and publication of a newsletter. Membership in the section is open to all members of the State Bar of Michigan. Statements made on behalf of the section do not necessarily reflect the views of the State Bar of Michigan.

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