

STATE BAR OF MICHIGAN

Workers' Compensation Section Newsletter

Summer 2009



From the Chair

By Murray Feldman

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As I write this, my last Chairperson's Message, I want to update you on recent and upcoming events and to publicly thank those who have contributed to our many successes this past year.

Thanks to John Charters, Denice LeVasseur, Rick Warsh, and Rich Zapala for their work on our Law School for Legislators presentation.

Thanks to Deb Strain for her work on our upcoming Las Vegas seminar. I'm pleased to report we will have a great turnout, and we expect lots of fun and a great presentation. Also, I want to take this opportunity to thank Fred Bleakley, Jr. for his work on our past winter seminar, which he planned.

Thanks to Denice LeVasseur for her work in planning our upcoming Past Presidents Golf Tournament and Dinner, a truly memorable event each year.

Elsewhere in this newsletter, you'll see details of our summer seminar at Crystal Mountain, June 18-20, 2009. I'd like to thank Ms. Sue DeLong for her hard work and effort in planning this event and all of her hard work this past year. Susie, our entire section is in your debt.

Reflecting back on this last year, we have much to be proud of. Faced with *Stokes* and its lack of procedural guidelines, your section council came together as one to create order out of chaos and create Agency Forms 105A and 105B. Thanks to your section officers and council, along with Agency Director Nolish, Chief Magistrate Gorchow, Dave Campbell, Rich Zapala, Jerry Marcinkoski, John Charters, Rick Warsh, and all of you who shared your thoughts and concerns regarding both forms. It's not an easy thing to consider the interests of so many, but all involved put aside petty differences with the singular goal of creating the fewest barriers to each of us doing the best for our clients. As I promised those of you who attended last summer's meeting, we would find a way to make it work, and we did. This is due primarily to the unselfish, non-partisan approach of all those involved. Whatever happens with *Stokes* and *Lofton*, you can be proud of the fact that when we had to act, we did.

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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

Thanks to Tom Ruth for his continuing excellent job as newsletter editor. Thanks to Jerry Marcinkoski for his continued case updates in the newsletter.

Thanks to Jack, Murray, and Martha for all of their assistance and cooperation on issues which have arisen this year. Particularly, thanks to all of them for involving the section in the many issues which have arisen, and for considering our suggestions and concerns in the decision making process. In that regard, thanks to all Agency and Bureau administrative personnel, who have been so cooperative in the many issues that have arisen this year. Particular thanks to Anne Williams and Sue Bickel for their patience with all of us as we drafted, re-drafted, and re-drafted again Forms 105A and 105B and a multitude of other issues which we have addressed.

Thanks for our Hall of Fame Committee, particularly Don Ducey, Nort Cohen, Steve Pollok, Len Hickey, Jim Geroux, and all others involved. We will be inducting four new members into the Hall of Fame at our upcoming seminar.

Finally, thanks to all of you for your constructive suggestions this year. As we have struggled with the many issues your section officers and council have faced, we are most appreciative of your interest and participation in section activities, and your thoughts and concerns with regard to section issues.

I therefore couldn't be more pleased to report that your section is financially sound, that you are actively involved, and that our section has begun and continued many significant and worthwhile projects this year. It's certainly been my honor to serve as your chairperson during this most interesting and challenging year. ✂

Editor's Note

By the time this is read, some of you will most likely have returned from Las Vegas. Even though "what happens in Vegas, stays in Vegas," I am sure we will all take an interest in the events of that trip as told at the spring meeting. The registration forms are in this issue; please take the time to get them in early, as we expect many more participants this year. Anyone who is interested in the golf tournament will have to contact Dave DeGraw.

Our section is contemplating a change in the section's bylaws that would have the section pay for the dues of the magistrates, mediators, and commissioners. It will be voted on by the section at the spring meeting. If any questions, please speak with a council member or keep an eye on the *Michigan Bar Journal* for the exact change in language contemplated.

Our section continues to be financially strong, and most of the events of the spring meeting will either be wholly compensated by the section or significantly subsidized. This, as you can see, is reflected in the price of these items on the registration. For example, there is no registration fee for the meeting itself.

I believe everyone is waiting for a decision from our courts re *Stokes* and/or *Lof-ton*. Time has been allocated in the spring meeting agenda to discuss any developments that occur between now and then.

The section is also working with the State and ICLE to ensure that we continue to get copies of the Act on a regular basis. Because of the State's financial condition, this may require each member to pay a small fee for each copy. Details at the spring meeting. ✂

Workers' Compensation Appellate Commission

By Martha M. Gasparovich, Chairperson

Over the past nine months, the courts and the Commission have been remanding cases for new hearings regarding the determination of disability. We are just beginning to see those cases come back to the Commission, and hopefully, we will be able to provide all of the parties with swift review and decisions. A concern has arisen regarding notification of those decisions.

In September of 2007, we filed amendments to our administrative appellate rules. Included in those amendments is Rule 2(3), which requires that one recipient, for all correspondence, be named for each party.

We did receive a request from this council to reconsider our rule, and that request was discussed at our January 20, 2009 public meeting. No one from the public appeared at that meeting. We are committed to make the practice before this Commission as accommodating as possible.

Changing an administrative rule is very time consuming and costs thousands of dollars for process and public notification. In addition, one of the reasons cited for the 2007 rule

amendment was the cost to the State of copying and mailing charges. We are not in a position at this time with our State's fragile budget to reinstate those costs.

The rule will not be changed; however, any party can request as many additional copies of all correspondence as he wishes. There will be a charge for the additional copies. The charge will be in line with the FIOA charges, which are currently 25 cents per page plus postage. Any request for additional copies should be made at the same time as the correspondence recipient is named, if the parties wish to receive the additional copies at the same time as the recipients. Additions will be placed on a mailing list and receive copies of all correspondence just as the designated recipient does. Any request for copies will be honored under FOIA, but may not be as expeditious as getting on the list at the start of the appeal process.

As always, we are looking forward to seeing all of you at Crystal Mountain in June. ✖

Board of Magistrates Update

By Murray A. Gorchow, Chairperson, Board of Magistrates

Magistrate Appointments and Re-appointments

Governor Granholm has re-appointed Magistrates Michael T. Harris, Timothy M. McAree, Thomas G. Moher, Melody A. Paige, Paul M. Purcell, G. Jay Quist, and Joy A. Turner to the Board of Magistrates, for four-year terms ending on January 26, 2013.

New magistrates have also been appointed by the Governor. David M. Kurtz, Jr. (formerly with LeClair Ryan) and Michael J. Mason (formerly with MacArthur, MacArthur & Associates) have been appointed to fill vacancies on the Board of Magistrates. They have been appointed for four-year terms ending on January 26, 2013. Magistrate Mason has been assigned to the Detroit hearing office and Magistrate Kurtz to the Mt. Clemens hearing office, until that office is closed later this year. He will then be transferred to the Detroit office. The appointment of these two experienced workers' compensation attorneys as magistrates will be of great help in reducing docket size in these offices, so that improved service can be provided to all interested parties.

Bifurcated Medicare Redemptions

For the last few years, I have been urging bifurcation of redemptions as a vehicle to enable the parties to move forward with at least a partial redemption of liability in cases where Medicare's interests must be considered, taken into account, and, if necessary, protected. (See *WC Section Newsletter*, summer 2006, p.6). Many cases were resolved by first redeeming all liability leaving medical open, until such time as the Centers for Medicare and Medicaid Services (CMS) finally provided the necessary letters regarding any prior conditional payments and any set-aside requirement for the future. As a result, in all cases, plaintiff was able to get at least the bulk of the agreed upon settlement earlier rather than a lot later. In many cases, employers were able to stop paying weekly indemnity benefits, without having to continue those payments long after a settlement was agreed upon pending long delays in receiving conditional payment and set-aside letters from CMS.

Many of you have probably heard recently that we may have a problem with our CMS bifurcated two-step redemp-

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Board of Magistrates Update

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tion program. An article in the December 18, 2008, *Carr Allison Medicare Set-Aside Newsletter* (www.carrallison.com) has raised an alarm. My reading of that article; my conversation with its author; a recent presentation I heard from a local Medicare/CMS specialist; and a recent U.S. District Court decision (*U.S. v Paul Harris*, 2008, LEXIS 92415, ND WV 11/13/08); have caused me to subject such redemptions to an extremely heightened level of scrutiny, causing me to significantly limit my willingness to approve the first step of a Medicare/CMS bifurcated redemption. The new information about CMS actions has created uncertainty in my ability to determine whether the first step of a bifurcated redemption is in plaintiff's best interest.

Let me explain the problem. Previously we had understood that CMS did not consider its rights to be affected if medical was not being closed out by redemption. However, now it appears that CMS is raising concerns as to the point in time that it will seek reimbursement of conditional payments. Recently, the Carr Allison firm has seen an increasing effort by CMS around the country to recover conditional payments out of the initial proceeds of a case in which only indemnity has been settled. They emphasize that Medicare has a right to seek reimbursement of conditional payments at any time, even in the absence of some type of resolution through settlement, judgment, award, or otherwise. Medicare's right to reimbursement also exists at the time of full or partial settlement. This raises the specter of CMS demanding reimbursement for conditional payments even if the parties have not resolved that portion of the case.

It appears that Medicare has no problem with our leaving medical open as it affects set-asides for future medical care. Medicare appears to be concerned that the settlement of indemnity benefits may simply be an attempt to partially resolve a case, leaving medical open, in an attempt to avoid ever reimbursing conditional payments.

My concern, as a magistrate, is the statutory requirement that I must decide whether or not redemption is in the plaintiff's best interest before I can approve of it. Given CMS's recent new efforts, which could compromise plaintiff's future Medicare coverage up to the full amount of the total redemption, I think you will understand my concern.

Add to that the fate of West Virginia attorney Paul Harris, who settled his client's injury case for \$25,000. Harris distributed the settlement to his client less attorney fees and expenses to himself, without reimbursing Medicare from the proceeds of the settlement. He was found to be a liable party in a suit by CMS to recover over \$10,000 in conditional payments plus federal court attorney fees and costs. (See 42 USC

1395y(b)(2); 42 CFR 411.24(g)). Harris' motion to dismiss as against himself was denied.

I am aware of the obvious disconnect here between CMS saying they want to be reimbursed conditional payments with the first step of a bifurcated redemption, and the fact that the amount of such payments is an unknown. Indeed, that is the reason for the bifurcated redemption process in the first place. The parties want to settle for an agreed-upon amount. They may even have agreed who will be responsible for reimbursing the conditional payments when the amount is known. So, how can they give CMS what it wants without CMS telling the parties on a timely basis what it wants? For this magistrate, the question becomes: How can I say that this first step redemption is in plaintiff's best interest, if I do not know how much CMS may want from this initial settlement? And where does that leave plaintiff, who has received the proceeds of an indemnity redemption, and thought that there would later be a second redemption taking care of Medicare's interests? What if there is a long delay before medical can be redeemed, or the parties later decide not to redeem medical? Medicare may come after plaintiff and, possibly, counsel. Plaintiff may have to use up to the full indemnity redemption dollars to reimburse the conditional payments before Medicare will pay for any further medical care for the work injury. Maybe everything gets fixed up down the road when CMS finally sends its conditional payment and set-aside letters, but maybe not without litigation and a serious affect on plaintiff's access to medical care in the meantime.

My approval of a CMS bifurcated redemption will be on a case-by-case basis, deciding whether or not redemption is in plaintiff's best interest. I can certainly see the possibility of a case wherein plaintiff is in an extreme hardship situation. For example, what if plaintiff desperately needs the indemnity redemption money or his house will be lost to foreclosure, with the family on the street in short order? I would have to look at all of the usual required factors, and then balance the severity and imminent degree of hardship, as against the new concerns that I have regarding CMS. In some cases, I may conclude that the hardship outweighs the CMS concern, especially if the likelihood of any significant outstanding conditional payments appears small relative to the size of the indemnity redemption.

Some of you may have heard that Medicare has a website that enables attorneys, with authorization from plaintiff, to obtain Medicare eligibility and payment information. This is true as far as it goes. The website is <http://mymedicare.gov/>. This site will provide past payment information by provider, as well as detail as to the procedure codes and service pro-

vided for each provider. It almost sounds too good to be true—and it is! It only provides data 15 months back from the date you go online. This might be helpful if the injury date is within the last 15 months from the date you want to redeem. Another problem is that it may not include procedures for which Medicare pays 100 percent as with laboratory studies! It also appears that it may not include Medicare Part D prescription payments. If that's not bad enough, we have learned that Medicare permits providers to submit their initial bill to Medicare for a period ranging from 15 to 27 months after the date of service. This billing time gap will probably go a long way toward explaining why CMS refuses to provide a "final" conditional payment amount, and why we are seeing additional conditional payment amounts pop up months after redemption.

I do see, however, a possible help to us from the "my Medicare" website. Perhaps very early and periodic requests for payment information from that website can help the parties effectively expand the 15-month window with trips to that website over the course of the handling of the case. Perhaps even with the shortcomings of what is available on the website, the attorneys may be able to get a better handle on the conditional payments they may have to deal with once they do decide to redeem. In the meantime, I will continue to attempt to get further clarification of the site's apparent shortcomings. I would ask plaintiffs' counsel to explore the website, with your clients' authorization, and try to determine if payments for laboratory tests are showing up on the site for clients who definitely have had laboratory work. Please do the same regarding prescription drug costs for those plaintiffs that have Medicare Part D. I would like to get some feedback from the Bar so I can determine the value of this website for dealing with our Medicare redemption issues. I look forward to hearing from you, and seeing your documentation for what you have learned. ✕

The New Redemption Order Form WC-113

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

I am sure you all noticed that I missed the last edition of the newsletter, but the editor did a fine job putting the edition together without me.

By now many of you have heard that we have revised the **Redemption Order**.

The Revised **WC 113** has been created with input from the section council and others. It has been reviewed by agency staff, magistrates, and the Attorney General's Office. We have asked the council to have their staff look at it. We have received suggestions from many and have incorporated most. The only guarantee I will make, however, is that once the new Order is out in the field, someone will spot something that everybody missed. (You can see a full-sized Order on page 15.)

You will notice that the order has a different look. It is now set up in "columns and rows" to force a more legible approach to the distributions being ordered. They are also grouped to correspond to data compilations done in the computer system. As before, the full Social Security Number must be indicated.

The 113 will be available by the time you read this. Although the form indicates "Prior editions obsolete," we assume we will need some transition time. Therefore, Chief Magistrate Gorchow will advise the magistrates to accept the old forms through July 2, 2009, which is the Thursday preceding the 4th of July holiday. **Starting Monday, July 6, 2009, you will be required to submit redemptions on the new 113.** Please remove the old forms from your office and instruct your office staff accordingly. Please have the forms typed whenever possible.

The form will be available at the hearings offices or by request from Lansing. It will also be available on the agency's website (www.michigan.gov/wca) in a pdf format that can be filled in. As with our other pdf forms, unless you have the full Adobe Acrobat program, the forms cannot be saved once completed. If you are going to use our download version, please consider using "ncr" paper when you print the completed forms. This type of paper is not from the old cash register company, but rather is "no carbon required" paper, just like the paper we use when printing the form. Multi-color is nice but not required. If you wish to use the "ncr" paper, put a stack of the paper in your printer and tell

Continued on next page

The New . . .

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it to print five copies of the redemption order. Remember, however, that the paper has front and back sides and must be printed on the front side. If not, we end up with one original with four copies that have the names, numbers, and magistrate signature on the back.

The new 113 calls for providing the Federal Employer Identification Numbers (FEIN) for plaintiff's counsel *and* for the medical providers. Although we have required counsel's "38" or FEIN number for some time, more and more delays are occurring in payments to medical providers due to the absence of their FEIN. It is my understanding that numerous carrier and provider accounting systems will simply not produce a check for payment to a provider without the FEIN. Yes, this is an example of requiring more work, but this requirement is faster and easier than a post-redemption Rule V hearing over timeliness of provider payments.

Since **bifurcated redemptions are still possible** if they meet the statutory criteria for being in the best interest of the injured worker (418.836(1)(a)), we have standardized the reservation phrase: "Medical left open ___ (only if initialed by Magistrate)." In the case of an indemnity/medical bifurcation, the magistrate should initial the line to insure that there is no question about the medical being left open for either another redemption, or as we have seen in a couple of situations, where the defendant decides to simply leave the medical open forever rather than pay for a WC-MSA with cash up-front.

Payments being made for conditional payment reimbursement and for WCMSA should be listed in the "medical payments" section. Such payments should be clearly identified.

You will also notice two faintly printed rectangles in the lower right portion of the form labeled "Do not write in this area." The upper of the two will be used when an appeal period waiver is requested. The box conveniently fits the stamp that we use for waivers. The lower box is for agency use at the main office for filing information, etc. Please do not write in these areas.

With only a little foreshadowing of articles to come, the "other payments" can also be used to handle such things as child support liens, or additional medical payments that did not fit in the medical payment section of the Order.

I hope this has provided some insight into the use of the new form. As always, if you have questions, please feel free to contact either me or Chief Magistrate Gorchow. As with any change, there will be some resistance and grumbling. Murray and I wish to thank all of you in advance for your cooperation in the transition to and implementation of the new redemption order form. ✂

Summer Seminar Set

We are looking forward to your attendance, involvement, and active participation in this year's summer seminar scheduled for June 18-20, 2009, at Crystal Mountain Resort in Thompsonville, Michigan.

Recognizing our current economic climate, your section has chosen to subsidize the seminar by eliminating the seminar fee charged in previous years. We do this to reduce your costs and encourage your attendance. Additionally, on the seminar reservation form, you have the opportunity to select the events you want to attend and pay for only those events.

The weekend festivities will begin with our Thursday night cocktail party, followed by our traditional dinner during which we will honor four inductees into the Workers' Compensation Hall of Fame. Thursday night, we will have our usual "hospitality suite" as well. After breakfast Friday morning, our seminar will take place between 9:00 a.m. and noon, followed by our annual golf tournament, chaired by Dave DeGraw. An additional cocktail party and dinner will take place Friday evening.

The Friday seminar will include presentations by Agency Director Nolish, Chief Magistrate Gorchow, Appellate Commission Chair Martha Gasparovich, and Mr. Chris Gullen of the Tenon Group on Medicare issues. We will also be electing new officers for the coming year at the Friday meeting.

Included, on page 8, is the section meeting reservation form. **Please note the seminar reservation form and the resort reservation form are separate forms that are sent to separate addresses. Please be sure to complete and submit BOTH reservation forms to the appropriate addresses.**

Our section is strengthened by your involvement, and we hope our attempts to reduce your costs will encourage you to attend the summer seminar. We look forward to seeing you in June. Questions can be directed to any section officer or council member. ✂

Workers' Compensation Hall of Fame

At this year's meeting, the following individuals will be inducted into the Hall of Fame:

- Richard (Dick) Anderson, long time practitioner and former magistrate;
- Nancy Day, former magistrate and Appellate Commission member;
- Paul Tomasi, long time Upper Peninsula defense attorney;
- Art Woll, deceased, former plaintiff's attorney.

We look forward to honoring them during our Thursday night dinner.

Congratulations to them all.

Workers' Compensation Law Section
 Annual Summer Meeting June 18-20, 2009
 Crystal Mountain, Thompsonville, MI

TENTATIVE SCHEDULE OF EVENTS

Thursday, June 18, 2009

4:00 p.m.- 6:00 p.m.	Registration	
4:00 p.m.	Workers' Compensation Section	council meeting
6:00 p.m.	Cocktail reception and hors d'oeuvres;	dinner
TBA	Hospitality Suite	

Friday, June 19, 2009

8:00 a.m.	Breakfast	
9:00 a.m.	Annual Meeting	
12:30 p.m.	Golf tournament—scramble format— (269)781-9851	contact David DeGraw at
6:00 p.m.	Cocktail reception and hors d'oeuvres	
7:30 p.m.	Dinner	

Saturday, June 20, 2009

No planned section activities

CRYSTAL MOUNTAIN ACCOMMODATIONS

All units are non-smoking and feature air conditioning, satellite television, microwave, coffee maker, toaster, video player, hair dryer, iron and ironing board. Efficiency kitchens include small refrigerator, microwave, plates, bowls, and utensils. Full kitchens include full size refrigerator, oven, dishwasher, stove, and standard cooking and serving utensils.

GUEST ROOM

PINEHURST units feature one queen bed * private bath, some units have double whirlpools * efficiency kitchen

RESORT HOTEL ROOM

COLONY units feature two queen beds * bathtub with whirlpool jets * efficiency kitchen * some units feature full kitchens and fireplaces
HAMLET units feature one queen bed plus either a second queen bed, queen Sico bed, or queen sofa sleeper * whirlpool for two * efficiency kitchen * two barrier-free units are available

1 BEDROOM SUITE

INN UNITS feature private bedroom with queen bed * double whirlpool tub * efficiency kitchen * electronic work station with integral voice & data ports * living area with queen size Sico bed * high quality task area with natural lighting and comfortable seating

1 BEDROOM CONDOMINIUM

PINEHURST condos feature living room with fireplace and sofa sleeper * one bedroom with king bed * one bath including tub with whirlpool jets * full kitchen * dining area * private outdoor deck overlooking golf course
WINTERGREEN condos feature living room with fireplace and Sico bed * one bedroom with queen bed * one bath including tub with whirlpool jets * full kitchen * dining area * private outdoor deck overlooking golf course

2 BEDROOM CONDINIUM

WINTERGREEN condos feature living room with fireplace * master bedroom with one queen bed and giant whirlpool for two with skylight * guest bedroom with queen bed * full kitchen * dining area * private outdoor deck overlooking golf course * two full baths
KINLOCHEN condos feature living room with fireplace, some with sofa sleeper * master bedroom with one king or two queen beds * guest bedroom with varied bedding * two baths including one tub with whirlpool jets * full kitchen * dining area

2-3 BEDROOM COTTAGES

COTTAGES AT WATER'S EDGE feature living room with fireplace or wood stove and queen sofa sleeper * master bedroom with one king bed * two baths, one with a single whirlpool tub * full kitchen * dining area * screened-in porch

3-5 BEDROOM RESORT HOMES

RESORT HOMES vary in architectural style and feature living room with fireplace * three to five bedrooms * two to three baths, some may include a whirlpool * full kitchen * dining room * some homes feature patio decks and fairway locations



WORKERS' COMPENSATION LAW SECTION

Annual Summer Meeting Registration

Registration deadline June 1, 2009

New! Register online at <http://e.michbar.org>

Please join your colleagues for this year's Summer Section meeting and seminar, June 18-20, 2009 at Crystal Mountain Resort in Thompsonville, Michigan. Room reservation forms were mailed previously; if you have not yet reserved your room, please contact Crystal Mountain at (800)968-7686 [new phone number]. You can visit www.crystalmountain.com to learn more about the accommodations.

If you plan to play golf, you must contact Dave DeGraw at (616) 774-8000 or (616) 458-3646 by June 1, 2009 to register.

ATTEND EVERYTHING . . .

Section members and adult guests attending both the cocktail party and dinner on **both** Thursday and Friday will be charged \$60 per person.....number of adults _____ x \$60 = _____

Children (under 14) attending the dinner on **both** Thursday and Friday will be charged \$10 per personnumber of children _____ x \$10 = _____

TOTAL: \$ _____

. . . OR SELECT YOUR EVENTS

Thursday, June 18, 2009

6:00 p.m. Cocktail party—hors d'oeuvres and two complimentary beverages..... number of adults _____ x \$10 = _____

7:00 p.m. Dinner number of adults _____ x \$20 = _____
 number of children _____ x \$5 = _____

Attend BOTH cocktail party and dinner..... number of adults _____ x \$30 = _____

Friday, June 19, 2009

8:00 a.m. Complimentary breakfast..... number of adults and children _____

6:00 p.m. Cocktail party—hors d'oeuvres and two complimentary beverages..... number of adults _____ x \$10 = _____

7:00 p.m. Dinner number of adults _____ x \$20 = _____
 number of children _____ x \$5 = _____

Attend BOTH cocktail party and dinner..... number of adults _____ x \$30 = _____

For more information, contact Sue Delong at SDelong@strobplpc.com or (248) 540-2300.

TOTAL: \$ _____

P # _____

Name: _____

Adult guest: _____

Children: _____

Firm/Organization: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: (____) _____

Enclosed is check # _____ for \$ _____ payable to STATE BAR OF MICHIGAN

Please bill my: Visa MasterCard

Card #: _____

Expiration Date: _____

Please print name as it appears on credit card:

Mail your check and completed registration form to:
 State Bar of Michigan
 Attn: Seminar Registration
 Michael Franck Building
 306 Townsend Street
 Lansing, MI 48933

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

Payment **MUST** be received on or before date of event.

wcreg050609

Objections in Depositions

By Donna J. Grit

It has long been the practice in workers' compensation that depositions are admitted, without any specific ruling at trial to the objections contained in the depositions. There is a better alternative that would reduce remands, reversals, and possible malpractice claims.

Commonly, the parties do not object to admitting the depositions, but they do maintain the objections already contained in the transcripts. The parties rarely raise the deposition objections with the magistrate at trial. However, because the objections were made, they stand as potentially valid objections until ruled on.

While the magistrates usually do a very good job of considering whether the objection to the hypothetical question is valid, most do not rule on the remaining objections. (In full disclosure, that was also my habit while a magistrate. Objections other than the hypothetical were left unanswered unless specifically raised by the parties at trial. That was my mistake, but because it wasn't raised on appeal—it just happened to be a mistake I got away with for years.)

Here is why this is important to you as a trial attorney. Suppose the opposing party has filled your deposition with objections, and you fail to ask the magistrate to rule on those objections. How will you know if you need to cure the objections? You won't know. And if you don't know, you just might commit malpractice.

For instance, suppose the opposing party objects to hearsay regarding medical information relied on by your doctor. You need to know if the hearsay objection is sustained, overruled, or waived before putting on proofs. Otherwise, you may miss your one and only chance to cure the hearsay objection.

A better practice would be to meet with opposing counsel before the start of trial and determine which objections he or she plans on maintaining. The parties should then ask the magistrate to address the remaining objections at trial. Some objections might be waived. It seems likely that objections to the hypothetical will not be waived. But in either case, if you seek a ruling on those objections that can be addressed at trial, you will know what objections you have to overcome before you close your proofs.

Keep in mind magistrates generally do not have enough information to rule on objections to the hypothetical questions or objections that are "subject to proofs," until after the

proofs are submitted and the medical testimony reviewed. In most cases, this means you cannot expect a ruling on these types of objections until you receive the decision.

If a magistrate takes time at trial to address the objections contained in the depositions (except for those objections that cannot be ruled on until proofs are closed), he will benefit by reducing remands and reversals. There is no question that it will take time at trial to sort through the objections. However, the magistrates have a better chance of being affirmed if they address all the deposition objections before issuing a decision. Requiring the attorneys to waive, maintain, or address the deposition objections at trial increases the chance of writing a "bullet-proof" decision.

In a 2003 case, a defendant raised this exact issue with the commission. In *Bourdo v Owens-Illinois* 2003 ACO #143, Magistrate Quist did not rule on the defendant's objection to the deposition of one of the plaintiff's expert witnesses. The WCAC remanded the case for a ruling on the objection. The WCAC said:

We are not surprised, in the context of routine practice, and in the absence of a specific renewal of the objection at trial, that the magistrate did not make a specific ruling on the objection. While we believe that the objection was preserved, we urge litigants to adopt a more active approach if specific adjudication of an objection raised in a deposition is sought. We offer, by way of suggestion, only, that a magistrate might inquire whether there are objections in the depositions, and whether the objecting party requires a specific ruling, or whether the objection is waived. [*Id.* p 3.]

The remand in *Bourdo* led the magistrate to change his procedure regarding deposition objections. Now the magistrate advises the parties that they must specifically address the objections at trial, or the objections are waived. The magistrate allows the attorneys an opportunity at trial to review the depositions before addressing the objections. Commonly, the attorneys maintain the objections to hypothetical questions. However, the magistrate advises most of the other objections are resolved without having to go through the depositions line by line. He indicated although this procedure "may create more work at the trial level, I think it is better than facing a remand." ✖

Appeal Process for Conditional Payment Disputes

By Chuck Palmer

The Conditional Payment Process at the MSPRC

In every workers' compensation redemption where the plaintiff is a Medicare beneficiary, the Medicare Secondary Payer Recovery Contractor (MSPRC) must be contacted before the redemption hearing to determine whether Medicare had paid for any work-related medical bills. (MSPRC, P.O. Box 33828, Detroit, MI 48232-3828, (866) 677-7720) The authority for Medicare's right to recover these payments is found in the Medicare Secondary Payer Act, 42 USC 1395y(b). When Medicare makes a payment for a medical bill that may be the responsibility of another entity, then Medicare makes the "conditional payment", but retains the right to recover these amounts. However, be sure to include in your letter to MSPRC the total amount of the settlement and the figures for costs and attorneys fees, as MSPRC will reduce the conditional payment by the proportionate amount of Medicare's share of the plaintiff's costs and fees. For example, assume a \$10,000 settlement is reached in a case where Medicare made \$500 in conditional payments, with costs of \$1,000, and an attorney fee of \$1,350. The reduction of the conditional payments is calculated below:

1. Amount of settlement: \$10,000
2. Total Medicare payments: 500
3. Attorney fees & costs..... 2,350
4. Ratio of costs & fees to settlement..... .235
5. Medicare's share of total costs 117.50
(#4 X #2)
6. Net Medicare recovery..... 382.50
(#2 minus #5)

Appeal of Conditional Payment Decision

After a substantial delay, the MSPRC will advise the claimant of the conditional payment required to be paid out of the settlement. Maybe it's just a coincidence, but since this writer filed a federal lawsuit alleging a due process right

to an appeal from an MSPRC decision, MSPRC is now advising claimants of an appeal process in the conditional payment letters. Previously, MSPRC did not advise claimants of any appeal rights. MSPRC has only recently starting advising claimants of an appeal process, and it is unknown to this writer how long the various stages of appeals will take. Although this writer would assume the same appeal process would be used in Medicare set-aside disputes, I have not yet seen it.

MSPRC conditional payment letters advise the plaintiff has 180 days to request reconsideration from Maximus Federal Services Part A West, 10440 First Avenue, Suite 310, King of Prussia, PA 19406. Apparently Maximus is a separate Medicare contractor, and is not part of the SSA or MSPRC. Claimants dissatisfied with Maximus' decision can appeal to the Office of Medicare Hearings and Appeals within 60 days of Maximus' decision. Michigan appeals are handled in the Medicare Midwest field office located in Cleveland, Ohio. Requests for hearing require a minimum dispute of \$110 in order to be heard. If the claimant disagrees with the administrative law judge hearing decision, then a request for review can be filed with the Medicare Appeals Council within 60 days. The Medicare Appeals Council decides the appeals on the basis of briefs and/or argument submitted by the claimant. If the claimant is dissatisfied with the Medicare Appeals Council decision, then the claimant may file an action for review in the federal district court.

How far back can Medicare go?

In late December I filed suit for my client in the federal district court for the Northern District of Ohio (my client is a resident of Toledo). She had redeemed her case, paid the amount of conditional payments requested by the MSPRC, then after the redemption, MSPRC requested additional conditional payments, some of them from 1991 and 1992. My

Historical Note

In some early European cultures, it was a common practice to compensate a family of a worker who was killed or crippled in the construction of some large, state-funded building or project. Generally, the payment of money as compensation for personal injury was a way of keeping the peace that took the place of reprisal or sabotage in some cases, and also ensured incentive of craftsman and laborers. The advent of the "guild" furthered the protection of injured members of the guild and their families. Modern historians, of course, believe that CMS is still deciding the set-aside amounts on some of those early injuries.

repeated requests and demand for an appeal were ignored, and finally the U.S. Dept. of Treasury began withholding 15 percent of her old-age Social Security benefits each month. I filed suit, alleging a violation of various Social Security and treasury regulations and a violation of my client's constitutional right to due process. Attorneys with a PACER account (<http://pacer.psc.uscourts.gov/>) can view the pleadings online. The case is *Venier v HHS*, 3:08-cv-03021-DAK, pending before Judge Katz in the Northern District of Ohio.

While waiting the 60 days for an answer from the Department of Health and Human Services, the federal agency which includes Social Security and Medicare, the MSPRC issued a revised and lower conditional payment amount. Since the MSPRC is still requesting conditional payments dating back to 1991 and 1992, I am preparing to file an amended complaint requesting a declaratory judgment that Medicare is limited to the three-year statute of limitation found at 42 USC 1395y(b)(2)(B)(vi). The government is arguing for the

six-year limitation at 28 USC 2415(a), which states, in part:

Subject to the provisions of section 4216 of this title, **and except as otherwise provided by Congress**, every action for money damages brought by the United States or an officer or agency thereof **which is founded upon any contract express or implied in law or fact**, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

I believe that Congress has provided for a limitation period in the Medicare Secondary Payer Act that should trump this section. Also, it is clear that conditional payment recovery is not based on any express or implied contract. I hope to litigate this issue in my case, and will keep you posted. ✖

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

There have not been any full decisions from the Supreme Court since our last newsletter, as of this writing. There has, however, been a substantive order from the Court on rehearing in *Sazima v Shepherd Bar & Restaurant*, ___ Mich ___, ___ NW2d ___ (2009) (SC Docket No. 136940, entered April 3, 2009).

The employer in this case did not have an employee parking lot. Instead, it directed its employees to park in public spaces near the place of business (a restaurant), but not in the parking spots in front of the restaurant because they were reserved for customers. Plaintiff parked in a space down the street from the employer's location. She fell and was injured while walking from that parking space to work. The magistrate awarded benefits, and the Workers' Compensation Appellate Commission affirmed. After the Court of Appeals denied leave, the Supreme Court heard oral argument, and on December 17, 2008 issued an order reversing the Appellate Commission in a 4-3 ruling.

Plaintiff moved the Supreme Court for reconsideration. In an order entered April 3, 2009, the Supreme Court granted the motion for reconsideration and vacated its December 17, 2008 order. The effect was to let stand the award.

The Court's most recent order was itself a 4-3 ruling. In dissent, Justice Markman, with Justice Corrigan and Justice Young joining, said that established law does not support the majority's decision to reverse its prior order, and the only basis for the reversal was a change in the makeup of the Court.

In *Petersen v Magna Corp* (SC Docket Nos. 136542 and 136543), the Supreme Court heard oral argument on January 22, 2009. The Court has yet to rule in the case, as of this writing. The issue is whether the defendant can be charged with plaintiff's counsel's fees in relationship to unpaid medical expenses.

Finally, the case *Lofton v AutoZone, Inc* (SC Docket No. 136029) has returned to the Supreme Court after the magistrate's decision on remand and remains pending there. This case had been remanded by the Supreme Court, with the Court retaining jurisdiction, for the magistrate to apply *Stokes*, and—if the magistrate found plaintiff disabled under *Stokes*—determine whether plaintiff's disability was total or partial.

Court of Appeals

There has only been one Court of Appeals decision released since our last newsletter, and it is an unpublished,

Continued on next page

Recent Cases

Continued from page 11

non-precedential decision. The case is *Sanger v Action Custom Roofing, Inc* (CA Docket No. 284593, rel'd March 26, 2009). The issue in *Sanger* involved application of Section 356(1). This provision provides for an increase in a workers' compensation recipient's weekly rate "after 2 years of continuous disability." To obtain the increase, the recipient must petition for a hearing and present evidence "that by virtue of the employee's age, education, training, experience, or other documented evidence" the recipient would have been expected to experience an increase in his earnings.

Mr. Sanger had suffered a work injury when he fell from a roof and became a paraplegic. The parties stipulated that he was totally and permanently disabled. The only issue was whether he was entitled to the Section 356(1) increase. The magistrate denied plaintiff's request. The Workers' Compensation Appellate Commission affirmed.

The Court of Appeals likewise affirmed. The Court noted that prior case law held that "a claimant is not entitled to an increase in wage loss benefits under § 356(1) that simply reflects the effects of inflation, wage minimums, or increased 'seniority.'" The Court said it was undisputed that plaintiff had difficulty reading, had not completed high school, and had not obtained a GED. The Court also noted that, while plaintiff took vocational classes in high school, those classes did not appear particularly relevant to roofing. For these reasons, the Court concluded the Appellate Commission could rationally reject plaintiff's contention that he would have become a "skilled roofer" as speculative.

Workers' Compensation Appellate Commission

Friend of the Court Liens

In *Barnes v Expert Tire*, 2009 ACO #79, plaintiff and defendant had previously redeemed the case. Afterwards, plaintiff requested penalties saying that defendants had been instructed at the redemption hearing to send a check made payable to the Friend of the Court and plaintiff to plaintiff's counsel's office and failed to do so. Defendants had sent the check directly to the Friend of the Court. Plaintiff argued that, as a result, he lost his ability to negotiate a reduced lien with the Friend of the Court. The transcript of the redemption proceeding revealed that plaintiff's counsel did make a request that the check be sent to her office rather than to the Friend of the Court directly, and defendant's counsel appeared to agree. However, the precise instructions on the magistrate's order did not provide for that type of transmittal, stating instead that the amount should be transmitted directly to the Friend of the Court.

The magistrate denied plaintiff's request for penalties due to defendants' failure to send the check to plaintiff's counsel's office. But the magistrate did invoke equitable principles and ordered the defendants to issue a second check made payable to plaintiff and the Friend of the Court with the check to be sent to plaintiff's counsel's office.

The Commission reversed the magistrate's decision. The Commission said the magistrate was correct to deny the penalty, but the Commission said the defendants followed the exact instruction on the magistrate's order itself. The Commission said magistrates, like courts, speak through their orders, not through its oral statements or opinions.

Moving One's Residence Post-Injury

In *Walker v Cadillac Casting, Inc*, 2009 ACO #62, plaintiff suffered a shoulder injury and was ultimately extended an offer of "reasonable employment" (favored work). Plaintiff admitted he could perform the offered job, but by the time the offer was extended, he had moved approximately 63 miles from the place of employment. He had moved to accommodate his wife's worksite, as she was now the "breadwinner" of the family. Plaintiff had also developed a non-occupational pulmonary condition requiring the use of oxygen by the time the job offer was extended.

The employer argued that since plaintiff moved before he filed his petition for benefits, the magistrate could not use the distance from home to support a finding of a reasonable refusal under MCL 418.301(5). And, the employer argued that plaintiff's inability to accept the reasonable employment due to a non-work-related pulmonary condition does not justify the refusal. The Appellate Commission disagreed. The Appellate Commission said the offer was not within a reasonable distance from plaintiff's residence and it posed a clear and proximate threat to his health and safety, which meant the job offer did not constitute "reasonable employment" as it is defined in MCL 418.301(9). The Commission did remand the case, however, for the threshold determination of whether plaintiff is "disabled" in light of *Stokes v Chrysler, LLC*, 481 Mich 266 (2008), given that the case had been tried prior to the release of *Stokes*.

Magistrate Recusals

In *Diaz v Delphi Corp*, 2009 ACO #48, the defendant moved to disqualify a magistrate, alleging bias. The challenged magistrate refused to disqualify himself. The defendant sought review of that ruling from a different magistrate. That magistrate held a hearing where no evidence was presented, and the hearing consisted of oral arguments and

briefs. The magistrate on review denied defendant's motion for recusal after detailing Michigan law on recusals. The defendant appealed further to the Appellate Commission.

The Appellate Commission affirmed the rulings below. The Commission rejected defendant's argument that the appearance of bias is enough for disqualification. The Commission explained its underlying rationale as follow:

If we held for the defendant and disqualified Magistrate Purcell within the facts of this case, our action would be an invitation to any litigant who is unhappy with the action of a magistrate to seek disqualification of the Magistrate involved. To say such action on the part of this Commission would open the flood gates for the filing of other motions is an understatement. For our system to work within the efficiency, the disqualification of a magistrate has to be predicated on the establishment of actual bias on the part of the magistrate based on the evidence presented.

"Wage Loss" Requirement

With the appeal in the case of *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1 (2008) now final, the Appellate Commission has more uniformly begun, saying the wage loss requirement in the second sentence of MCL 418.301(4) must be satisfied by the claimant. The second sentence of Section 301(4) said: "The establishment of disability does not create a presumption of wage loss." In prior cases, some Commission panels had been reversing awards "because plaintiff failed to prove that her injury caused her wage loss." *Gordon v General Motors Corp*, 2007 ACO #65 (with the Supreme Court recently denying leave in a 4-3 order entered February 4, 2009 in SC Docket #137420).

Now that *Romero* has been finalized, the Commission is saying:

The magistrate is required to apply a standard of proof, that any loss of wages is a direct consequence of the work injury. This standard is as a result of a recent published decision from the Court of Appeals, *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1 (2008).

Kuikstra v Challenge Manufacturing Company, 2009 ACO #56.

Similarly, in *Campbell v Denso Manufacturing*, 2009 ACO #57, the Commission explained:

In the past, there had been some disagreement on whether the wage loss statements in *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997) survived *Sington*. The recent case of *Romero* erases any prior confusion on this issue. In *Romero*, the Court stated:

"The portion of *Haske* requiring proof of wage loss and a cause of connection between the disability and the wage loss was not overruled by *Sington*."

Remand for *Brackett*

In *Raguckas v State of Michigan, Department of Corrections*, 2009 ACO #82, the employer argued that plaintiff's emotional injury was the product of violation of a work rule. The magistrate rejected that defense, rendering her decision prior to release of *Brackett v Focus Hope, Inc*, 482 Mich 269 (2008). The magistrate had reasoned "plaintiff's conduct was not quasi-criminal and was not dangerous with want and disregard of the consequences." The Commission remanded the case to the magistrate for reconsideration. The Commission explained:

Most recently, in *Brackett v Focus Hope, Inc*, 482 Mich 269, 276 (2008), the Court defined "misconduct" as "improper behavior' ... done on 'purpose' despite the knowledge that it is against the rules." The magistrate did not utilize this definition, which appeared after she issued her opinion. We requested supplemental briefs from the parties, which have brought into sharp focus the point that the magistrate did not make the necessary findings. In addition, the magistrate analyzed whether plaintiff's disability was attributable to the (mis)conduct, whereas § 305 addresses an "injury" that occurs "by reason of intentional and willful misconduct." (Footnote omitted). ✖



Invite someone
to join the section

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

We Honor Our Own

In the March 2009 *Michigan Bar Journal*, a list of 50-year honorees was included. Several of the individuals are section members, and thus, we'd like to take the opportunity to honor:

Newton Bernstein

Jack Binges

Paul Carrier

Nort Cohen

John Hilgendorf

Bob Hodges

Herb Sharples

Jeremy Taylor

Ron Weiner

If you think we've missed anyone, please contact Tom Ruth so we can honor those individuals in our next newsletter. The full list can be found on page 20 of the March 2009 *Michigan Bar Journal*.

Print

Reset

REDEMPTION ORDER

Michigan Department of Energy, Labor & Economic Growth
 Workers' Compensation Agency/Board of Magistrates
 PO Box 30016, Lansing, MI 48909

Personal Service Mailed

_____ Day of _____ 20 _____

Magistrate (please print)

Plaintiff Name	Full Social Security Number	Address
Defendant(s)		Carrier(s)

If more than one defendant/carrier, also complete and attach Multiple Carrier Redemption Form WC-113A

The agreement to redeem the defendant's entire¹ workers' compensation liability for injuries sustained by the plaintiff on _____ has been considered by a Magistrate. **IT IS ORDERED** that this agreement to redeem the defendant's entire¹ liability for workers' disability compensation benefits by the payment of \$ _____ is **APPROVED** **DENIED**.
¹Medical left open _____ (only if initiated by Magistrate)

IT IS FURTHER ORDERED that the above sum be paid as follows:

AMOUNT	PAYABLE TO / FOR	
	ATTORNEY	
\$	Federal ID #	Fees \$
		Expenses \$
	MEDICAL PAYMENTS (include Federal ID#)	
\$		
\$		
\$		
\$		
	OTHER PAYMENTS	
\$		
\$		
\$	100.00	State of Michigan for statutory redemption fee
	PLAINTIFF	
\$		Cost of annuity, if applicable
\$		Balance directly to plaintiff

IT IS FURTHER ORDERED that defendant remit defendant's statutory redemption fee of \$100.00 directly to the State of Michigan.²

Do not write in this area.

IT IS FURTHER ORDERED that defendant shall also continue the payment of weekly compensation of \$ _____ per week through _____.

Social Security Administration Information	
The worker is currently age _____	and has a remaining life expectancy of _____ years.
The net payment of \$ _____	is allocated at the rate of \$ _____ per month.

Signed this _____ day of _____, 20 _____ County of _____. Magistrate _____

If a request by any of the parties for review by the director, or notice of review on the director's own motion, is not filed with the Agency within 15 days from personal service, or if mailed, the mailing date of this order, it shall stand as the final decision of the Workers' Compensation Agency. ² **Payment of benefits pursuant to this order and redemption fees are due upon expiration of the appeal period.** Denial of this agreement does not discharge the liability for redemption fees. Send one copy of this order with your payment. Checks are to be made payable to the State of Michigan and mailed to WCA Redemption Fees, PO Box 30646, Lansing, Michigan 48909.

Do not write in this area.

DELEG is an equal opportunity employer/program. Auxiliary aids, services and other reasonable accommodations are available upon request to individuals with disabilities. Authority: Workers' Disability Compensation Act 418.835; 418.836; 418.837 Completion: Voluntary; Penalty: None
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SBM

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