

STATE BAR OF MICHIGAN

# Workers' Compensation Section Newsletter

Summer 2013



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## From the Past Chair

By Teresa Martin

The Workers' Compensation Section of the State Bar of Michigan held its annual meeting at Boyne Highlands June 21-22, 2013. The meeting was informative and included social events as well as the induction of Michael Flynn into the Workers Compensation Hall of Fame. Ella Parker, with the help of Chris Rabideau and Matt Conklin, worked hard to organize this meeting. As always, Ella did a spectacular job.

This past year certainly was not as busy as the previous, as the Legislature stayed relatively quiet in the Workers' Compensation arena. One event that the Section sponsored that was particularly noteworthy was the 100<sup>th</sup> Commemoration of the Workers' Compensation Act. This was a two-day event that took place at Wayne State University on October 18 and 19, 2012. The Workers' Compensation Agency (WCA) spearheaded the event. Deputy Director Jack Nolish spent a great amount of time organizing the Commemoration, with the help of Rosa Bava. Rosa graciously volunteered to help on behalf of the Section. For those of us who attended some or all of the events, and on behalf of the Section, I would like to thank Jack and Rosa for a job well done!

We also held our annual Winter Meeting at the Inn at St. John's in Plymouth. This was a well-attended event by the Section. Council members Andrea Hamm and Phillip Frame organized the Meeting. Evidence Based Medicine was the topic of discussion at this meeting, as the WCA has expressed their "interest" in adopting this approach in Michigan, although nothing formal has been introduced at this point. As was the case last summer, the Section awaits a formal position statement from the Agency before taking any active role.

As I stated at the Summer meeting in June, I believe that most of the Section is not quite aware of how much the Council does on behalf of the Section. It really is a commitment of time and energy and all the members are very active in attending the council meetings and working on behalf of the Section in areas that concern us all. I was not aware of the time commitment before last June. I would personally like to take this opportunity to express my gratitude to these attorneys and urge the Section to thank them for their hard work on their behalf when they get the chance!

Continued on next page

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This newsletter is published by the Workers' Compensation Section, 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.

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**From the Past Chair** Continued from page 1

Congratulations to Chuck Palmer for being elected Chairperson of the Section for the coming year. Also, congratulations to the following for their elections: J. William Housefield, Jr., Vice-Chairperson; Christopher J. Rabideau, Secretary; and Ella S. Parker, Treasurer. Philip I. Frame, Andrea Lynne Hamm, and Rosa Bava were nominated by the committee and elected for terms expiring in 2016. Attorney John Combs was elected to fill the balance of Ella S. Parker's term, which expires in June 2014. ✕

## From the Chair

Who is Chuck Palmer and what is he going to do for us?



Charles W. Palmer

On June 21, I was honored to be elected Chairperson of the Workers' Compensation Section. I would like to introduce myself to the members of the section and let you know something about what I hope to accomplish in the next year.

I started my career working as a staff attorney for Wayne County Neighborhood Legal Services in Highland Park from 1978-1981. During that time, I was also president of the Organized Workers of Legal Services, Local #1, the attorneys' union. As the president, I negotiated a new contract for our members. Unfortunately, I did not include a super seniority clause for union officers and, so, I was laid off in December 1981 due to budget cuts.

I was fortunate to have a friend doing labor law in Taylor for the Steelworkers' Union and, so, in 1982, I started doing workers' compensation for the firm. I wince when I remember the rookie mistakes I made as a new lawyer in this field. However, I also remember the collegiality and integrity of most of my opposing counsel. That aspect of our practice stands out as the most important asset of practicing in this area of law and gives me great pleasure. For the most part, we are honest with each other, respect each other's advocacy, and are willing to accommodate each other when needed. Our ability to get along and still advocate zealously for our clients is a treasured hallmark of our section.

I intend to continue that tradition in my term as your Chairperson. Although many of the defense bar know me as a zealous and sometimes maddening advocate for injured workers, I have always tried to be honest in my dealings with other counsel and willing to accommodate reasonable requests. I promise to work together with all of you and the rest of the Council in representing ALL of our members, not just the plaintiffs' bar. I am particularly grateful that Bill Housefield will be the Vice-Chairperson this year, as Bill is a much more precise and organized person than myself, and I am sure he will help keep me on task and help me in the year ahead.

We have a great Council, and they spend a lot of time trying to do what needs to be done to improve our practice. We take our responsibility to serve you seriously and we welcome your input and your suggestions. Do not be afraid to bring

Continued on next page

From the Chair Continued from page 2

up any issues that confront you in your practice. You would be surprised how often both sides of the bar can agree and work together to advocate for changes in the Workers' Compensation Agency.

This summer, I have three things on my agenda to consider. First, I want to see if we can resolve the problem of medical provider compliance with attorney-signed subpoenas. The director of the Agency has offered to assist us in trying to solve the problem.

Second, I would like to reach a consensus on evidence-based medicine with the Agency and the section, if possible. We have been informed that a rule implementing evidence-based medicine will probably be proposed in the fall. We did not have unanimity when the Director first proposed the idea, but a surprising amount of consensus was reached in the attorneys who served on the Director's Advisory Committee. I would like to be ready to address the issues when the rule is proposed, and seek whatever consensus we can reach on the Council when it happens. If a rule is proposed this fall, I am sure we will have something substantive to present to everyone at our winter meeting in December.

Third, I would like to increase our attendance at the Summer meetings. I would like to consider moving the meeting from a Thursday-Friday schedule to a Friday-Saturday schedule with the hope that losing only one day in the office will encourage more people to attend. I will be obtaining proposals from a number of Michigan resorts this summer, so we can make a decision later this summer about location and dates. If anyone has any suggestions about locations for the summer meeting, we would welcome your input as well.

Now that you know a little about my past practice and my future goals, I welcome any of your suggestions and complaints. You can e-mail me at [cpalmerpc@sbcglobal.net](mailto:cpalmerpc@sbcglobal.net). My cell phone number is (313) 938-0081. I look forward to working for you this next year. I hope you will participate in our Section's activities. The more people involved and active in the Section, the better the results will be.

Chuck Palmer ✂

## A Word from the Editor

By Ella S. Parker

First, I would like to thank the Section for electing me as the Treasurer for the 2013-2014 year at our annual Spring/Summer meeting at Boyne Highlands. It is an honor to serve alongside the other elected members, who are so committed to this Section. As Teresa and Chuck pointed out, we all take our responsibilities very seriously and are truly dedicated to helping the Section thrive as we meet the challenges ahead of us.

Second, I would like to apologize for the delay in getting this Newsletter out. I was waiting for one or two articles but, as a whole, the majority of the contributors met the deadline and submitted their articles in a timely fashion. Without contributions from the Section, the Board and the Agency, this Newsletter would not be as meaningful and hopefully beneficial to all. I would like to encourage all of our Section members to submit articles or updates on recent or upcoming events. We are fortunate to have Bill Housefield and Murray Feldman contribute articles about some recent events that are worthy of acknowledgement.

Third, I would like to thank all of those who came to our annual meeting and who also spoke on our behalf. I know Hall of Fame Inductee Mike Flynn had an awesome time surrounded by family, friends, co-workers, and well wishers at the dinner on Thursday night. His son Dennis Flynn gave a wonderful, heartfelt accounting of Mike's many accomplishments over the years.

It was also great to see so many family members attending the events with our members this year. I hope we can continue this trend in the future. Please check out the photo gallery on the next page to see some of the attendees and highlights. ✂



# Pictures of the Annual Meeting



Magistrate Klaeren and Matt Conklin



Mike and Dennis Flynn



Old Friends & New



Mike Flynn and Chris Rabideau



Rich Erhlich and Dave Lewsley

## Board of Magistrates Update

By Chief Magistrate Lisa Klaeren

At the 2013 Workers' Compensation Section Annual Meeting in June, I was able to provide the Section members with an update on the status of the Board of Magistrates, which is now part of the Michigan Administrative Hearing Systems (MAHS).

The major change in the last twelve months was the appointment of four new magistrates (Lisa Woons, Jane Colombo, Keith Castora and Dave Williams), and the reappointment of three magistrates (Tim McAree, Bob Timmons and Dave Kurtz). All seven magistrates' terms end in January 2017. This represented an overall reduction of the Board from seventeen to fifteen; as two spots were not filled.

When I became Chairperson of the Board in July 2011, the percent of cases over twelve months old was 42.8% of the total cases in litigation (excluding cases in the "await" category). As of the end of April 2013, that percentage has been reduced to 35%. The magistrates will continue to focus on reducing this percentage further.

The Workers' Compensation Agency (WCA) tracks cases from the time they are filed until a decision or order is mailed. In cases that actually proceed to trial, the numbers reflect that it is taking approximately eighteen months from the pretrial date until a decision is mailed. For cases that are redeemed, the time from the first pretrial until the redemption order is signed is approximately twenty-one months. Based upon the current complexity of workers' compensation cases, I do not expect either of these numbers to vary greatly over the next twelve months.

However, the overall number of trial decisions will be reduced significantly if we continue on the same track we have established for the first four months of 2013. During the first four months of this year, the magistrates have issued forty-four decisions, which when projected through the end of the year, would result in 132 decisions for 2013. This is compared to 212 for 2012, 214 in 2011 and 285 for 2010. Of the forty-four decisions issued thus far in 2013, 93% were issued within the statutory forty-two days, with it taking an average of twenty days to write a decision. On the other hand, the magistrates are seeing a significant increase in the number of facilitations. Please see Magistrate Woons' article for further insight on this issue.

The Board has not yet seen a significant number of cases dealing with the December 2011 amendments. With the average case taking eighteen months to get to trial, I suspect that we will start seeing cases with injury dates after the amendments in the near future. Also, we have only seen a small number of stipulated redemptions, which was a new addition to the Act with the 2011 changes.

In the future, Section members can anticipate continued effort from the magistrates to reduce the average age of the cases before them. There will also be continued requests from the magistrates at trial that the parties narrow the issues for decision, with all others being waived. This will provide a more focused decision and narrow the issues for appeal. We also anticipate that there will be rules proposed for the Board, in conjunction with a comprehensive set of rules proposed for MAHS. ✂

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## The Transition to the Other Side

By Magistrate Lisa Woons

When I accepted a position with the Board of Magistrates, I had certain preconceived notions of what to expect. After all, I had been a workers' compensation practitioner for over 20 years. I had traveled throughout the state and experienced the different idiosyncrasies associated with the different venues. I had also been advised to expect certain changes from the bar, even though I have known a significant portion of the attorneys for years. For example, my jokes would all of a sudden become funnier and people would at least feign interest in what I had to say. However,

I still have not gotten used to attorneys asking me my position on particular issues or recent cases and then actually listening to my opinions! I am fairly certain no one really cared what I had to say in the past.

Despite my years of practice "in the trenches", there is a learning curve which continues to unfold. I guess this should be expected with any career change. The initial shock came on my first trip to the Upper Peninsula. For those of you who do not know me, I was born in the UP so I do have some

Continued on next page

**The Transition** Continued from page 5

knowledge of that great territory north of the bridge. However, on my first trip up, I experienced blizzard like conditions with high winds and white outs and of course, they closed the main road into Baraga. With cautionary warnings from a few helpful attorneys, I made it up there and we were able to proceed with hearings with Ruthie, our dedicated court reporter, by telephone. They certainly are a resilient bunch. They have to be considering Houghton-Hancock still had 4 feet of snow on the ground at the end of April. Really!

What has been refreshing is the level of collegiality and respect that is displayed amongst practitioners throughout the state. Parties agree to adjourn depositions at the request of opposing counsel simply because opposing counsel may have a conflict. It has also been nice to see the way many attorneys cover for their opponent who may have dropped the ball and failed to do what they said they were going to do. This is not to imply that both sides of the bar do anything but zealously represent their client's interests. It is just done in a respectful manner. I know that this is not always the case in other areas of practice.

Lately, there has been a lot of discussion about the facilitation process. The process has been met with varying degrees of acceptance, depending on location and attorney. Each Magistrate has his or her own preferences on how the process should be done. I can offer a few suggestions that I believe have been accepted by the entire Board of Magistrates.

First, more is not necessarily better. If you are going to

submit something in writing for the Magistrate's review, be brief. No one has the time to review 50 pages of medical, company records, 3 surveillance videos or twenty attachments or exhibits.

Second, be prepared. The process works best when all parties are prepared. The parties should know the average weekly wage, the worker's compensation rate, the potential accrued and whether there are any liens or medical bills to consider or whether Medicare issues need to be addressed.

Finally, be courteous. All parties will have an opportunity to present information. While it is important to represent your client's interest, there is no need to interrupt the other side. As the late great, Jim Ryan used to say, "you catch more flies with honey than vinegar."

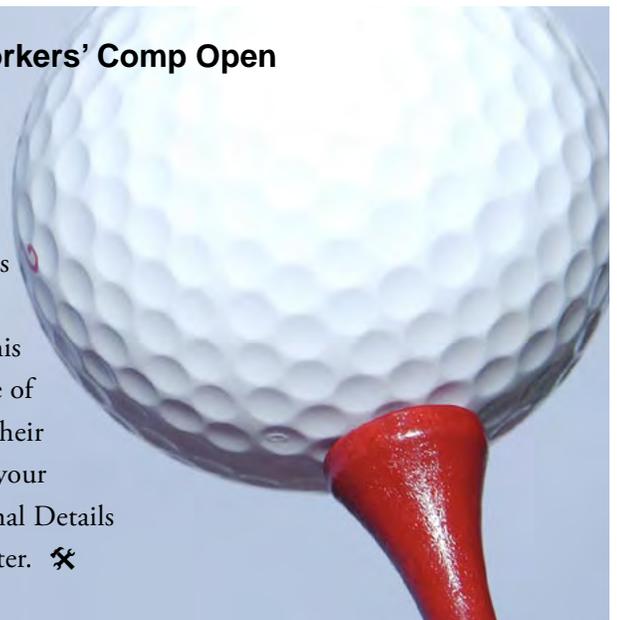
Also, if you have scheduled facilitation in advance with a Magistrate and it has to be cancelled for any reason, please advise the magistrate as soon as possible. This will allow the magistrate to schedule accordingly. For the time being, the process is here to stay. It can work to bring a case to resolution, if you give it a chance.

I realize that with the new appointments it is also a transition for the bar itself. After all, each magistrate has his or her own way of doing things. It takes time for litigants to adjust to the new rules and or procedures too, of which we are all aware. Therefore, even though I have not discussed this with any of the other recent appointees, please continue to be patient with us. We are collectively a work in progress. ✖

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## Murray Feldman enjoyed the Annual Harold Dean Workers' Comp Open

This year's Harold Dean W.C. Open was held on June 28<sup>th</sup> at Polo Fields golf course. Despite the inclement weather, a good time was had by all. Spotted in the crowd were George Chipman (formerly of the Second Injury Fund) and several members of the Workers' Compensation Hall of Fame. As always, this event would not be possible without the efforts of Ray Bohnstiehl and his staff and his family. Also, thanks to all who purchased Kids' Chance of Michigan raffle tickets and especially to those who chose to donate their winnings back. KCOM thanks all who helped raise \$1,300. Mark your calendar for September 28, our Rock Concert for KCOM. Additional Details are outlined in the Kids' Chance of Michigan article in this Newsletter. ✖



# Kids' Chance of Michigan Update

## Educating Children of Injured Workers

By Murray Feldman

We have a lot of exciting news to share with you.

With heartfelt thanks to the MSIA, Susan Azar, and our Fund Raising Committee, and all who participated in and donated to our Silent Auction and 5K Fun Run/Walk, we are thrilled to report that we raised over \$9000 for KCOM at the recent MSIA annual meeting.

We would also like to thank the Kalamazoo area RABA members who donated 5% of each ticket sold from their recent Detroit Tigers Outing.

With regard to future fund raising events, please check our website, [www.kidschanceofmi.org](http://www.kidschanceofmi.org), as we have several upcoming events in the planning stages. One that is sure to be a fun night is the Battle of the Bands at The Loft in Lansing on September 28, 2013. Section Member Dan Zolkowski and his band Capital City Grove, amongst others will be there. The Loft is located at 414 E. Michigan Ave, Lansing, MI 48933. For out of town, or non-Lansing residents who plan on attending the "Night Out" event, we have reached a deal with the Radisson in Lansing for discounted rooms. The hotel is only one block from The Loft. Please contact Dan Zolkowski at 517-281-1815 for more information. We are hoping for a great turnout at this event.

We are also excited that we have received multiple applications for scholarship funds, which our Scholarship Committee is presently reviewing. We look forward to sharing the names of the first KCOM Scholarship recipients and are targeting the end of August to award the first scholarships.

We encourage you to spread the word about available higher education scholarships from KCOM to anyone you think might benefit and encourage them to visit our website to complete and submit an Application.



Susan Azar, Dr. Kneiser, John Chapman, and Don Ducey

Please direct any questions to any of our Officers or the Executive Director. [admin@kidschanceofmi.org](mailto:admin@kidschanceofmi.org)

We thank you for your continuing support of Kid's Chance of Michigan. ✨



# Conditional Payments and the SMART Act

By Chuck Palmer

Last year, Congress passed the SMART Act, otherwise known as the "Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers Act of 2012." The Act amends the Medicare Secondary Payer Act, 42 U.S.C. 1395y. We all know what a pain it has been to obtain prompt Medicare conditional payments from MSPRC. Lately, in my experience, we have been getting Medicare Set-Asides approved faster than conditional payment letters from MSPRC. Hopefully, with the implementation of this new law, we will get faster conditional payment letters, a quicker resolution of disputes over conditional payment amounts, and protection from any subsequent revisions of conditional payments amounts after settlement.

The highlights of the law include:

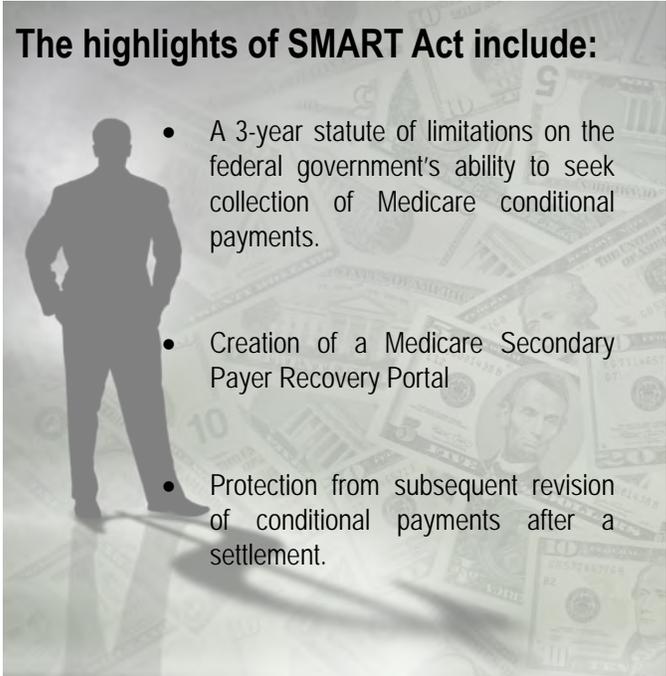
- **A 3-year statute of limitations** on the federal government's ability to seek collection of Medicare conditional payments. The 3 years run from the date of notice to Medicare of a settlement, judgment, award, or other payment to Medicare for conditional payments. If you notify Medicare of the settlement or award, the United States cannot seek to recover conditional payments if it has been more than 3 years from the time of notice.
- **Creation of a Medicare Secondary Payer Recovery Portal**- MSPRC has created a website that Medicare beneficiaries, family members and attorneys can access to determine the amount of conditional payments claimed. See 42 USC 1395y(2)(B)(vii). The law requires the website be updated no later than 15 days after Medicare makes a conditional payment. You can sign up for an account at <http://www.msprc.info/> I was unable to sign up on a recent Sunday, but the website says the portal is up and running.
- **Protection from subsequent revision of conditional payments after a settlement.** The law provides protection of settlements to claimants after 120-day notice of a settlement is given to MSPRC. 42 USC 1395y(2)(B)(vii)(I). Once the notice has been given to Medicare, it has 65 days to determine the final conditional payment. Medicare can claim an additional 30 days if needed. After that time, the conditional payment statement downloaded from the website is a final number, *as long as the settlement is within 3 days of the download.* 42 USC 1395y(2)(B)(vii)(III).

- **Quicker resolution of disputes over conditional payment amounts**- In order to dispute a conditional payment claim by Medicare, the party must provide documentation explaining the "discrepancy" and a proposal for resolving the discrepancy. Medicare then has 11 business days after receipt of the proposal in which to determine whether there is a reasonable basis to remove or include the claims on the conditional payment statement. If Medicare does not make a determination one way or another within 11 business days, then the claimant's proposal to resolve the discrepancy shall be accepted. If Medicare determines the proposal is not acceptable within the 11 business days, then Medicare must respond in a timely manner by providing documentation showing with good cause why Medicare is not agreeing to the proposal and establishing an alternative dispute resolution. 42 USC 1395y(2)(B)(vii)(IV).

Regulations to implement these changes are required to be promulgated by October 10, 2013. See the MSPRC website for more information on how to sign up for the portal, and the new address for using the downloaded statement from the portal:

<http://www.msprc.info/> ✕

## The highlights of SMART Act include:

- 
- A 3-year statute of limitations on the federal government's ability to seek collection of Medicare conditional payments.
  - Creation of a Medicare Secondary Payer Recovery Portal
  - Protection from subsequent revision of conditional payments after a settlement.



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## But Did You Know . . .

By Martin L. Critchell

Most practitioners understand that the workers' compensation board of magistrates can decide a claim by an employee to compensation, the cost of medical care, and adding the fee of counsel to the cost of medical care under the ruling(s) by the Michigan supreme court in deciding the case of *Peterson v Magna Corp.*<sup>1 2</sup> And, practitioners know the decision by the board on one or another of these claims can be appealed. But did you know . . . the particular subject decided by the board determines where and when to appeal?

The decision by the board about compensation and the cost of medical care can be appealed to the Michigan compensation appellate commission under the first sentence of MCL 418.859a(1), which says that, "Except as otherwise provided for in this act, a claim for review of a case for which an application under section 847 is filed after March 31, 1986 shall be filed with the appellate commission.") But the decision about a claim to an attorney fee must be appealed to the director of the workers' compensation agency because the third and fourth sentences of MCL 418.858(1) say that, "In the event of a disagreement as to such fees, an interested party may apply to the bureau for a hearing. After an order by the worker's compensation magistrate, review may be had by the director . . ." Only the decision by the director of the worker's compensation agency about the attorney fee can be appealed to the commission as the last sentence of §858(1) states that, "Thereafter the director's order may be reviewed by the appellate commission on request of an interested party . . ."

The time for filing an appeal is markedly different when the subject of an appeal is about compensation and the cost of medical care and not about an attorney fee. The time for filing a claim for review with the appellate commission to appeal the decision by the board about compensation and the cost of medical care is thirty days and can be enlarged. The second and third sentences of §859a(1) state that, "A claim for review shall be filed with the commission not more than 30 days after the date of the order of the worker's compensation magistrate or director is sent to the parties. For sufficient cause shown, the commission may grant further time in which to claim a review."

In sharp contrast to this, the decision by the board about an attorney fee is fifteen days, not thirty days, *and* cannot be enlarged. The last sentence of §858(1) says, "Thereafter the director's order may be reviewed by the appellate commission on request of an interested party, if a request is filed within 15 days . . ." (emphasis added) There is no further text in §858(1) to allow enlarging the time for filing an appeal from the director as there is with §859a(1). ✖

### Endnotes

- 1 484 Mich 300; 773 NW2d 564 (2009).
- 2 Martin L. Critchell filed a brief amicus curiae with the Michigan supreme court for the Michigan Workers' Compensation Placement Facility and another for the American Insurance Association.

# Upcoming Events

Date	Event	Contact Person	Contact Information
09/06/13	Section Meeting -Lansing and Detroit, MI	Chuck Palmer	cpalmerpc@sbcglobal.net
09/18- 09/20/13	State Bar of Michigan Annual Meeting Lansing Center, Lansing, MI	State Bar of Michigan	
09/28/13	Kids' Chance of MI Battle of the Bands The Loft in Lansing, MI	Dan Zolkowski	517-281-1815
10/03/13	RABA Golf Outing Thornapple Creek Golf Club Kalamazoo, MI	Karen Anderson	Kanderson@chanbersteiner.com Golf Course 269-344-0040 <i>Call to schedule your foursome</i>
10/03/13	RABA Bike Ride 2:00 PM at Golf Course <i>All bicycle enthusiasts welcome</i>	LeeAnne Latchaw	LeeAnnL@accidentfund.com
10/04/13	Section Meeting -Lansing and Detroit, MI	Chuck Palmer	cpalmerpc@sbcglobal.net
10/10/13	MSIA Conference	TBA	
11/01/13	Section Meeting - Lansing and Detroit, MI	Chuck Palmer	cpalmerpc@sbcglobal.net
12/06/13*	Section Meeting - Lansing, MI	Andrea Hamm	Andreahamm@millercohen.com
01/10/14	Section Meeting -Lansing and Detroit, MI	Chuck Palmer	cpalmerpc@sbcglobal.net
02/07/14	Section Meeting -Lansing and Detroit, MI	Chuck Palmer	cpalmerpc@sbcglobal.net
02/15/14- 02/22/14	Winter Seminar -Secrets Hutaulco Resort Huatulco, Mexico	Fred Bleakley Jill Lisman	Fred@bleakleylaw.com jdlisman@hotmail.com
03/07/14	Section Meeting -Lansing and Detroit, MI	Chuck Palmer	cpalmerpc@sbcglobal.net
04/04/14*	Section Meeting -Lansing and Detroit, MI	Chuck Palmer	cpalmerpc@sbcglobal.net
05/02/14*	Section Meeting -Lansing and Detroit, MI	Chuck Palmer	cpalmerpc@sbcglobal.net

# State Bar of Michigan-Worker's Compensation Section 2014 Winter Seminar

## February 15-22 2014

### Huatulco, Mexico

#### Secrets Huatulco Resort & Spa Unlimited Luxury All Inclusive Resort

<http://www.secretsresorts.com/huatulco>

#### Departure from Chicago:

Jr Suite Ocean View room \$1913.00 per person

- Flight times: Chicago O'Hare 8:30am direct; arrive Huatulco 1:10pm on the 15th of February
- Huatulco 2:05pm direct; arrive Chicago O'Hare 6:50pm on the 22nd of February
- Deposit of \$350.00 per person

#### Departure from Grand Rapids *(Overnight in Chicago on the 22nd)*

- Jr Suite Ocean View Room \$2324.00 per person
- Flight Times: Grand Rapids 5:50am 1 stop Chicago O'Hare; arrive Huatulco 1:43pm on February 15
- Huatulco 2:34pm; arrive Chicago O'Hare 7:21p on the 22nd of February
- Chicago O'Hare 9:55am; arrive Grand Rapids 11:45am on the 23rd of February
- Hilton O'Hare on the 22nd of February \$130.00 per room
- Deposit of \$1000.00 per person

#### Departure from Detroit *(Overnight in Chicago on the 22nd)*

- Jr Suite Ocean View Room \$2314.00 per arrive Huatulco person
- Flight times: Detroit 7:05am 1 stop Chicago O'Hare; arrive Huatulco 1:43pm on the 15th of February
- Huatulco 2:35pm; arrive Chicago O'Hare 7:21pm on the 22nd of February
- Chicago O'Hare 9:25am; arrive Detroit 11:35am on the 23rd of February
- Hilton O'Hare on the 22nd of February \$130.00 per room
- Deposit of \$1000.00 per person

#### Room Category upgrades available upon request

~~~~All guests from the 2013 Workers Comp Seminar will receive a \$75.00 credit per person~~~~

**All deposits are due on the 28th of August 2013**

Passports are required

Please contact: Jill Lisman at Pro Travel 231 733 8359 [jdlistman@hotmail.com](mailto:jdlistman@hotmail.com)



# Caselaw Update

By Martin L. Critchell

## Michigan Supreme Court

The Michigan supreme court decided two cases involving different statutes in the workers' compensation act as the 2012-2013 Term ended.

The case of *Smitter v Thornapple Twp*<sup>1</sup> involved MCL 418.354(1) coordination of benefits and reimbursement by the Second Injury Fund. The particular problem arose concerning whether Thornapple Township had a choice in reducing Robert Smitter's worker's compensation benefits by a portion of the group disability insurance benefit that it paid to Smitter when §354(1)(b) said that, "the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under Section 361(2) and (3) shall be reduced by the amounts: The after-tax amounts of the payments received or being received under a ... disability insurance policy provided by the same employer ..." (emphasis added) *Smitter*.<sup>2</sup>

This problem occurred because Thornapple decided not to reduce or "coordinate" the compensation with the amount of the disability insurance that Smitter received for an injury at work and then asked the Michigan Second Injury Fund for reimbursement of this higher portion because they did not take an offset, *Smitter*,<sup>3</sup> and the SIF objected. *Smitter*.<sup>4</sup>

The Court ruled that Thornapple had no choice to forego the reduction of compensation because *shall* in *shall be reduced* was imperative, not discretionary. *Smitter*.<sup>5</sup> ("The coordination of benefits is mandatory, not discretionary ...")

The ruling led the Court to overrule the decision by the Michigan court of appeals in the case of *Rahman v Detroit Bd of Ed*.<sup>6</sup> *Smitter*.<sup>7</sup> This was particularly important. First, the Court said only one narrow group of employers had been allowed by §354(15) to choose to coordinate and so, all others had to coordinate. *Smitter*.<sup>8</sup> ("By specifically outlining the parameters under which an employer may permissibly waive coordination of benefits, the Legislature by implication prohibited *all other employers* who do not meet the specification from waiving coordination.") (emphasis by the Court) This is important because the ruling is omnibus. All employers that can coordinate compensation must coordinate unless the employee is within §354(15).

Second, the Court did not consider any other factor other than error by the court of appeals. There was no analysis of reliance of people on *Rahman*, an issue usually addressed when considering overruling decisions by the Court itself. See, e.g., *Reed v Yackell*.<sup>9</sup> This *may* signal that the only

criteria for overruling a decision by the court of appeals is a finding of an error while reliance criteria must be considered before any overruling of a decision by the Supreme Court.

Justice Cavanagh dissented on the ground that the SIF had no responsibility for reimbursement because Smitter was a volunteer firefighter. *Smitter*.<sup>10</sup> This was remarkable as everyone had agreed that Smitter was not a volunteer firefighter *and* that the SIF did not advocate that it was entirely free of responsibility for reimbursing Thornapple. *Smitter*.<sup>11</sup>

Justice McCormick dissented on other grounds. Justice McCormick said that the context made *shall* a permissive, not an imperative. *Smitter*.<sup>12</sup> That analysis is not strong. The best Justice McCormick says is the imperative usage of *shall* "could have more clearly [been] accomplished in a number of ways." *Smitter*.<sup>13</sup> Doubtless. That greater clarity or precision could have been achieved does not mean that the text is ambiguous or that a narrow understanding should obtain *Lansing Mayor v Pub Service Comm*.<sup>14</sup>

The other case decided by the Court was *Mohney v American Int'l Group*.<sup>15</sup> The problem in that case was about MCL 418.301(3), the presumption that an employee was *in the course of employment* when on the premises of an employer. *Mohney*.<sup>16</sup>

The problem occurred because Loren Mohney was injured walking to work after parking his car. *Mohney*.<sup>17</sup> He claimed that he was pursuing the most reasonably direct route to his work, which would make his case fall within the rule expressed by the Court when deciding the case of *Simpkins v Gen Motors Corp (After Remand)*.<sup>18</sup> *Mohney*.<sup>19</sup>

The Court distinguished the facts of this case from what happened in the case of *Simpkins*. Loren Mohney was injured walking into work after parking his auto in a public parking lot, not a lot owned by AIG. *Mohney*.<sup>20</sup> Elizabeth Simpkins parked her car in a lot owned by GM but instead of going directly into the factory, got in a car with a fellow employee, Perry Mitru, and left and went to another, privately owned parking lot for a time. Simkins was then hurt crossing the street to go into the factory. *Simkins*.<sup>21</sup>

The Court concluded that the presumption could not apply and Mohney was not eligible for any compensation as a commuter.

The decision is authoritative under *DeFrain v State Farm Mut Auto Ins Co*.<sup>22</sup> ("[A]n order of this Court is binding precedent if it constitutes a final disposition of an application

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[for leave to appeal] and contains a concise statement of the applicable facts and reasons for the decision.”)

The decision is important by answering the question that was raised but deferred by the Court when disposing of the case of *Sazima v Shepard Bar & Restaurant*.<sup>23</sup>

## Michigan Court of Appeals

No decision by the Michigan Court of Appeals about the workers' compensation act was released “for publication” to establish precedent. However, the Court of Appeals did decide two noteworthy cases, *Baird v Aka Trucking, Inc.*,<sup>24</sup> and *Elde v Castle Bros, Inc.*<sup>25</sup>

The problem in the case of *Baird* was with the extension of a policy of workers' compensation insurance that had expired before an employee, William Baird, was injured working for an employer, AKA Trucking. *Baird*.<sup>26</sup>

This problem occurred as Safeco Insurance paid auto no-fault benefits after Baird was injured driving a truck for AKA Trucking and then sought reimbursement from Travelers Insurance that had once insured AKA for workers' compensation. Travelers agreed that it had not reported that its compensation policy had expired until after Baird was injured but maintained that Safeco was not an *employee of the insured employer* who could reach the policy of compensation insurance under MCL 418.621(4)(g). *Baird*.<sup>27</sup>

The Court of Appeals decided that Safeco was an *employee of the insured employer* under the doctrine of equitable subrogation to Baird on the authority of *Auto-Owners Ins Co v Amoco Prod Co.*<sup>28</sup> *Baird*.<sup>29</sup> The court of appeals saw no important difference between Amoco as a self-insured employer and AKA as an uninsured employer. The relationship that was thought important was the relationship of Baird to Travelers Insurance or *Baird v AKA Trucking*.

The main point is that an auto no-fault insurance company *is* the “employee” when a worker is hurt driving for work.

While there were many problems presented for the Court of Appeals to consider in *Elde*, all were avoided except one. The avoidance was because of evidence to warrant a fact (about an employee-employer relationship) or by default of the appellant through abandonment or failure to preserve an issue (about average weekly wage and dismissal for nondisclosure under MCL 418.222.) *Elde*.<sup>30</sup>

The Court of Appeals only decided that the particular “last day of work” was July 11 because July 12, 2008 was a Saturday. *Elde*.<sup>31</sup>

## Michigan Compensation Appellate Commission

The decision by the Michigan compensation appellate commission in the case of *Lovely v Ridge Co, Inc.*,<sup>32</sup> is noteworthy.

The dispute was about the costs of medical care that had been provided to Sarah Lovely and a claim for a fee in addition to the bills. *Lovely*.<sup>33</sup>

The commission ruled that the “cost containment” rules apply to medical care provided outside of Michigan saying, “It seems clear that the state [of Michigan], by statute and rule, has undertaken to extend regulation of reimbursement to out of state providers of medical services ...” *Lovely*.<sup>34</sup> The decisions in earlier cases – *Trileth v Kalin Constr Co, Inc*<sup>35</sup> and *Donoho v Wal-Mart Stores, Inc*<sup>36</sup>– were considered not authoritative having recited the decision by the workers' compensation board of magistrates and dicta. *Lovely*.<sup>37</sup> (“The relied upon language in both cases is contained in quotations from the underlying magistrates' decisions and [was] neither a pronouncement by the [c]ommission nor critical to the disposition of the issues ...”) Essentially, *Lovely* is the authority.

More important, the cost containment amount is not the default amount to pay for medical care. Absent the agreement of the employer, each and every charge by a provider must be first documented and then compared to the “usual and customary charge by the provider” and the lesser amount compared to the cost containment amount. The lesser of the two is payable. *Lovely*.<sup>38</sup>

Finally, the lawyer must produce the retainer to establish the actual fee to apply. *Lovely*.<sup>39</sup> (“Quantification of the fee percentage is not subject to the [workers' compensation board of magistrates'] discretion. It is to be set per statute to conform to the contingent fee agreement between the [employee and client] and [the lawyer.]”)

## Endnotes

- 1 -- Mich -- ; -- Nw2d – (2013).
- 2 *Id.* at slip op. 7.
- 3 *Id.* at slip op. 3-4.
- 4 *Id.*
- 5 *Id.* at slip op. 14.
- 6 245 Mich App 103; 627 NW2d 41 (2001).
- 7 -- Mich -- , -- ; -- NW2d – (2013).
- 8 *Id.* at slip op. 13-14.

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- 9 473 Mich 520, 539; 703 NW2d 1 (2005).
- 10 -- Mich -- ; -- Nw2d – (2013).
- 11 *Id.* slip op. at 2.
- 12 -- Mich --, -- ; -- NW2d – (2013) (McCORMICK, J., dissenting)
- 13 *Id.* at slip op. 5.
- 14 470 Mich 154, 166-167; 680 NW2d 840 (2004).
- 15 -- Mich -- : -- NW2d – (2013).
- 16 *Id.*
- 17 *Id.*
- 18 453 Mich 703, 723; 556 NW2d 839 (1996).
- 19 -- Mich -- : -- NW2d – (2013).
- 20 *Id.*
- 21 453 Mich at 706.
- 22 491 Mich 359, 369; 817 NW2d 504 (2012).
- 23 483 Mich 924; 762 NW2d 924 (2009).
- 24 Unpublished opinion of the Court of Appeals, issued on April 16, 2013 (Docket no. 299975). The author represented the appellant, Travelers Insurance Company.
- 25 Unpublished opinion of the Court of Appeals, issued on June 4, 2013 (Docket no. 308638).
- 26 Unpublished opinion of the Court of Appeals, issued on April 16, 2013 (Docket no. 299975) at 2.
- 27 *Id.*
- 28 468 Mich 53; 658 NW2d 460 (2003). The author represented the appellant, Amoco Production Co.
- 29 Unpublished opinion of the Court of Appeals, issued on April 16, 2013 (Docket no. 299975) at 3.
- 30 Unpublished opinion of the Court of Appeals, issued on June 4, 2013 (Docket no. 308638) at 6, 9-10.
- 31 *Id.* at 10.
- 32 2013 Mich ACO 70. The author was counsel for the appellants, Ridge Company and Secura Insurance.
- 33 *Id.* at 7-8.
- 34 *Id.* at 78.
- 35 2003 Mich ACO 16.
- 36 2004 Mich ACO 142.
- 37 2013 Mich ACO 70 at 7.
- 38 *Id.* at 5, 6, 7.
- 39 *Id.* at 6.

## RABA Golf Outing & Bicycle Ride!

When: Thursday, October 3, 2013

Where: Thornapple Creek Golf Club  
Kalamazoo, MI  
(269) 344-0040

Why: You won't want to miss this time-honored event, surprise guests, limerick contests and other shenanigans guaranteed!!!

**Gather your foursome** and call the golf course for reservations.

Tee Times begin at 1:00 p.m.

18 holes with a cart is \$35 per person – *pay for golf at the course.*

**The Bike Ride** begins at 2:00 p.m. for bicycle enthusiasts, all skill levels welcome! Meet in parking lot at golf course for a beautiful Fall ride on and near the Kal-Haven Trail. Contact Lee Anne Latchaw [LeeAnneL@accidentfund.com](mailto:LeeAnneL@accidentfund.com) for details.

**Dinner to follow** –Cash bar, BBQ Ribs & Chicken buffet - \$25 per person. Please RSVP for dinner to [kanderson@chamberssteiner.com](mailto:kanderson@chamberssteiner.com) by **September 11, 2013**. Pay Karen that evening, cash and checks accepted.



## From the Agency: Attention Counsel Filing Contested Cases Using Form 104A

By Jack A. Nolish, Deputy Director

### Agency Form 104A Formatting for Optical Character Recognition (OCR)

In our continuing efforts to increase efficiency and reduce costs, the Workers' Compensation Agency is in the midst of several modernization and system enhancements. One of these enhancements involves the application of Optical Character Recognition (OCR) to image indexing data from the form 104A, Application for Mediation or Hearing filed by counsel. These upgrades will enable the Agency to serve our customers with a greater efficiency while positioning the Agency for future operating system upgrades. In the short term, it will enable us to locate a form 104A as soon as it is scanned instead of waiting until its data has been manually input into our data system.

As a result, the process changes require data to be in very specific locations to prevent future problems. This leaves little tolerance for location variation. Therefore, **effective September 1, 2013**, pursuant to MCL 418.221, the Agency will require that all forms 104A must match exactly those forms found on the Workers' Compensation Agency website, including but not limited to language, block space and positioning, font and dimension. In addition, when data is input into the various forms, an Arial 10 point font must be used, with each field limited to one line of data. The form does not have to be filed on yellow paper.

The form 104A is available for download on the [WCA website](#).

**Any form 104A not complying with these requirements filed on or after September 1, 2013, will be rejected and returned unprocessed. In anticipation of these requirements, you should immediately make any necessary modifications to your current systems and processes so that forms filed on or after September 1, 2013 will be in the correct format and not be rejected.**

**Handwritten or typed forms submitted *in pro per* will continue to be handled as they have in the past but the OCR image indexing will not take place.**

As part of the OCR process, please also note that faxed copies of filings will no longer be accepted after September 1st.

Those using Adobe Reader 11 or Adobe Acrobat Pro will be able to save the completed forms on their local computer. Those using prior versions of Reader will not be able to save the completed forms.

Questions regarding these changes or what will be required effective September 1, 2013, should be directed to Ken Smith at 517-322-5937.

We thank you for your continued cooperation as we move through these transitions to better serve you, our customers.

Jack A. Nolish  
Deputy Director

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### Bill Housefield Wished Pete Munroe a Happy 95<sup>th</sup> Birthday

Congratulations to Pete Munroe who celebrated his 95<sup>th</sup> birthday on July 9, 2013. Bill Housefield threw this Workers' Compensation Hall of Fame member a party in his home. Pete practiced law for 51 years before his retirement. I understand quite a few current members of the Section attended the party, including Cam McComb, Mike Otis, Ed Welch, John McIntosh, Tom Hay and Steve Pollok. Happy Birthday Pete! And thank you Bill for hosting the party.

