

STATE BAR OF MICHIGAN

Workers' Compensation Section Newsletter

Summer 2012



From the Past Chair Annual Report

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The Workers' Compensation Section of the State Bar of Michigan held its annual meeting at Mission Point Resort on Mackinac Island June 21 through June 23, 2012. We had a record setting attendance and beautiful weather for the events.

This past year has been a very busy one for the section. In June of 2011, our annual meeting was held in Traverse City. At that meeting, it became evident that our legislature was considering changes to the Workers' Disability Compensation Act of the state of Michigan. Immediately following the 2011 annual meeting, the section council began to investigate and consider the proposals being offered to significantly change the law.

Over the next several months, the council members met repeatedly and discussed, drafted, and considered various positions with regard to the proposed changes. Eventually, after discussions among many members of the section and the council, the council drafted and considered a proposal for the section's official position.

[Continued on next page](#)



Workers' Compensation Law Section Council

Teresa L. Martin, Chairperson
Law Offices of Catherine A. Gofrank
1441 West Long Lake Road, Suite 305
Troy, MI 48098
P: (248) 312-7918
F: (855) 832-2458
e-mail: tmartin4@travelers.com

Charles W. Palmer, Vice Chairperson

J. William Housefield, Jr., Secretary

Christopher J. Rabideau, Treasurer

John M. Sims, Ex Officio

Term Expiring 2013

Phillip Frame, Lansing
Andrea Hamm, Detroit
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Matthew R. Conklin, St. Joseph
Timothy J. Esper, Detroit
Ella S. Parker, Grand Rapids

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Dennis P. Flynn, Grand Rapids
Mark Mouhsin Sesi, Mount Clemens
Kevin P. Kales, Royal Oak

Kevin Elsenheimer, Director, Michigan
Workers' Compensation Agency

Lisa Klaeren, Chief Magistrate, Michigan
Workers' Compensation Agency

Jack Wheatley, Michigan Compensation
Appellate Commission

James N. Erhart, Commissioner Liaison

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State Bar of Michigan

Ella S. Parker, 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.

Material for publication should be sent
to the editor at:

Conklin Benham PC
2323 East Paris Ave SE Ste 104
Grand Rapids, MI 49546
eparker@ConklinBenham.com

From the Past Chair

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The council voted on and adopted the proposal, which was prepared and distributed to the various committees of the legislature and other concerned parties. The council sent representatives to the committee hearings in the Senate and the House to present the section's position.

Although the governor signed the new law on December 19, 2011, the council has continued to represent the section's interest with regard to ongoing issues arising from enactment of the law, not the least of which has been a continuing effort to get various parties to accept the new rules regarding subpoenas signed by the attorneys in their cases, a practice long accepted in general civil practice.

We now are investigating whether the section should take a position with regard to the concept of evidence based medicine and its possible application to our practice. We are awaiting a position statement from the Agency before taking any active role at this time.

Despite the time and effort involved in the above endeavors, the council has also continued with its normal yearly activities, all of which have received a very enthusiastic response from our membership.

The section's winter meeting held in December again brought in record attendance. The weeklong annual winter seminar was held in Jamaica this year and was also well attended and most informative, touching on topics near and dear to the hearts of every member. We would like to extend our thanks to Fred Bleakley for his willingness to help organize the winter seminar for the past few years.

The council has also taken an active role, as well as a financial role, in supporting and bringing about the planned Centennial Celebration of the Workers' Disability Compensation Act scheduled for this fall. The celebration will be held on October 18 and 19, 2012, in partnership with Wayne State University Law School and their Department of History. The council also approved the preparation and submission, on May 21, 2012, of an amicus brief in the matter of *Hadden v United States*. This case deals with Medicare's demands for 100 percent repayment of conditional payments where litigated parties agreed that the defendant was only 10 percent liable for the accident and was only paying an estimated 10 percent of the damages. Along with other interested parties, we are urging the United States Supreme Court to address this issue by granting leave in the case.

Teresa Martin has been elected chairperson of the section for the next year. In addition, Dennis Flynn was re-elected as a member of the council, and Mark Sesi and Kevin Kales were elected as new council members.

It has been a most active and interesting time.

Sincerely, *John M. Sims*

From the Chair

By Teresa Martin

I would like to thank all the members for showing their support to our section and attending the annual meeting. We had a very good attendance this year. Mackinac Island is one of the most beautiful spots in our state. The Annual Meeting Committee did an excellent job putting together the largest annual meeting any have seen, and it went off without a hitch. Thank you to Ella Parker, Matt Conklin, and Chris Rabideau for all your hard work and attention to detail.

For those of you who do not know me, I graduated from Cooley Law School in December 1999 (yes, I did take Workers' Compensation—thanks, Steve Pollok!) I became a member of this section at the same time I became a member of the Bar. I quickly learned how fortunate I was to be a member of such a professional, elite group. Jim Cmejrek and my mom, Melody Paige, gave me the opportunity to practice in this area and they both gave me more guidance and knowledge than words could ever express. I have been staff counsel for Travelers since September 2002.

As chairperson, during this upcoming year I encourage our members to attend the various meetings and become aware of the issues our section is facing. We, as a section, need to determine what goals we are



striving to achieve, and how the current climate is affecting our practice and all of our clients.

The council faced many challenges, particularly in this past year. They worked tirelessly with the legislature and amongst themselves, for the purpose of promoting a fair and just administration of the Act. They were faced with the many changes that were made to the Act in December. In the coming year, I strive to promote the fair and just administration of the law of workers' compensation alongside, and in unity with, the extremely qualified officers and members of the council. I welcome all suggestions and comments from the section and anticipate there will be many!

This year also brings the 100th anniversary of Michigan's Workers' Comp Act. The Workers' Compensation Law Section, Wayne State History Department, and LARA are sponsoring events to commemorate the anniversary on October 18 and 19, 2012. I urge all members to attend these events. On behalf of the section, I would like to thank the committee for all of its hard work, especially Denice LeVasseur and Jack Nolish. Please check your emails for updates and the agenda as they become available. ✂

A Word from the Editor

By Ella S. Parker

I do not know about the rest of you, but it sure seems as if I have been on a roller coaster ride for the past year. With all the twists, turns, and changes that have occurred in workers' compensation over the last 12 months, Jack Nolish was right when he said, "Sit down, fasten your seat belt, and hold on tight. It is going to be a bumpy ride." I suspect, based on over 20 years of experience, the twists, turns, and changes will continue in our ever-evolving practice. Some changes occurred at the annual meeting on Mackinac Island, and some occurred before the meeting.

Congratulations to the new council members elected at the annual meeting. Those members include Teresa Martin, who was elected chairperson, and members Kevin Kales and Mark Sesi. Dennis Flynn was re-elected for a second term as a member of the council. Please feel free to contact the new council members with any questions or concerns you may have. You are also free to contact any other members of the council as well. As Teresa indicated, this is *your* section, and we welcome your suggestions and concerns.

The section inducted two members into the Workers' Compensation Hall of Fame at the annual meeting. Those members were Thomas McNally and Gerald Richardson. Both were able to attend the induction ceremony on Thursday, June 21, 2012, along with members of their families. Both appeared very pleased and proud of the fact that the section appreciated and acknowledged their many years of hard work and contributions. Congratulations once again, Tom and Gerry, for your induction into the Hall of Fame. Section members should start thinking of candidates for next year's Hall of Fame Induction.

A wonderful highlight of the Friday evening activities on the Island was an informal "jam" session by section members Duncan McMillian and Roy Portenga and Roy's wife, Britta. I love hearing Duncan play the banjo. Roy and Britta's accompaniment with a guitar and fiddle brought back many good memories of visits with relatives in Virginia and family reunions. I heard a lot of positive feedback on their performance that night and their practice session on the lawn of Mission Point that afternoon. Perhaps we should invite both Duncan and Roy to be presenters at next year's meeting so they can provide the entertainment once again. Something to consider....

With the election of the new members, some terms of members who served for many years ended. John Sims, John Charters, and Denice LeVasseur have contributed a lot of time and effort over the years, and their involvement warrants recognition. So, at this time, I would like to thank them for their many years of dedicated service.

There were other changes as well, before the annual meeting. In addition to Dennis Morrill retiring, Larry Burke retired from Travelers Insurance Company as house counsel after 30 years of service. Larry was always truly a gentleman and a person of his word. He is now free to continue his personal hobbies, including bird watching on a full-time basis. As a going away present, some unnamed individual (Steve) generously purchased a multi-level birdhouse and invited attorneys in Kalamazoo and Grand Rapids to sign with their well wishes. Michael Podein contributed this poem to Larry's birdhouse:



Photo courtesy of LeAnn Latchaw

Larry Burke with his new birdhouse

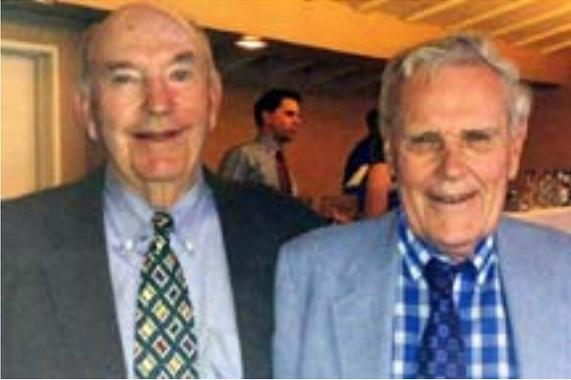
There once was a man named Burke,
His work duties, he never did shirk.
The birding was heavy,
While he drove in his Chevy,
All the while, he was never a jerk!

By Michael Podein

Finally, a big thanks to Matt Conklin's parents for all their help with the meeting handouts and checking in people while Matt and I were at the council meeting.

Scenes from the Section's Annual Meeting

Photos courtesy of Kathryn Haves



*Tom McNally and Don Ducey,
with Matt Conklin in the background*



Steve Pollok and Gerry Richardson sharing a laugh



Gerry Richardson and Tom McNally catching up



Gerry Richardson and Ella Parker

The following is a list of phone and email contacts for the secretaries assigned to each hearing site:

HEARING SITE	SUPPORT STAFF	EMAIL	PHONE
Detroit	Robin Hines	hinesr1@michigan.gov	313.456.3675
Detroit	Joyce Hurley	hurleyj1@michigan.gov	313.456.3695
Flint	Teresa Gagnon	gagnont@michigan.gov	810.760.2618
Grand Rapids	Beth Chase	chaseb@michigan.gov	616.447.2680
Kalamazoo	Molly Glamzi	glamzim@michigan.gov	269.544.4440
Lansing	Kris Fry	fryk@michigan.gov	517.636.4718
Pontiac	Denise Collins	collinsd9@michigan.gov	248.334.2497
Saginaw	Nichole Schoettke	schoettken@michigan.gov	989.758.1768
Traverse City	Kris Fry	fryk@michigan.gov	517.636.4718
UP/Gaylord	Anne Williams*	williamsa@michigan.gov	313.456.3657

*Supervisor

Notes from the Director

By Kevin Elsenheimer, Director, WCA

I appreciated the opportunity to provide the section with a brief agency update at the summer meeting on Mackinac Island. This article will focus on some new items.

First, we have issued a revised Form 701, which is now available on our website along with revised instructions.

http://www.michigan.gov/documents/wca/wca_WC-701_filing_251189_7.pdf (The form can also be found on the following pages.)

There are new sections to the Form 701 to facilitate calculation of adjustments to weekly wage loss benefits based on Post Injury Wage Earning Capacity (PIWEC) and to facilitate calculations of the revised reductions for old-age Social Security benefits. Thanks to the section for its input into the revision of this form.

Next, our office has made some internal changes on how we deal with employers with large-deductible policies. These policies are becoming more popular in the marketplace, which presents some issues. We have noticed that insurers are not always receiving notice from the employer's TPAs, or the employers themselves, of an injury that falls within a company's deductible. Unreported injuries could impact an employer's experience rating and lead to inaccurate assessments of risk by insurers. Since the agency's longstanding position is that the carrier of record has "day one dollar one" coverage no matter what the deductible might be in a policy, the carriers are at risk of being found liable for a claim that they knew nothing about. This affects everybody's insurance costs.

The growth in large deductible policies has the potential to result in a de facto self-insurance program without the strict regulations imposed by statute and overseen by this office. To address the matter, our primary contact for office communications regarding an injury will be the carrier of record as opposed to the TPA. The carrier will be responsible for forwarding communications to the TPA or the employer, as it deems appropriate.

Lastly, the director's office works to accommodate parties wishing to waive the 15-day appeal period following approval of a redemption. When we grant a waiver, we are not only accepting the parties' agreement not to seek review, we are likewise giving up our own right to review the redemption.

Unfortunately, we have seen some cases where payments are taking too long. The members of my team able to grant waivers on my behalf are trained to require, as a condition of the waiver, that parties act in good faith to pay amounts due under the redemption within 15 days unless agreed to by the injured worker. To address this, we will be changing our "stamps" on the waivers to include this as a formal condition of our waiver.

As a final note, I would like to publicly thank *Dennis Morrill* for his decades of service to the state and announce that *Mark Long*, formerly of MAHS, has taken over the Funds Administrator position after Dennis's retirement.



Invite someone you know to join the fun.

Invite someone to join the section.

Section membership forms can be found at <http://www.michbar.org/sections>

NOTICE OF COMPENSATION PAYMENTS
 Michigan Department of Licensing and Regulatory Affairs
 Workers' Compensation Agency
 P.O. Box 30016, Lansing, MI 48909

FILING # _____

PART A

1. Social Security Number	2. Date of Injury	3. Employee Name (Last, First, MI)		4. Date of Birth	5. Date of Death
6. Employee Street Address			7. City	8. State	9. ZIP Code
10. Employer Name				11. Federal ID Number	12. Injury Location Code N/A
13. Employer Street Address			14. City	15. State	16. ZIP Code
17. Carrier or Self-Insured Name				18. NAIC or Self-Insured Number	
19. Self-Insurer's Service Company Name				20. Service Company ID Number	
21. ZIP Code of Issuing Office	22. Carrier or Self-Insured Claim Number	23. Date Carrier Received Notice of Injury		24. Date First Payment Made	

PART B

25. Nature of Injury		26. Part of Body	
27. Average Weekly Wage \$ _____	28. Discontinued Fringes \$ _____	29. Second Employer A.W.W. \$ _____	30. Second Employer Discontinued Fringes \$ _____
31. Tax Filing Status on Date of Injury	32. Last Day Worked	33. Number of Days in Work Week	34. Number of Dependents

PART C

35. Reason for Filing	36. Weekly Compensation Base Rate \$ _____		
37. Weekly Adjustments to Base Rate			
_____ \$ _____	_____ \$ _____	_____ \$ _____	_____ \$ _____
_____ \$ _____	_____ \$ _____	_____ \$ _____	_____ \$ _____
38. Weekly Amount Being Reimbursed by a Fund (Not reported on Line 37)			
_____ \$ _____	_____ \$ _____	_____ \$ _____	_____ \$ _____

PART D

BASIS OF PAYMENT	BENEFIT TYPE	SPECIAL PAYMENT	TOTAL WEEKLY RATE	FROM	THROUGH	TOTAL AMOUNT PAID	YEAR PAID	TERMINATION REASON

IF BASIS OF PAYMENT IS OTHER THAN "A" (VOLUNTARY PAYMENT) OR LINE 37 IS EQUAL TO "J" OR "K," ENTER ORDER # _____

IF BENEFIT TYPE IS "C" (SPECIFIC LOSS), ENTER NUMBER OF WEEKS _____ AND EFFECTIVE DATE OF LOSS _____

IF ANY FILING CODES ON THIS FORM REPRESENT "OTHER," PLEASE BE SPECIFIC _____

Making a false or fraudulent statement for the purpose of obtaining or denying benefits can result in criminal or civil prosecution, or both, and denial of benefits.

THIS IS TO CERTIFY THAT A COPY OF THIS FORM HAS BEEN MAILED OR GIVEN TO THE EMPLOYEE			
39. Authorized signature	40. Person Handling Claim (Please Print)	41. Telephone Number	42. Date

NOTICE TO EMPLOYEE: IF ANY OF THE ABOVE INFORMATION IS INCORRECT, PLEASE CONTACT THE INDIVIDUAL NAMED IN LINE 40.

PART E – COORDINATION OF BENEFITS

	PENSION	WAGE CONTINUATION	DISABILITY INSURANCE	SELF INSURANCE	OTHER
A. WEEKLY BENEFIT AMOUNT					
B. 80% AFTER-TAX AMOUNT OF (A)					
	x 1.25	x 1.25	x 1.25	x 1.25	x 1.25
C. 100% AFTER-TAX AMOUNT					
D. FICA TAX ¹					
E. STATE INCOME TAX ¹					
F. % EMPLOYER CONTRIBUTION					
G. INCOME TO BE COORDINATED ²					

¹ Does not apply in all cases. If applicable, include the value of FICA and state income tax using the figures provided in the back of the agency's rate tables corresponding to the year of injury.

² Line G = (Line C + D + E) x Line F. (This figure should appear in Part C, Line 37, with the appropriate adjustment code)

SOCIAL SECURITY This section applies to **old age retirement** benefits only. (Enter net benefit with code "B" in Part C, Line 37)

A. MONTHLY SOCIAL SECURITY OLD AGE RETIREMENT AMOUNT	
B. WEEKLY SOCIAL SECURITY OLD AGE RETIREMENT AMOUNT (Line A divided by 4.33)	
C. 50% OF LINE B	
D. 50% OF BASE RATE (Found in Box 36)	
E. IS DATE OF INJURY ON OR AFTER 12/19/11?	<input type="checkbox"/> YES <input type="checkbox"/> NO
IF NO – COORDINATE AMOUNT IN LINE C	
IF YES – WERE SOCIAL SECURITY OLD AGE RETIREMENT BENEFITS BEING PAID ON THE DATE OF INJURY?	<input type="checkbox"/> YES <input type="checkbox"/> NO
IF NO – COORDINATE AMOUNT IN LINE C	
IF YES – COORDINATE THE LOWEST AMOUNT FOUND IN LINE C OR D	

UNEMPLOYMENT COMPENSATION

A. NUMBER OF WEEKS AWARDED	
B. BEGINNING DATE OF UNEMPLOYMENT COMPENSATION	
C. SCHEDULED EXPIRATION DATE	
D. TOTAL WEEKLY UNEMPLOYMENT COMPENSATION BENEFITS (Enter with code "D" in Part C, Line 37)	

PART F – RATE ADJUSTMENT³ FOR POST INJURY WAGE EARNING CAPACITY (PIWEC)

(MCL 418.301(8) & 401(6))

A. AVERAGE WEEKLY WAGE (On front, Line 27)	
B. 80% AFTER-TAX AMOUNT OF LINE A (See calc program or rate charts)	
C. 100% AFTER-TAX AMOUNT (Line B multiplied by 1.25)	
D. GROSS WEEKLY POST INJURY WAGE EARNING CAPACITY (PIWEC) AMOUNT	
E. DIFFERENCE BETWEEN 100% AFTER-TAX AMOUNT AND PIWEC (Line C minus Line D) If the calculation in line E is less than or equal to \$0, report base rate as adjustment amount in G.	
F. 80% of Line E (Line E multiplied by .8) ³	
G. AMOUNT OF ADJUSTMENT FOR PIWEC (Base rate from front, Line 36, minus Line F) This figure should appear on front, Part C, Line 37, with appropriate adjustment code R. If the adjustment calculation shows an amount that is less than or equal to \$0, no adjustment can be applied.	

³ For injury dates on or after 12/19/11, the weekly benefit rate payable is 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the employee's wage earning capacity after the personal injury but not more than the maximum weekly rate determined under section 355.

LARA 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, R408.31(6a-d) Completion: Mandatory Penalty: Workers' Disability Compensation Act, 418.631; 418.801
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Michigan Compensation Appellate Commission

By Jack Wheatley

The Commission was created by Governor Snyder in the late spring of 2011 by merging the former Workers' Compensation Appellate Commission and the Michigan Employment Security Commission Board of Review. The new Commission assumed its duties and took over the responsibilities of the two prior entities on August 1, 2011.

There are nine members of the new commission: myself, Greg Przybylo, Gary Goolsby, George Wyatt, L'Mell Smith, Danielle Brown, Patricia Halm, Lester Owczarski, and Neil Young. On the new Commission, none of the members are designated "employer" or "employee" representative, as they were in the past.

When the Commission began, there were 4,500 unemployment insurance appeals pending before the Commission with an average age of 145 days. Put in perspective, the federal standard is 40 days. During orientation, Mike Zimmer, chief deputy of the Department of Licensing and Regulation, impressed upon the new commissioners that Michigan was an at-risk state. That is, we were in danger of having the federal government take over direction of the entire Michigan unemployment insurance program. That is something we did not want to happen in our state.

As of June 1, 2012, the Commission has reduced those 4,500 cases to 2,300 cases with an average age of 73 days. The corrective plan that Michigan filed with the U.S. Department of Energy set a target date of 90 days by the end of 2012. Thus, we have met and exceeded our corrective plan

a full eight months ahead of our target date. Few people felt our proposed plan was feasible, but we proved them wrong.

In regards to workers' compensation cases, our caseload has remained stable for the past several years. We have approximately 170 cases pending on appeal at any one time, and we are averaging between 7 and 15 appeals per month. The Commission has been able to reduce the number of cases pending just about every month.

The Governor's Executive Order creating MCAC provides for three panels to decide unemployment and workers' compensation cases. Because of the backlog in unemployment cases and the more complicated nature of workers' compensation appeals, currently there are two panels hearing workers' compensation appeals.

The first panel is composed of me, George Wyatt, and Gary Goolsby. The second panel is composed of Greg Przybylo, L'Mell Smith, and Lester Owczarski. All of us have prior experience in handling workers' compensation cases. At this point, a third panel is not scheduled to handle workers' compensation appeals until we get closer to our federal standard of 40 days for deciding unemployment appeals.

We have not lost our focus on our responsibility to decide workers' compensation appeals on a timely basis. Be assured also that this Commission is dedicated to following the edicts of the Michigan courts and the Workers' Compensation Act in performing our duties pursuant to the statute and the Executive Order issued by the governor. ✖

Board of Magistrates Update

By Lisa Klaeren, Chief Magistrate

Since the annual meeting in June 2011, there have not been any substantial changes to the personnel at the Board of Magistrates. The last appointment was in August 2011, when Governor Snyder appointed Robert Timmons to replace former Chief Magistrate G. Jay Quist when he left to become an administrative law administrator with MAHS.

However, in June 2012, Magistrate Joy Turner accepted a position with the Social Security Administration. Her former seat is presently open. It is unknown at this time whether the governor will appoint someone to fill Magistrate Turner's remaining term, which is a limited term scheduled to expire in January 2013.

In January 2013, there are nine terms scheduled to expire (including Magistrate Turner's). This upcoming round of appointments will be the first set of appointments under the new statute, which eliminated term limits and removed any requirement of prior workers' compensation experience. Before the changes to the Act in December 2011, a candidate was required

Continued on next page

Board of Magistrates Update

Continued from page 9

to pass a test regarding his workers' compensation knowledge or, alternatively, have the requisite experience practicing workers' compensation law. Those requirements have been eliminated.

Applications for appointment will be accepted through Governor Snyder's website. Please look in the section regarding boards and commissions if you are interested in being considered.

I am pleased to report there has been steady measurable improvement at the Board over the last 18 months. The improvements are in closing the trial record within 30 days of commencing trial, issuing the decision within the statutorily required 42 days, and the average days for a decision to be issued.

The Board is currently closing the trial record within 30 days 77 percent of the time, compared to 68 percent in 2010. Moreover, 97 percent of decisions thus far in 2012 were issued within the statutorily required 42 days, an increase from 54 percent in 2010. Finally, the average days for a magistrate to issue a decision after trial is now 21 days, down from 84.3 days. I do not expect these numbers to decrease much further, but I do hope to maintain this average in the future.

The Board has continued to focus on the overall age of the cases across all areas, including the age at trial, redemption, and after placement into an "await" category. We anticipate that the magistrates will continue to require attorneys to work towards earlier resolution in all of these categories in order to reduce the average time any given case is pending at the Agency and before the Board. In the past year, the magistrates have reduced the number of cases older than 12 months, and they will continue to work, with everyone's help, to reduce these numbers further. ✖

But Did You Know...

By Martin L. Critchell

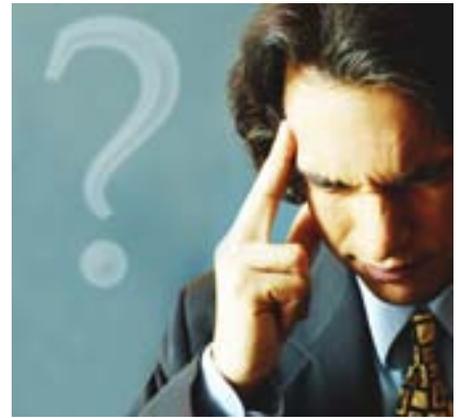
Most lawyers remember the case of *Marbury v Madison*¹ for ruling that a court can decide whether a statute is unconstitutional. Many lawyers remember that Chief Justice John Marshall was the author of the opinion. But did you know . . . Chief Justice Marshall was the one who was responsible for the events leading to the lawsuit?

After Thomas Jefferson defeated John Adams in the November 1800 election, Congress created 45 justice of the peace positions for the District of Columbia to reward those who had been loyal to Adams. Those loyal Adams followers were certain to be dismissed from their Department of State and Department of War positions just as soon as Jefferson was inaugurated. When the Senate confirmed the appointees by Adams, it fell to the secretary of state to sign and deliver the 45 commissions. That secretary of state was John Marshall.

Marshall devoted the penultimate and last day before the inauguration of Jefferson to signing and delivering these commissions throughout Washington. He was in his office signing the last 17 commissions the night before the inauguration when representatives of Jefferson appeared and told him to stop and leave with his personal effects. He did, leaving behind the signed commission of William Marbury.

Jefferson was inaugurated and directed his secretary of state, James Madison, not to deliver the commission to Marbury. And so, Marbury sued for delivery. There would have been no lawsuit against Madison and so, no *Marbury v Madison*, had John Marshall simply gathered up the commission as he left his office and delivered it before Jefferson was sworn in the next day.

And there is another fact overshadowed by the ruling in the case of *Marbury v Madison*. John Marshall was chief justice of the Supreme Court when he was also secretary of state and responsible for signing and delivering the commission to Marbury. Chief Justice Oliver Ellsworth had resigned from the Court the month before the November 1800 election and, when Adams was defeated, he and the Senate that was dominated by Federalists did two things. One was to nominate and confirm Marshall as chief justice. The other was to reduce the Court to five justices to prevent Jefferson from appointing a replacement of an elderly justice who was likely to die during the next four years. So, John Marshall was both the secretary of state who failed to deliver the commission and at the same time was the chief justice who ultimately wrote the memorable decision in *Marbury v Madison*. ✖



Endnote

1 5 US (1 Cranch) 137; 2 L Ed 60 (1803).

W.C. Harold Dean Open

Murray Feldman

This year's W.C. Harold Dean Open was held on June 29, 2012. All of the more than 110 golfers and guests had a wonderful day. Spotted in the crowd were George Chipman (formerly of Second Injury Fund, recently retired), recent Hall of Fame inductee Tom McNally, and Social Security Judge Gerry Friedman (who was celebrating a special birthday). Thanks to all who participated and our sponsors. As always, all credit goes to Ray Bohnenstiel whose hard work and dedication keep the spirit of Harold Dean and the tournament alive. Be sure to join us next year as we celebrate the 25th anniversary of this Workers' Comp. tradition. ✂



North American Labor History Conference Oct. 18-19, 2012

Workers' Compensation Agency celebrates history of Michigan's diverse workforce

By Jack Nolish, Deputy Director Michigan Workers' Compensation Agency

The Workers' Compensation Section of the State Bar of Michigan and the Michigan Workers' Compensation Agency (WCA) invite the public to join them in celebrating the history of Michigan's diverse workforce at the 2012 North American Labor History Conference. The Conference runs from Thursday, Oct. 18, through Friday, Oct. 19, at the Wayne State University Law School Auditorium, located at 471 West Palmer Street in Detroit.

The Workers' Compensation Section of the State Bar of Michigan is funding and partnering with the Wayne State University History Department and the Wayne State University Law School.

The two-day event opens with a screening and panel discussion of the film *1913 Massacre*, by award-winning directors Ken Ross and Louis V. Galdieri. The second day of the conference commemorates the 100th anniversary of Michigan's Workers' Compensation Act by presenting a daylong symposium discussing the Act's past, present, and future.

Additionally, the conference features a distinguished panel of speakers and presenters including Lt. Gov. Brian Calley; WCA Director Kevin Elsenheimer; Michigan Technological Institute Professor Larry Lankton; former agency Director Ed Welch; Thomas Hoeg, president and CEO of Agency Business Solutions, LLC (Affiliated with Amerisure); Rutgers University Professor John Burton; H. Allan Hunt of the Upjohn Institute; and IAIABC¹ Executive Director Jennifer Wolf Horejsh and Executive Director Emeritus Gregory Krohm.

The State Bar of Michigan's events are free of charge. Participation in the NALHC luncheon requires registration and prepayment through the event website <http://specialevents.wayne.edu/nalhc-2012>

For more information on the 100th Anniversary Celebration and the 2012 North American Labor History Conference, contact Rosa Bava at (248) 822-6447 or Jack Nolish at (313) 456-3650. Please reference the event agenda on the next page for specific details. The full agenda includes other parts of the conference, which may require registration and have fees associated with them. The full agenda can be found at the following website: http://nalhc.wayne.edu/NALHC2012_03-july.pdf ✂

Wayne State History Department

THE NORTH AMERICAN LABOR HISTORY CONFERENCE
October 18 & 19, 2012

Workers' compensation laws spread across the U.S. in the period between 1910 and 1913, following the coalescence of the rise of labor unions, increases in tort liability, and the shift from the paternalistic approach to workers to the acceptance of social responsibility for disadvantaged individuals. Considered to be the first social legislation, it was followed by unemployment compensation and other employee benefits. It was a system, however, that came about with the shift from agricultural to industrial employment. There is another great shift happening with the arrival of the Millennial Generation. The enormous impact of that change will be felt in the practice of workers' compensation law.

<p>Thursday 10/18 7:30–9 pm</p>	<p>"1913 Massacre" Film Showing Wayne State Law School Auditorium</p> <p>Panel discussion with:</p> <ul style="list-style-type: none"> ● film makers Louis Galdieri and Ken Ross ● Prof. Larry Lankton <p>An event sponsored by the State Bar of Michigan open to all conference participants.</p>	<p>On December 24, 1913, the striking copper miners of Calumet were gathered with their wives and children for a holiday party at the Italian Hall. After the festivities had begun, someone—to this day, no one knows who—yelled "Fire!"</p> <p>"1913 Massacre" follows singer/songwriter Arlo Guthrie to the town of Calumet, a once-thriving mining town on Michigan's Upper Peninsula still haunted by the tragic events that inspired Woody Guthrie's ballad, "1913 Massacre."</p>
<p>Friday 10/19 9–10:15</p>	<p>SB Morning Gathering (Coffee service begins at 8:30) Wayne State Law School Auditorium</p> <p><i>Teresa Martin</i>, WC Section Chair</p> <p><i>Lt. Governor Brian Calley & Kevin Eisenheimer</i>, WCA Director</p> <p><i>Morgan E. Dowling, Esq.</i> Wage Workers' Remedy</p> <p><i>Prof. Larry Lankton</i> Author & Historian</p>	<p>Commemoration of the 100th Anniversary</p> <ul style="list-style-type: none"> ● Event Welcome ● The social context of the time ● View above the bridge & below the ground
<p>10:15–10:30</p>	<p>Break</p>	
<p>10:30–12:00</p>	<p><i>Thomas E. Hoeg</i> President and CEO, Agency Business Solutions, LLC An Affiliate of Amerisure Mutual Holdings, Inc. Business/Insurance perspective</p> <p><i>Edward Welch</i> Dean of Michigan Workers' Compensation What might have been</p> <p><i>Jennifer Wolfe</i> IAIABC Executive Director Millennials and the next generation of workers' compensation</p>	<ul style="list-style-type: none"> ● Multi-focus discussion of the 100 years of workers' compensation—looking back; looking ahead ● Discussion of the coming demographic changes in the workplace and its impact on WC as we know it. "From Punch Press to Knowledge Worker"
<p>12:00–1:20</p>	<p>Joint SBM/WSU Luncheon at McGregor (interested persons must register & pre-pay through the NALHC website) or lunch on own</p>	<p>Conference Keynote Speaker <i>Baldemar Vazquez</i>; Farm Labor Organizing Committee</p>
<p>1:30–3:30</p>	<p>State Bar Afternoon Session WSU Law School Auditorium</p> <p><i>Professor John Burton</i>, Rutgers University and <i>Gregory Krohm</i>, IAIABC Executive Director Emeritus</p> <p>Moderator: <i>Dr. H. Allan Hunt</i>, Upjohn Institute</p>	<p>Counterpoint argument from two workers' compensation thought-leaders. These leaders will debate the question of whether or not there has been erosion of workers' compensation protections today. <i>Are injured workers getting shortchanged by today's benefit structures? Do employers bear an unrealistic financial burden by the complicated and heterogeneous administrative systems across the United States?</i></p> <p>Moderator will provide Michigan perspective.</p>

These presentations are made possible by the generous support of the Workers' Compensation Section of the State Bar of Michigan working in cooperation with the History Department of Wayne State University, Wayne State University Law School, and The Workers' Compensation Agency.

Upcoming Events

Date	Event	Contact Person	Contact Information
09/19–09/21/12	State Bar of Michigan Annual Meeting DeVos Place Grand Rapids, MI		http://www.michbar.org/news/releases/archives12/am/registration.cfm
10/04/12	RABA Golf Outing Kalamazoo, MI	Kevin Anderson	kevlaw51@yahoo.com or (269) 926-6135
10/18–10/19/12	National Ass'n Labor Historical Conference	Rosa Bava Jack Nolish	rosa.bava@thehartford.com or (248) 822-6447 Nolishj@Michigan.gov or (313) 456-3650
12/07/12	Winter Section Meeting	To be determined	To be determined

Caselaw Update

Supreme Court

The Michigan Supreme Court did not decide a case involving the Workers' Compensation Act since the last newsletter other than denying leave to appeal. There is no case on the Court's calendar involving the Workers' Compensation Act that is to be decided by the end of the 2011-2012 term.

Court of Appeals

The Michigan Court of Appeals did not publish an opinion specifically involving the Workers' Compensation Act since the last newsletter. However, the decision in the case of *Bronson Methodist Hosp v Auto-Owners Ins Co*¹ involving a claim for the payment of the cost of medical care under the No-fault Act may affect claims for the payment of the cost of medical care under the Workers' Compensation Act. An auto no-fault insurer is responsible for the cost of medical care that is *reasonable*, just as an employer or compensation insurer under MCL 418.315(1), and there is a ceiling or maximum allowable charge just as under § 315(2).

The Court of Appeals ruled in *Bronson Methodist Hosp*² that “[no-fault insurers] are permitted to consider the cost to providers of providing treatment and not merely the cost of treatment as billed by the provider to the injured person when evaluating the reasonableness of the charges [that have been] submitted for payment.” (Emphasis by the Court.) This may be done by comparing the charge to the charge by other providers of the same or similar care *or* comparing the provider's charge to the wholesale cost of medical device or equipment. The Court of Appeals said: “[Bronson Methodist] is free to argue that its charges are in line with those of similar providers for the surgical implant products at issue here and [Auto-Owners] may respond by asserting that [the] markup over the average wholesale cost of those products renders the charges excessive.”³

Importantly, the Court of Appeals said that neither the customary charge nor the particular charge was reasonable per se. The Court of Appeals said that: “...although §3157 limits what can be charged, nowhere in that section does the Legislature indicate that a “customary” charge is necessarily a “reasonable” charge that must be reimbursed in full...”⁴ “[W]e rejected the provider's claim that [auto no-fault] insurers must pay all reasonable necessary medical expenses incurred for accidental bodily injuries as long as the charges did not exceed the amount the provider customarily charged for comparable services to patients *without* insurance.”⁵ (Emphasis by the Court.)

Michigan Compensation Appellate Commission

The Michigan Compensation Appellate Commission decided several cases since the last newsletter expanding on what resources are and are not available when considering a claim of disability under *Stokes v Chrysler, LLC*.⁶ In the case of *Peterson v Consumers Energy Co (After Remand)*,⁷ the Commission said that a physician was not a resource for deciding disability under *Stokes*. The Commission said that, “The doctor may restrict [Kim A. Peterson] from any number of activities. Then [Peterson] must show those restrictions prohibit him from earning wages in particular jobs suitable to his qualifications and training. [Peterson] may accomplish *this* using a vocational expert or through job search efforts. * * * a medical doctor cannot in most instances provide an expert opinion [about] the translation of medical restrictions into vocational outcomes.”⁸ (Emphasis added.)

In the case of *Bowden v Gen Motors Corp*,⁹ the Commission considered the association between a disability from an injury sustained at work and the loss of wages. John R.

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Case Law Update

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Bowden was convicted of impaired driving, and his driver's license was suspended. He said that this was associated with his disability from an injury at General Motors because his impairment was a result of the medicine that he took for the injury.¹⁰ But the commission said that the loss of the driver's license was from Bowden's own decision to drive while under the influence of the pain medicine, a choice that broke any association between the disability from the injury at work and wage loss: "[John R. Bowden] claimed that his pain medication for the work injury caused [his] DUI conviction. This does not constitute a causal connection to work. [Bowden] independently operated a motor vehicle while under the influence. That choice severed any work relationship."¹¹

The case is noteworthy for the absence of any discussion of MCL 418.361(1) that bars compensation when an employee disabled by an injury sustained at work cannot obtain work because of the commission of a crime. Bowden had been convicted and by all accounts, the inability to obtain work was the result of having no valid license. Section 361(1) prohibits compensation and does not contemplate why the crime occurred.

The commission decided a case involving the coordination of compensation with the income received by an employee under a disability-based pension plan. *Arbuckle v Gen Motors, LLC*.¹² There, the collective bargaining agent of Clifton M. Arbuckle, the UAW, and his employer, GM, rescinded the agreement that compensation for disability from an injury at work would not be coordinated with the income from a pension plan that was paid for "total and permanent" disability as described the plan.¹³ The rescission of the agreement occurred after Arbuckle had resigned and was receiving compensation and disability pension benefits.¹⁴ When GM began coordinating the compensation and disability pension, Arbuckle sued.

The commission ruled that coordination was proper because of the decision by the Court of Appeals in *Murphy v City of Pontiac*¹⁵ that, "changes in a pension plan as a result of collective bargaining constitute [the] renewal of the plan within the meaning of [MCL 418.354(14)]."¹⁶ And the commission said that coordination was proper even without *Murphy* for "if the later amendments [to the pension plan] did not bind [Arbuckle] because the UAW lacked the authority to bargain for [him], then the amendments also would not protect [him.]" * * * When the agreement that [Arbuckle] actually ratified expired, the prohibition against coordination also expired.¹⁷ ✕

Endnotes

- 1 295 Mich App 431; - NW2d – (2012).
- 2 *Id* at 450-451.
- 3 *Id.* at 450.
- 4 *Id.* at 447.
- 5 *Id.* at 446-447.
- 6 481 Mich 266; 750 NW2d 129 (2008).
- 7 2012 Mich ACO 31.
- 8 *Id.* at 6.
- 9 2012 Mich ACO 25.
- 10 *Id.* at 7.
- 11 *Id.*
- 12 2012 Mich ACO 34.
- 13 *Id.* at 6.
- 14 *Id* at 4, 6.
- 15 221 Mich App 639; 561 NW2d 882 (1997).
- 16 *Id.* at 643.
- 17 2012 Mich ACO 34 at 6.

