State Bar of Michigan

Workers' Compensation Section Newsletter

Summer 2010

From the Chair

By Joel Alpert, Chairperson

Although I have been privileged to be a member of the section council for many years, my term as chair has given me greater insight into the council's mission, the dynamics of the way in which the council does its work, and the chair's responsibilities. In my final newsletter article as chair, following are my thoughts. Fortunately, we have not experienced any legislative or case law crises this year (though we have faced a significant financial crisis that has led to "downsizing" the agency), so I have had time to deal with the way the council does its work. I believe that the Worker's Compensation Law Section and its council exist to serve our members—the attorneys. To better serve our members, I have attempted to bring more organization and professionalism to the council by incrementally changing the way we do business. I have found new rules imposed upon the council by the State Bar and have implemented them. I have discovered new programs offered by the State Bar and have introduced them to the council. I have re-reviewed our mission statement and bylaws with the council and have done my best to require us to abide by them. I have attempted to provide better organization by using e-mail to communicate with the council members and provide them with monthly agendas in advance of our meetings. We have started using the Internet for better communication with our members by electronically mailing our newsletter and by continually updating our members on matters of legal and social importance. And, at my suggestion, we now save time, fuel, and money by holding our meetings by video conference in Detroit and Lansing.

I believe that the chair should be the section's moral compass. I have tried to lead by example in all aspects of our practice—from client interview, to trial preparation, to dealing with opposing counsel and the administration. I don't know if I have been totally fit for this job, or successful in my attempts, but I have tried my best. I have editorialized about fraud and fair dealing. I have suggested that our annual scholarship be awarded in conjunction with the Young Lawyers Section essay

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

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
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contest. I have tried to update our knowledge of how we can incorporate technology into our practices to make them more efficient and productive. I have reached out to our state's law schools, and to other State Bar sections. Hopefully these efforts have benefitted our practices.

We have been called "clubby." We are. Our area of practice is quite complex. Our numbers are relatively few. Other attorneys throw up their hands in confusion when attempting to deal with comp issues and often need to defer to us. I believe that we should embrace our "comp culture" and continue to proudly hold ourselves out as the experts that we are. We have earned that privilege. We need to work more closely together. We need even more goodwill between magistrates, the administration, plaintiff attorneys, and defense attorneys. This will lead to better representation of our clients' interests, and an even greater degree of specialization. If we do this, we will create more business opportunities for our members.

Our incoming chair, David DeGraw, has indicated he will be refining some of my practices and expanding on some of my ideas. I am certain that he has many ideas for more improvements and will introduce his own new initiatives. I wish him success in his term as chair of the section council. I thank John Charters, David DeGraw, Timothy Esper, Murray Feldman, Dennis Flynn, Murray Gorchow, William Housefield, Denise LeVasseur, Chuck Palmer, Ella Parker, Chris Rabideau, Tom Ruth, John M. Sims, and Mark Viel for the help they have given me and the work that they have done on your behalf, and, more importantly, for the time that they have taken away from their busy schedules for nothing more than the opportunity to improve the practice for all who appear at the agency. I thank my business partner and your past chair, Rick Warsh, for his guidance and input. I thank my wife, Gail, for her support, and for all she does to make my life better. And I thank all of you for allowing me the opportunity to serve you. 🛠

The opinions expressed in this article are those of the author and not necessarily those of the Section Council.

Editor's Note

Once again, your Section Council beckons you North to attend the Section Spring Meeting. The last several years has seen an increase in attendance and we need to continue that trend. Joel's note in this edition that we, as a Section, are "clubby" is correct - we are and that is one of the things that makes us different in a positive way. The annual meetings are an expression of this. Please take the time to thank all the Section officers for their hard work, effort and time for your Section - making it stronger and giving it a chance to have a more significant impact on our practices and the great State of Michigan. We thank Chairperson Joel Alpert for his direction and vision and, in turn, welcome Dave Degraw to the helm.

Your section members and officers are all attorneys with conviction. It is from that sense of conviction that, at times, discussions over Section issues have become hotly debated and passionate. We all come to the "table" with different views and concerns - which is what makes for a good Council. "Out of reasonable disagreement - comes strength; and out of free debate - justice and progress" You are a part of this as well. Please voice any thoughts or concerns to a Council member—See you Up North!

Tom Ruth -Editor

Notes from the Director

By Jack Nolish, Director, WCA

My kids grew up on two streets: Hendrie and Sesame. Although I personally have always identified with Cookie Monster, the analogy for our times is the opening of each episode: "Today's show is brought to you by the letter……" Well, here on *Comp4me Street*, every day is brought to you by the letter "B," as in BUDGET.

It is no secret that the nation's and Michigan's economic woes continue, although there do seem to be signals and signs of recovery. Hopefully, these will coalesce into a real recovery for our state. Unfortunately, the decline in tax revenue adversely impacts the state general fund, which is the most significant portion of our funding. We have already seen the impact of this decline in the form of office closures, along with magistrate and staff reductions. If you walk around all the Agency facilities, you would see few young workers and only a couple new faces. From a peak of 202 over 10 years ago, the agency is now only 136 employees. At one time, there were 30 magistrates; now we have 17. I can go on with more numbers, but it gets really depressing. Of course we do have to remember that at one time we had over 20,000 contested cases filed per year. This year, it looks like fewer than 10,000 will be filed, but that includes the recent batch of cases filed relating to the pension set-off calculations being done by GM as part of a contract negotiation.

As I write this, the state legislature is locked in battle over the budget process including teacher retirement options. There are three separate budget proposals with three separate figures for our general funding amount. The teacher retirement discussion has overshadowed the early-out for state employee options that are also looming. The impact of the retirement discussion cannot be understated. Like most other states, particularly after years of hiring freezes, we have a very significant number of employees that would be eligible for most of the early retirement plans that have been discussed. There are so many variables that attach to the retirement issue that it is very difficult to even plan for the impact. Some of the "early-out" plans call for a two-for-three replacement ratio. We have managed to maintain a high level of service through the last several years of reductions, but now I am beginning to think, or actually fear, that we are approaching the tipping point. The teeter will be soon tottering against us.

Some have suggested we can solve all of our financial concerns by simply raising redemption fees or adding some other access charges. You are aware that former director, and unofficial dean of Workers' Compensation, Ed Welch, has been working with the agency to try to build some consensus among the various participants in the system to improve all facets of our operation, including funding. Various meetings have been held, and a specific finance committee was convened. As to the question of raising fees as a solution, Ed has said:

> There were some people who just assumed we could double redemption fees and others who opposed any increase at all. I think we might have been able to get an agreement if we had been able to focus on a specific shortfall in funds that could be remedied by an increase in fees. The budget process, however, is so complicated and so deeply involved in partisan disputes that we were not able to do that.

It is impossible to predict when and how these matters will be resolved. I do know that the 100th anniversary of workers' compensation in Michigan is just over the horizon in 2012. I don't know what the celebration is going to look like, but I will absolutely keep trying to make sure we all make it to the party. 🛠

Hall of Fame Induction to be Held During the Section Annual Meeting

The Workers' Compensation Law Section Council has adopted rigorous standards for nomination and induction into the Worker's Compensation Hall of Fame. An induction ceremony will be held in conjunction with the Annual Summer Seminar, meeting, and election of officers at the Crystal Mountain Resort on June 1719, 2010. The section council is proud to announce and congratulate this year's inductees, Ray W. Cardew, Jr. and John P. Baril.

Separate resort and seminar registrations are required for the Summer Seminar. For more information, visit the section's website or ask one of your council members: David DeGraw, John Sims, Denice LeVasseur, John Charters, Tim Esper, Dennis Flynn, Bill Housefield, Chuck Palmer, Ella Parker, Chris Rabideau, Tom Ruth, or Mark Viel. 🛠

Board of Magistrates Update

By Christopher P. Ambrose, Chairperson, Board of Magistrates

It is with mixed feelings that I announce the departure of Magistrate Valencia Jarvis from the Board of Magistrates. Val has been an asset to the Board for years, and will surely be missed. Her sense of professionalism, work ethic, and fairness are just a few of the attributes that describe this fine jurist. My feelings are mixed, because although I will miss having her on the Board, I am thrilled for her new opportunity as an ALJ with the Social Security Administration. Magistrate Jarvis will be installed as an ALJ in the St Louis Missouri Social Security Administration National Hearings Center. Our loss is the country's gain, and I am certain the Social Security system will benefit highly from having Val Jarvis aboard.

Practitioners need to be aware that there has been a change in the Board of Magistrates Rules. The newly revised version is as follows:

> R 418.55 Admission of records, reports, memorandum, and data compilation.
> Rule 5. (1) Not less than 42 days before a hearing, the party intending to introduce a record, memorandum, report, or data compilation shall furnish copies and a notice of intent to all parties, for which a proof of service shall be completed and retained by the noticing party.
> (2) Any party objecting to an exhibit under this rule shall provide written objection to all parties not less than 21 days before the hearing, for which a proof of service shall be completed and retained by the objecting party. An objecting party may schedule cross examination in response to the record, memorandum, report, or data compilation sought to be admitted under this rule.
> (3) This rule shall not affect the magistrate's discretion to rule on newly discovered evidence.
> (4) The notice of intent, objection, and proof of service shall not be sent to the agency. Only those records admitted into evidence by a magistrate shall be placed in the agency file or maintained by the agency.

Under the newly revised Rule, parties are no longer to mail the Agency the notice of intent, objection (if applicable), and proof of service. Rather, these documents are to be kept by the parties. Only records admitted into evidence will be placed into the agency file. Notices of intent, objections, and proof of service may be used at trial to show that the Rule has been complied with. The Agency is making every effort to minimize needless paper in the files. This will reduce storage space, time spent filing, and make for cleaner Agency files in general.

Finally, the WCAC, Board of Magistrates, and mediators met at the end of April for Comp College 2010. This was a good use of time for all involved, as there is an ongoing need to create efficiencies in the workers' compensation litigation system. With the recent reduction in magistrates to 17, along with more complex litigation in light of recent case law, getting cases resolved through the mediation and trial process remains a challenge. There were many ideas discussed, including the issue of pre-hearing and post-hearing briefs, better exhibit review and discussions prior to trial, the issue of alternative dispute resolution, and the optimal use of mediator and magistrate time.

I plan to speak to these subjects in greater detail at the upcoming section meeting in June. I look forward to seeing many of you there. In the meantime, please keep the comments, recommendations, ideas, and yes, criticism coming. I value the input of those in the trenches, so feel free to call or e-mail me at your convenience. 🛠

WC Hall of Fame Committee

By Murray R. Feldman, Chairperson, WC Hall of Fame Committee

The Section Council has voted and this year's WC Hall of Fame Inductees are former Magistrate John Baril and Ray Cardew, Jr. Please join us in honoring them at this year's Summer Section Seminar, June 17-18, 2010, at Crystal Mountain Resort. We will presenting John and Ray with their plaques after dinner on Thursday, June 17, 2010. 🛠

Harold Dean Open

By Murray R. Feldman

Although not an officially sponsored Section event, this year's Harold Dean WC Open Golf Tournament is scheduled for Friday, June 25, 2010 at Fox Hills (The Golden Fox) as in past years. Again, the $135 cost will include a buffet lunch, unlimited bar (in the Clubhouse), 18 holes of golf with cart, dinner, and prizes. To make your reservations for this fund and always memorable day, contact Ray Bohnenstiehl at (248) 358-5080. Ray can also be reached at rbohnenstiehl@comcast.net. 🛠

New Trust Account Overdraft Notice Rule Takes Effect Sept. 15

New Rule 1.15A of the Michigan Rules of Professional Conduct, also known as the Trust Account Overdraft Notice Rule (TAON), takes effect on September 15, 2010. To review Rule 1.15A in its entirety, visit MRPC 1.15A.

A brief summary of the requirements of the TAON Rule is provided below:

- Before the effective date of the TAON Rule, financial institutions doing business in Michigan must submit a signed agreement to the State Bar of Michigan to obtain approval to maintain lawyer trust accounts as defined by MRPC 1.15(a).
- Lawyers must confirm that their financial institutions are on the list of approved financial institutions posted on the State Bar's website.
- No further action is required by lawyers for their preexisting IOLTA accounts; these accounts have already been identified as lawyer trust accounts by financial institutions when opened by lawyers.
- After confirming that their financial institution is on the State Bar's list, lawyers must contact their financial institutions to change the name on their non-IOLTA accounts to include the term "trust" or "escrow" if not already included in the account name.
- After confirming that their financial institution is on the State Bar's list, lawyers may download a form (Non-IOLTA Lawyer Trust Account Notice to Financial Institution) from the State Bar's website and submit the completed form to their approved financial institutions for each non-IOLTA trust account and must send a copy to the State Bar.
- Lawyers must continue to safeguard client and third-party funds held in trust to avoid all overdrafts to their IOLTA and non-IOLTA accounts.
- Approved financial institutions maintaining lawyer trust accounts must submit overdraft reports within five banking days of any overdrafts to the grievance administrator of the Attorney Grievance Commission.

The State Bar is in the process of communicating with financial institutions to invite their participation in the TAON program. The State Bar expects to begin receiving signed TAON agreements from financial institutions in May and will begin posting its list of approved financial institutions at that time. The State Bar will update the list of approved financial institutions as signed TAON agreements are received from financial institutions. Lawyers should wait until the name of their financial institution appears on the State Bar's list of approved financial institutions before submitting a completed non-IOLTA notice form.

Michigan Workers' Compensation Appellate Commission Update

By Murray A. Gorchow, WCAC Chairperson

Claim for Review, Transcript Filing, and Hearing Date Issues

The Commission is having a problem determining if and when the complete transcript in a case has been filed with the Commission. The Commission's accurate knowledge of *all* dates the magistrate was *on the record* for trial, and *only* the dates they are *on the record* for trial, is critically important.

It is the attorney's responsibility to indicate the correct hearing dates on the Claim for Review. It is the attorney's responsibility to accurately provide those dates and timely submit the complete testimonial record to the Commission. It is the attorney and his client that bear the consequences for failure to do so. These consequences include dismissals and show cause orders for possible dismissal of an appeal for failure to timely file all transcripts, and also possible remands for clarification. Further, the timeline/deadline for the filing of briefs is triggered by the date all transcripts are received at the Commission. Therefore, counsel should take care to make sure he indicates the correct hearing dates, and that the complete record is timely filed.

When filing transcripts with the commission, the cover letter should clearly state the dates of the hearings of the transcripts being submitted, whether additional transcripts are still to be filed,; or whether counsel considers the transcript filing to be complete.

The Commission has requested that the Board of Magistrates assist by carefully and accurately reporting, at the start of every opinion, including opinions on remand, the exact dates that the parties were on the record. If there was no hearing on the record, such as often happens on remand, then that fact will be reported at the beginning of the opinion in lieu of dates of hearing.

However, while the magistrate can help in this regard, it is still the responsibility of the attorney to provide accurate dates on the Claim for Review form, and to timely file all transcripts. Attorneys will be well advised to consider the serious consequences that can result from their failure to do so.

Extensions of Time to File Transcripts

Effective July 1, 2010, the Commission will no longer grant extensions of time for filing transcripts by *letter*. An *order* extending time to file will be granted, for sufficient cause shown, upon the filing of a timely *motion* in compliance with Rule 7 [R418.7]. Requests by *letter* are insufficient. A Rule 7 compliant (see below) *motion* is required.

WCAC Rule 7—Motion and Affidavit Requirements

In the winter 2009 issue of the section newsletter, I addressed, perhaps too subtly, the failure of attorneys to comply with Appellate Commission Rule 7 [R418.7], dealing with motion practice before the Commission. Non-compliance with this rule alone is sufficient reason for the Commission to deny your motion. Many motions are denied for this reason alone. If your motion or response to a motion represents the existence of facts not in the record before the magistrate, there *must* be an *affidavit* accompanying the motion or response, and the affidavit *must* be from a *person with personal knowledge* of any facts stated in the motion, who frequently is *not* the attorney. *Caveat lawyer!*

Input Requested for WCAC Rule Changes

The Commission has just begun the process of a complete re-examination of its appellate rules. It is expected that we will be clarifying existing rules and adding additional rules to facilitate the efficient processing of appeals and handling procedural issues with greater consistency and transparency. We are inviting suggestions for changes and additions to the appellate rules from all interested workers' compensation practitioners. This will be a fairly complicated process, but working together with interested attorneys and the section council, I believe we can achieve a mutually beneficial result. Please submit your suggestions in writing to me at gorchowm@michigan.gov. It would be very helpful if you would explain the real world issue that your suggestion addresses, as well as the suggested language for a proposed change or addition to the rules.

Input Requested for the "Blue Book" Act, Rules and Index

The new *Michigan Workers' Disability Compensation Act and Administrative Rules,* the joint enterprise between the Institute of Continuing Legal Education (ICLE), the Workers' Compensation Section, and the Workers' Compensation Agency, that produced the new "Blue Book" last year, has been a great success, so much so that ICLE is committed to reprinting, as needed, and to publishing a new edition when warranted.

ICLE would like to know about any typos, errors, or other suggestions for improvement in the book that we may have, *including additions to the index* (in which the commissioners and I were so involved). Since we are all the beneficiaries of this useful publication, let's keep improving it. Please send me an e-mail at gorchowm@michigan.gov, and I will be happy to coordinate your suggestions with the section council and with ICLE.

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I look forward to seeing everyone at the Annual Summer Meeting on June 17-18, 2010.

Green Leaders Award for Crystal Mountain Resort

Our host for the Workers' Compensation Section's 2010 Annual Summer Meeting, the Crystal Mountain Resort, is one of the recipients of the *Detroit Free Press* inaugural Green Leader Awards. Selected by a panel of independent judges from among 350 nominees, Crystal Mountain Resort received its award along with 15 other award recipients at a sold out Earth Day breakfast ceremony on Belle Isle on April 22, 2010.

Crystal Mountain Resort and its president and CEO, Jim MacInnes, were cited for environmental stewardship:

> This resort was the state's first tourist attraction to invest in wind energy and has the Midwest's first silver Leadership in Energy and Environmental Design (LEED) certified spa. Resort leaders are dedicated to educating business and political leaders, employees and the community about the environmental and energy issues that will shape Michigan's future.

The judges commented:

> CEO Jim MacInness' passion for using progressive environmental technologies transcends the boundaries of his property, or even his community. He creates ties between the business and environmental communities as he works toward providing a better quality of life.

The Workers' Compensation Section is privileged to be associated with Crystal Mountain Resort, where we have had our Annual Summer Meeting for three of the last four years. Our congratulations go to Crystal Mountain Resort and our host, Jim MacInnes, for the exemplary environmental stewardship from which we all benefit.

[For more about the Green Leaders Awards, and the source material for this article, go to "Crystal Mountain Resort Ski and golf resort scores many firsts for environment."]

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

There have been very few cases of note decided since our last newsletter. The few that have been decided are the following.

Supreme Court

The Supreme Court released its opinion in *Brewer v A.D. Transport Express, Inc.*, _____ Mich _____; _____ NW2d_____ (2010). (S.Ct. Docket No.: 139068 decided May 10, 2010) which addresses that provision of the Act defining Michigan jurisdiction over injuries occurring outside of the state. MCL 418.845.

Recall that there have been many twists and turns with respect to this outstate injury provision. The provision itself, until recently, required plaintiffs to satisfy two requirements in order for Michigan to exercise jurisdiction over injuries occurring outside of the state. A plaintiff needed to demonstrate that he or she was a resident of Michigan at the time of the work injury, and needed to demonstrate that he or she was employed under a contract of hire made in Michigan. However, in 1932, the Supreme Court read the residency requirement out of the Act in *Roberts v IXL Glass Corp,* 259 Mich 644; 244 NW 188 (1932). The *Roberts* ruling was reaffirmed by the Supreme Court in *Boyd v WG Wade Shows* 443 Mich 515; 505 NW2d 544 (1993). In 2007, however, the Supreme Court revisited this area and overruled the *Boyd/Roberts* rule saying that the legislature's use of the conjunction "and" in the statute means the legislature was requiring that both jurisdictional requirements be met before Michigan exercises jurisdiction. The 2007 case so holding was *Karaczewski v Farbman Stein Co.,* 478 Mich 28; 731 NW2d 56 (2007).

The year after *Karaczewski* was decided, the legislature passed an amendment to the outstate jurisdiction provision, 2008 PA 499, effective date January 13, 2009. That amendment does more than restore *Boyd/Roberts,* however. While *Boyd/Roberts* required a Michigan contract of hire, under the presently controlling amendment Michigan can exercise jurisdiction over outstate injuries so long as the plaintiff can demonstrate *either* Michigan residency at the time of the injury *or* a contract of hire made in Michigan.

The specific question presented to the Supreme Court in *Brewer* was: does this new amendment apply retroactively to injuries occurring prior to its effective date? That is, does it apply retroactively to cover Mr. Brewer's date of injury in 2003?

The Supreme Court in *Brewer* held that the amendment does not apply retroactively. The Court says that the new jurisdictional standard "contains no language suggesting that this new standard applies to antecedent events or injuries. Therefore, the amendment applies only to injuries occurring on or after the effective date of the amendment, January 13, 2009." The Court said this is the general rule in workers' compensation; i.e., amendments to the Act do not normally apply to injuries preceding the amendment. The Court recognized that there is an exception to this general rule "for remedial or procedural amendments." But the Court concluded that the amendment at issue was not merely remedial or procedural because it "created a new rule under which *either* a Michigan contract of hire *or* Michigan residency would suffice." The Court noted that "constitutional challenges to this expansion of jurisdiction may arise," but no such issue was raised in this case, and the Court did not address that.

The Court's opinion was authored by Justice Corrigan. Justices Cavanagh, Young, and Markman concurred. Chief Justice Kelly concurred in the result only. Justice Hathaway, with Justice Weaver concurring, dissented from the majority's decision. The reasoning for their dissent was that they would have preferred further briefing and further oral argument on the issue.

There remains pending before the Supreme Court another case related to outstate jurisdiction. The other case is *Bezeau v Palace Sports & Entertainment, Inc.* (Docket No. 137500). *Bezeau* was orally argued the same day as *Brewer*, yet it is still undecided as of this writing. The issue in *Bezeau* is whether the *Karaczewski* holding, described above, should be limited to apply only prospectively, as opposed to all cases where there has not been a final judgment awarding benefits as of the date of the *Karaczewski* opinion. Look for *Bezeau* to be decided soon, in all likelihood no later than July 31, 2010.

Court of Appeals

There are no published or unpublished Court of Appeals decisions released since our last newsletter as of this submission.

Workers' Compensation Appellate Commission

Burden of Proof

In *Nichols v Howmet Corp* 2010 ACO #39, plaintiff had in a previous action persuaded the magistrate that he was disabled, but the magistrate closed plaintiff's award on the basis that plaintiff refused a bona fide offer of reasonable employment without good and reasonable cause under MCL 418.301(5)(a). That decision became final. Later,

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subsequent petitions were filed. The Appellate Commission described what each party needed to prove in the subsequent proceedings and who bore the burden of proof. The Commission explained:

> Plaintiff needed to plead and prove that he ended his refusal of reasonable employment. If he did, then defendant needed to prove that plaintiff's disability had ended because Magistrate Grit already found that plaintiff proved disability [in the prior proceeding]. Thus, the Magistrate clearly erred when he found that plaintiff failed to prove ongoing disability in this case. The Magistrate must decide whether each party satisfied its burden of proof.

The Commission further explained that these results are dictated by MCL 418.301(5) (a) because:

> That section requires suspension of benefits until the employee ends the period of refusal. If the magistrate enters an order finding disability but suspending benefits because the employee refuses reasonable employment, then further proceedings are necessary to restore benefits. The employee must request a determination that the refusal ended. When an employee presents adequate proof that the refusal ended, an employer may present proofs that the disability no longer exists. The employee carries the burden of proof concerning the end of the refusal, but the employer carries the burden of proof that the disability ended.

Average Weekly Wage

In *Moore v Nolff's Construction/Travelers Indemnity Company,* 2010 ACO #60, the Appellate Commission addressed the impact of recent orders from the Supreme Court on the average weekly wage provision, MCL 418.371.

The primary issue in the case was which subsection of § 371 must be used to calculate plaintiff's average weekly wage. The Commission held that, in light of the Supreme Court's order in *Stone v RW Lapine, Inc.* 482 Mich 982 (2008), as modified on rehearing, 483 Mich 1007 (2009), it is now "possible that more than one provision [of § 371] might apply in the case."

The Commission explained *Stone's* appellate history as follows:

> On appeal to the Supreme Court, the magistrate's order was reinstated insofar as the legal question was concerned. The Court held that:
>
> > [T]he Court of Appeals erred by holding that the average weekly wage must be calculated pursuant to MCL 418.371(3) in every instance where it can be determined using that subsection. The average weekly wage calculation provisions reveal 'the Legislature's overriding desire to have the basis for compensation reflect an accurate measure of wages.' *Rowell v Security Steel Processing Co,* 445 Mich 347, 356-357; 518 NW2d 409 (1994). In this case, the magistrate did not err in choosing to utilize MCL 418.371(6) to determine the plaintiff's average weekly wage. [*Stone, supra* at 482 Mich 983.]
>
> On rehearing, that "the magistrate did not err" in relying upon MCL 418.371(6) was reiterated but it was further held that the magistrate did not properly apply MCL 418.371(6) and the case was remanded to allow that to occur. *Stone, supra* at 438 Mich 1007. One inescapable point that must be drawn from the orders of the Supreme Court is that a belief that another subsection of MCL 418.371 can be applied does not demonstrate that MCL 418.371(6) does not apply.

The Commission therefore remanded the case with instructions that the magistrate not proceed as if he or she were bound to apply subsection 4 of § 371 [addressing injuries sustained before completing one's first work week] as opposed to subsection 6 § 371 [the "special circumstance" subsection where an average weekly wage "cannot justly be determined" under preceding subsections].

Rule 5 / Admission of Records and Reports

In *Pilcher v Kinross Correctional Facility,* 2010 ACO #63, plaintiff—proceeding *in pro per*—introduced at trial a medical report from a doctor hired by defendant to review plaintiff's medical records and offer an opinion. Defendant objected to admission of the report on the basis that plaintiff failed to follow R 418.55 [Rule 5], which requires notice of intent to submit the report. Without ruling on the objection, the magistrate admitted the report and held in plaintiff's favor.

On appeal, the Commission reversed. The Commission said the magistrate erred because plaintiff failed to provide the notice of intent to submit the records in advance of the hearing as required by R 418.55. It did not matter that the report was from a doctor hired by the defendant. After excluding that report, the Commission said there was no evidence to support the magistrate's award and, therefore, reversed it.