

Workers' Compensation Section Newsletter

Summer 2011



From the Past Chair

Transitions

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The Workers' Compensation Section annual meeting was held in Traverse City on June 16 and 17 and was an enjoyable event. The broad variety of activities available in Traverse City was well received by those in attendance. Those opportunities and activities more than offset the fact that our meeting was in a more urban setting than usual. The view from the top of the historic Park Place Hotel during the dinner and cocktail parties was breathtaking. Mike Breton's wine tour was well received, as was the golf outing at Lochenheath. The weather even cooperated nicely.

On Friday morning we were honored by presentations from Mike Zimmer, Kevin Elsenheimer, Greg Przybylo, and Jay Quist, all members of the current Michigan WC administrative structure. Each of those individuals candidly shared their vision for the future of workers' compensation and answered many questions regarding changes and potential changes. It is clear that Governor Snyder's pledge to "reinvent Michigan" applies to the administration of workers' compensation in Michigan as well.

We also elected a new Workers' Compensation Section Council. Phil Frame and Matt Conklin were newly elected to the council. Phil Frame is an assistant attorney general from Lansing. Matt Conklin is a plaintiff's attorney from St. Joseph. Both have been involved with workers' compensation for quite some time and will be strong additions to the council. Bill Housefield was moved up to the treasurer's spot. Ella Parker and Tim Esper were re-elected to new terms ending 2014. The members of the executive board each moved up a spot with Denise LeVasseur in the vice chair spot and Chuck Palmer as secretary. Please give this new council the same support and encouragement that I enjoyed during my years on the council and as chair. To a person, the current council members are engaged in their responsibilities, concerned about the future of our practice area, and very willing to promote the betterment of our practice.

John Sims will serve the next year as your chairperson. John is a plaintiff's attorney from Marshall, who has always been a very strong advocate for his clients. In my experience, John has also been very engaged in his responsibilities as a council member, and I know that he will serve well as chairperson of our section. Please give John your support as he leads this group through the coming year. I wish you good luck, John.

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Term expiring 2012

John P. Charters, Troy
Dennis P. Flynn, Grand Rapids
Christopher J. Rabideau, Grand Rapids

Term Expiring 2013

Phillip Frame, Lansing
Andrea Lynnea Hamm, Detroit
Kristin Alana Lusn, Troy

Term Expiring 2014

Matt Conklin, St. Joseph
Tim Esper, Detroit
Ella Parker, Grand Rapids

Kevin Elsenheimer, Director, Michigan
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Jay Quist, Chief Magistrate, Michigan
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Commission

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From the Chair
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As I pass the chairpersonship to John, it is appropriate for me to thank the many individuals with whom I have worked over the past year. As always, the danger in providing a listing of those folks is that someone will be left out. Understanding that risk, I want to specifically thank these folks for their work and interaction on council activities over the past year: John Sims, Denise LeVasseur, Chuck Palmer, Bill Housefield, Tom Ruth, John Charters, Dennis Flynn, Chris Rabideau, Ella Parker, Tim Esper, Kristin Lusn, Andrea Hamm, Mike Breton, Steve Pollok, Murray Feldman, Len Hickey, Kevin Elsenheimer, Jay Quist, Greg Przybylo, Joel Alpert, Jack Nolish, Ken Birch, Murray Gorchow, Ann Williams, Sue Bickel, and any other individuals who have helped move the interests of the section forward, whom I have inadvertently failed to mention here. I also want to thank all of those who felt very comfortable pulling me aside in the hallway to share your observations and opinions regarding our section. Finally I want to acknowledge the many individuals at the State Bar of Michigan whose assistance and patience are well appreciated.



David DeGraw at the Annual Meeting

As my parting comment as your outgoing chairperson, I will simply reiterate what I have said on a number of occasions over the past year. During the glory days of workers' compensation practice, some years ago, we as a group got along very well. I believe we were the envy of many other State Bar sections because we managed to get along quite well as individuals and also be very strong advocates for our respective clients. There are many stories of inflamed arguments during a trial or deposition followed by the two involved attorneys going to dinner afterwards because they genuinely like each other. Recently our practice has changed dramatically and appears to be poised for additional change. Today it is much more difficult to practice workers' comp for a variety of reasons. Amidst those difficulties please remember our roots and do not let the challenges we face alter our respect for each other. Please continue to do what, in the past, made us not just lawyers earning a living but professionals. Please continue to strongly advocate for your clients in the hearing room and be friends outside the courtroom. That quality always made workers' compensation lawyers a special group and should continue to be a characteristic of our WC family moving forward.

It has been an honor to serve as your chairperson for the past year. I thank you all for the opportunity to assist. I look forward to seeing each of you in the coming months.

Thank you.

—David

From the Chair

They were all right at the dance last night!

Well, I bet most of you thought you would never see the day...I know I didn't. Here I am, and I fear I have been elected as the captain of the Titanic. I keep being reminded of the old joke about Custer's Last Stand. The punch line is something about, "I don't know what is wrong with those Indians. They were just fine at the dance last night."

I believe that the section faces the greatest challenges of our practicing lives, and I hope to not only survive this next year but to build a basis for our continued survival in the face of overwhelming opposition. Workers' Compensation will celebrate 100 years next year. It is our job to see it move into the next century. I cannot believe that it will be a simple task.

My first order of business is to create a liaison committee to the governor. We are all aware that the governor is undertaking changes in the Workers' Compensation Agency and the law itself. We are, however, totally ignorant of what the nature of those changes will be, and we have been completely closed out from any discussion of the changes.

I have several questions. I think all of us would like to be able to give all of our clients some idea as to the answers to these questions.

1. Who is it that feels the law needs to be changed?
2. Why does he/she feel a change is needed?
3. Why was the section not asked for its input? (Did anyone think to ask the people who have worked in this system for decades, and have managed through their joint efforts to obtain massive efficiencies when compared to just 10 years ago, what they think about the need for or the type of changes being considered?)
4. What is the goal of the changes being considered?
5. What can we do to help?

My second priority is to try to find a way to push CMS into being reasonable. A federal lawsuit seems to be the only thing that gets their attention, and I intend to try to build a coalition with the Workers' Compensation sections in other states to pursue them into the clutches of a federal district court. This becomes necessary only if we are successful in protecting our clients' right to a fair and responsible form of due process for the hearing of their workers' compensation issues. We have to dodge the iceberg...or get those Indians to remember what a good time they had at the dance.

— John Sims



*John Simms and David DeGraw
at the Annual Meeting*



Invite
someone
to
join
the
section

<http://www.michbar.org/sections>



Scenes from the Section Annual Meeting



1. *Todd accepting Hall of Fame award on behalf of his father Jay Trucks*
2. *What happens at the Section Meeting - stays at the Section Meeting*
3. *John Sims and his crew*
4. *Todd and John*
5. *Mike and Len discuss Stokes*



Notes from the Director

By Kevin Elsenheimer, Director, WCA

Governor Snyder has a mantra: “relentless, positive action.” The pace and scope of change in the Agency over these last six months has certainly been relentless, and I think positive as well.

With the creation of the Michigan Administrative Hearing System (MAHS), the Agency’s focus has been refined. Our mission is now primarily regulatory; we deal with the insurance and customer service sides of the workers’ compensation industry. Once a file becomes contested, we hand it off to MAHS for resolution. When they finish with it, we’ll keep the file and make sure people live up to their agreements and obligations.

As a regulatory agency, efficiency is critical to our operation, and we’re making real progress in that arena. Our Electronic Data Interchange program allows us to accept electronic filings from insurers to cut down on paper. It’s been stuck at about 25 percent use for over a decade. Under Deputy Director Nolish’s leadership, we believe that we will be over 50 percent compliant by the end of the year. That represents tens of thousands of pieces of paper, and hours of employee time that can be used more productively.

We are ready to implement the first phase of our data processing hardware update as well. Our office keeps a photographic record of every document that we receive in the mail. Today, we spend hours a day making copies by microfiche. Phase one will instead use digital scanning equipment. The new system will actually cost about \$20,000 a year less to operate than our current imaging system.

We’re focused on policy as well. The newly reorganized Director’s Advisory Council had its first meeting several weeks ago, and heard presentations on use of evidence based medicine and electronic payment of comp benefits. The Agency is continuing to investigate both of these initiatives as potential rule changes.

Lastly, during the Act’s centennial year (2012) we plan to ask the legislature to update the Act to reflect the current state of the workers’ compensation system in Michigan. We are focused on process over policy in this effort, and appreciate the work that the section and others have done to suggest changes. While we’re in the drafting stage, I am still happy to receive suggestions for process-based changes. Feel free to email me at elsenheimerk@michigan.gov with your ideas. ✂

Board of Magistrates Update

By Lisa Klaeren, Magistrate

In June 2011, the Board of Magistrates welcomed three new magistrates to the bench: Brian Boyle, John Buehler, and Robert Tjapkes.

Brian Boyle has worked as a trial attorney in workers' compensation and negligence defense. He is an MSU graduate and earned his law degree from Cooley Law School. He will be assigned to the Detroit agency.

John Buehler is a self-employed attorney with prior work experience as a pharmaceutical account executive, an insurance agent, and a workers' compensation litigation attorney. He is a graduate of Marquette University and University of Dearborn Mercy. He will be assigned to the Detroit agency as well.

Robert Tjapkes is an attorney advisor for the Social Security Administration, previously in private practice as staff counsel for Travelers Insurance Company. He will be assigned to the Flint agency.

Chief Jay Quist will be leaving the Board of Magistrates on July 11, 2011, to begin a new position as an administrative law administrator, overseeing the Employment Services

Division (which will include the Board of Magistrates) for the Michigan Administrative Hearing System (MAHS). Jay has been a magistrate since January 1999. His work ethic, forthrightness, and professionalism will be missed by those practicing workers' compensation.

In the past six months (under Jay's strong guidance), the Board has made great strides in improving productivity. There has been a vast improvement in the average time for an opinion to be issued following trial and the closing of the record. An effort is being made to limit the number of cases where the trial record is open for longer than 30 days. The magistrates are focused on minimizing the age of their pending cases. All of these efforts are ongoing and will result in noticeable differences in the productivity of the Board.

By necessity, all of these efforts on the part of the Board are going to require the assistance of all those appearing before us. Counsel for all parties needs to come to any hearings prepared, knowledgeable about the case, and with the purpose of moving the case forward. If we all work together, we can make the system better for all of its users. ✕

Michigan Workers' Compensation Appellate Commission Update—Wage Loss

By Gregory A. Przybylo, WCAC Chairperson

The recent order in *Harder v Castle Bluff Apartments* from the Michigan Supreme Court signals change in our evaluation of wage loss issues in every case. However, the order does not provide the specificity that *Stokes* included for disability issues. That absence of specificity might produce complacency. I caution against preparing wage loss arguments that follow the status quo.

Perhaps the disability evolution best illustrates the precarious circumstances that accompany changes in legal standards. The evolution of the disability standard exposed some cases to as many as five different standards. A portion of those cases have endured an appellate process that eclipsed a decade. During the decade of appellate procedures, cases needed multiple supplemental hearings to allow proofs that

addressed the different standards. However, the supplemental proofs rarely addressed the subsequent legal standards. Thus, the proofs failed to address the final standard.

From my perspective, both parties should forecast the highest potential burden of proof and then introduce evidence that addresses that burden. This course of action should diminish the negative impact of the appellate process in several ways. First, comprehensive proof should reduce the necessity of remands. Remands, in the context of changing legal standards, occur to protect due process. The protection becomes unnecessary when the parties previously introduced all the necessary proofs. Thus, when the proofs at the initial hearing contain sufficient evidence, an appellate body could avoid time consuming remands and simply apply

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Wage Loss ... Continued from page 5

the new standard. In addition, forecasting a higher burden of proof avoids the arduous task of constructing a record when proofs are stale or perhaps unavailable. For example, when attempting to show job availability, litigants enjoy a significant advantage when they gather contemporaneous proofs as opposed to gathering proofs years later.

When making your forecast, I suggest starting with *Stokes* to construct a standard for wage loss issues. *Stokes* presents the current majority view, and it addresses the common phrase, "wage earning capacity." After examining *Stokes*, I suggest examining the statutes for any additional factors that might create a burden of proof.

Finally, please do not interpret these suggestions as a pronouncement of the law--they are not. All litigants should advocate vigorously for an interpretation of wage loss that best serves their interest. However, advocating for a particular interpretation does not prohibit introduction of evidence that might successfully satisfy a higher burden. Introduction of more comprehensive proofs might curtail remands. And curtailing remands benefits all, with the exception of appellate commissioners. ✂

But Did You Know...

By Martin L. Critchell

Most, if not all, practitioners are familiar with one statute in the workers' compensation act that applies when an employee has a job that accommodates or favors a disability from an injury at work for less than one hundred weeks, MCL 418.301(5)(e). Section 301(5)(e) says that, "If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job for whatever reason, the employee shall receive compensation based upon his or her wage at the original date of injury." But did you know that there is *another* that also applies, MCL 418.401(3)(e).

Section 401(3)(e) says that, "If the employee, after having been employed pursuant to this subsection for less than 100 weeks, loses his or her job through no fault of the employee, the employee shall receive compensation based upon his or her wage at the original date of injury."

Although it is in the chapter of the Workers' Compensation Act concerning occupational disease, § 401(3)(e) is not confined to an employee who has been disabled by an occupational disease. Section 401(3)(e) applies when an employee has the kind of disability that is described by MCL

418.401(1) as § 401(3) states that, "If disability is established pursuant to subsection (1), entitlement to weekly wage loss benefits shall be determined pursuant to this section . . ."

And that kind of disability can be from either an injury or a disease as the first sentence of § 401(1) states that, "As used in this chapter, disability means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury **or** work related disease." (Emphasis added).

The difference between the two statutes is important. The fault of the disabled employee does not matter at all under § 301(5)(e) because of the text **for whatever reason**. But the fault of the disabled employee matters a very great deal under § 401(3)(e). No weekly compensation is available when a disabled employee is "at fault" in losing an accommodation with one hundred weeks.

There is no decision by the Michigan Supreme Court or Michigan Court of Appeals that has considered how either § 301(5)(e) or § 401(5)(e) might take precedence over the other. ✂

Harold Dean Open

The 23rd annual Harold Dean WC Open was held on June 24, 2011 at the Polo Fields Golf Course in Ypsilanti. It was another great day of fun, frivolity, and enjoyment for all who participated.

Although not an official Section event, each year over 100 workers' comp attorneys and other professionals get together to play some golf and honor the memory of Harold Dean.

As usual the event would not be possible without the hard work and dedication of Ray Bohnenstiehl and his staff. Many thanks to Ray and his staff on behalf of all who participated. ✂

Caselaw Update

By Martin L. Critchell

Supreme Court

The Michigan Supreme Court has not released any opinion deciding a workers' compensation case since the beginning of the 2010-2011 term on August 1, 2010. However, the Court has made two statements about compensation law in two orders. In *Ferdon v Sterling Performance, Inc.*, - Mich - ; - NW2d - (2011), the Court denied an application for leave to appeal (5-2) after hearing oral argument that the failure to file one of two trial transcripts with the Workers' Compensation Appellate Commission could be excused and not a basis for the commission to dismiss the appeal. The conclusion from this is that absolutely strict compliance with the filing requirements is necessary as the transcript that had not been filed was only the opening of the record and setting another date for hearing. *Ferdon* (KELLY, Marilyn, J., dissenting) at ____.

In *Harder v Castle Bluff Apartments*, - Mich - ; - NW2d - (2011), the Court denied leave to appeal for review of an award of weekly compensation for total disability under MCL 418.351(1). Importantly, the Court added that the statute about partial disability—MCL 418.361(1)—“applies at all times to partially disabled workers” and *Lofton v AutoZone, Inc.*, 482 Mich 1005; 756 NW2d 85 (2008) explains how *that* statute operates. A conclusion from this is that the amount of weekly compensation does not depend on actual earnings of a disabled employee but on the extent of the disability established by the experts.

Court of Appeals

The Michigan Court of Appeals published two decisions concerning workers' compensation issues. In the case of *Findley v DaimlerChrysler Corp.*, 289 Mich App 483; - NW2d - (2010), the Court of Appeals vacated an order of the Workers' Compensation Appellate Commission because the supporting opinion had not been endorsed by two of the three commissioners seated on the panel. One commissioner endorsed an opinion; a second concurred “in result only” and did not subscribe; and the third dissented. The Michigan Supreme Court will decide the problem after hearing arguments on the application for leave to appeal. *Findley v DaimlerChrysler Corp.*, 488 Mich 1034; 793 NW2d 237 (2011).

The need to join parties in a contested claim for compensation was the question that was decided by the

Court of Appeals in *Bennett v Mackinac Bridge Auth.*, 289 Mich App 616; - NW2d - (2010), lv den - Mich - ; - NW2d - (2011). In the case, Ricky S. Bennett claimed compensation from Mackinac Bridge Authority and American Painting company as the principals of his uninsured employer, Allstate Painting Company, under MCL 418.171(1). The Bridge Authority and American said that Bennett was barred because he had not included them in the prior claim that he had filed and proved against Allstate. The Court of Appeals rejected this and allowed Bennett to proceed against the Bridge Authority and American with the ruling that there was no mandatory joinder of parties' compensation except in isolated situations such as a case involving a vocationally disabled employee under MCL 418.931(1) and an employee with an occupational disease under MCL 418.435. *Bennett* at 633. (“The Legislature intended to allow an injured employee to bring separate actions against his or her [immediate] employer and statutory employer without joining all potentially liable parties as defendants in one single proceeding.”)

The Court of Appeals added that the Bridge Authority and American were not bound by the determinations made in the first claim against Allstate such as that Bennett had been injured or was disabled by that injury. The Bridge Authority and American could contest any fact having not been involved in the case against Allstate. *Bennett* at 636. (“An injured employee may not invoke the doctrine of res judicata offensively against statutory employers in a subsequent proceeding.....”) ✖

