

STATE BAR OF MICHIGAN

# Workers' Compensation Section Newsletter

Summer 2017



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## From the Chair

By J. Timothy Esper



Greetings from your new chairperson. This November marks my 40<sup>th</sup> year as a workers' compensation practitioner. For my first 11 years, I bounced between plaintiff and defense jobs with Steve Ross, Conklin Benham, Mike McNamee and Bob Cummins. In 1988, I finally settled for good on the plaintiff side with Steve Sweeney in my hometown, Detroit.

More than anything else, I had the benefit of good mentoring, and a ton of good luck. Steve Ross was in the highest echelon of defense attorneys, brilliant with medical, meticulous in his preparation, withering on cross examination, and the hardest of hard-nosed adversaries. I spent the first 2 of my 7 years with Steve writing briefs on cases he had tried. One couldn't have had a better apprenticeship. Conklin Benham allowed me to hone my trial skills. Mike McNamee and Bob Cummins taught me important business and life lessons.

Steve Sweeney was looking for a young guy to take over his plaintiff workers' compensation and liability practice. He had recently beaten my pants off in a trial in front of Magistrate Ivy Riley. I'm not sure what he saw in me, but he ended up giving me the chance of my lifetime. He generously promoted me to his union construction building trades contacts. Jon Garrett and I were his protégés, Jon handling the construction accident liability work while I did the comp and social security. Mark Aiello joined me nearly 25 years ago and is now managing our office.

Enough about me. I owe a heartfelt thank you to Ella Parker for her leadership of the Section over the past year and for a wonderful Summer Meeting at Mackinac Island. Ella is infinitely organized and detail oriented. I followed Ella through the Council officer ranks, first as treasurer, then secretary. Ella saved me time and again, willingly sharing her experience while teaching me the ropes. I will continue to rely on her good counsel, and that of the other chairpersons under whom I have served on the Council.

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Term Expires June 19, 2018

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**Mark Long**, Director, Michigan Workers' Compensation Agency

**Lisa Klaeren**, Chief Magistrate, Michigan Workers' Compensation Agency

**George Wyatt, III**, Michigan Compensation Appellate Commission

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Jayson A. Chizick, Newsletter Editor

Opinions expressed herein are those of the authors or the editor and do not necessarily reflect the opinions of the section council, the membership, or their employers

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**From the Chair** Continued from page 1

### Upcoming Events:

- **Winter Meeting Friday, December 8**, location to be determined. To encourage better attendance, I will propose that the Council approve inclusion of a buffet lunch at Section expense for the meeting.
- **Winter Comp Trip:** Fred Bleakley has booked a Winter Seminar for Feb 11-18 on Riviera Maya. Details and booking information elsewhere in this Newsletter. ***A Deposit Of \$300/Person Is Due By Sept 13.***
- **Summer Meeting** Is planned for **JUNE 14-15** at Hotel Indigo in Traverse City.

### Updated Cell Phone List

The attorney cell phone list needs an update to add members we missed and drop those who have passed on. E-mail contact information to Ashley LaFave at: [ashley@esperlaw.com](mailto:ashley@esperlaw.com).

### Hall Of Fame Update

The current eligibility rules for the WC Hall of Fame would exclude many of the current members. I will appoint a committee to revisit the criteria for membership, and hopefully come up with a more workable format.

### Our Bona Fides

A primary focus of my term as Chair will be on preserving and strengthening the camaraderie and good will that have long defined our Section. In my 40 years as a comp practitioner, and in reading the Newsletter articles of past chairpersons, these are the qualities that stand out above all else. Where did this spirit, this ethos, come from?

I submit that the spirit that permeates our section is built on our ***bona fides*** (*bona FIE dees*). Synonyms for bona fide from various dictionaries include: above board; actual, as represented, candid; forthright; genuine; honest; honorable; just; open; principled; real; rightful; undisguised; undissembling; unsuspecting; unspurious; unfaked; unpretended. Yeah, that sounds like our bunch. The closest translation from the Latin is ***good faith***. When we get it right, good faith is the foundation of everything we do as comp practitioners.

*Bona fide* now appears in the Act itself, codifying what we used to call *favored work* as a "bona fide offer of reasonable employment". It seems to me that by putting the term *bona fide* right in the Act, the effect has been to weaken it. One could well ask how the above list of synonyms for bona fide could apply to an offer of a dead-end, low pay, volunteer type job shortly after an injury, when an injured worker is still actively treating. To add insult to injury: some are told that they have to schedule doctor and therapy visits outside working hours. And if they can't get in the 40 hours required, their pay is docked and partial comp reduced. Bona fide indeed!

I submit that when we don't consider the bona fides of an offer, and focus instead only on the Act's *reasonableness* criteria (distance, job duties, or threats to health and safety), we don't live up to our own *bona fides*. To get things in the proper order, the first consideration about any offer of reasonable employment must be the bona fides of the offer. Refer to the above list of synonyms. The Act's first listed requirement about a job offer is that it **MUST** be a *bona fide offer*. Best that we put our initial focus back where it belongs.

I welcome responses from any and all Section members. I invite all to share your thoughts, your concerns, and your ideas about how we, as Section members, can best be true to our bona fides. ✖

## From the Editor

By Jayson A. Chizick



I thought about writing this article as I dropped my twins off for their first day of third grade this morning. As summer comes to a close and new adventures begin for my children, I thought about the lessons that I taught them. I have not had to remind my children (nearly as much as my parents had to remind me), of the importance of telling the truth. Truth seems almost ingrained in a child, that is until there is a consequence for the truth. Teaching my kids to accept consequences for truth will hopefully result in them accepting life as it is thrown at them, the good, the bad and the ugly. As we grow, those consequences become more dire. In the past month, multiple examples of the importance of truth-telling have been presented to me and around me. A magistrate informed one of my clients, after he disclosed a truth that was harmful to his case, that “candor is always rewarded” in his courtroom. This statement pleased my client, as he felt that he had been heard by the court.

Our practice continues to become more difficult by the month. Whether you be a plaintiff attorney dealing with unreasonable lien holders, or a defense attorney seeking CMS resolution clarification, we all have faced adversity in different ways. The practice continues to evolve as the post-2011 law continues to be flushed out by the Board of Magistrates, Appellate Commission and higher Courts. We must stand firm as a Section to ensure that our way of dialogue, truth-telling and professional courtesy continues. Turning back to the magistrate referenced above, his request was simple, be honest. In our exchanges with each other, we must provide records timely, disclose information timely and save those important disputes of law and fact for an honest discourse before the bench. We do this, us workers' compensation practitioners. But we must guard to continue this despite the development of a more contentious nature of practice. As practitioners have more ground to cover, we should talk more to our opposing counsel. I have yet to find an opposing attorney unwilling to get me on the phone for a hearing, and I am always willing to do the same for others. Showing the presiding magistrate the same courtesy will pay off when a calendar conflict comes up.

*If you tell the truth you don't have to remember anything.*

*--Mark Twain*

When writing about truth and courtesy in a newsletter to Section members, I cannot let the example of our recent Hall of Fame inductees go by without mention. The Section honored Murray Feldman and Gregory Rapp at our summer meeting in June. Sue DeLong and Bob Steelman spoke about the incredible careers of Murray and Gregory, and their contributions to this Section. These two Hall of Fame members epitomize (even when the plaintiff lawyer across from them did not like the answer), exactly what it means to be truthful and a professional. Our upcoming year is going to be an exciting one with Tim Esper as our new chairperson. Tim is one who knows how to tell the truth, even when perhaps he ought not do so. Tim is looking to engage the Section membership, so check out his article in this newsletter and those to come. Much thanks goes out to past-chair Ella Parker for her leadership.

Keep your ears and eyes open for the upcoming Winter Meeting of the Section, along with many other exciting opportunities for social and scholarship purposes. The Section welcomes any newsletter article contributions. As we all continue to “live the dream” stay safe on the roads... ✖



Join the section. It's all it's cracked up to be.  
<http://www.michbar.org/sections>

# Annual Summer Section Meeting held on Mackinac Island

The Section membership held our Annual Summer Section meeting in June 2017 on Mackinac Island. Members and their guests were treated to a fantastic dinner, a beautiful view and good friends. The Section honored Greg Rapp and Murray Feldman with induction into the Workers' Compensation Hall of Fame. Bob Steelman made a great speech about Greg's many accomplishments, kind heart and service. Sue DeLong also made a wonderful speech about Murray Feldman's many years of charitable work, service to the Section and practice. Ella Parker capped off her year as Chair with a great program. The after-party was a loud and exciting trip to the Pink Pony.

Members elected Tim Esper as our new Chairperson. Also elected to the executive were Dennis Flynn (vice-chair), Andrea Hamm (secretary) and Rosa Bava (treasurer). The Section welcomed Sean Shearer, Dan Zolkowski and Dan Hebert to the council.



Rosa Bava, Tim Esper, Dennis Flynn and Andrea Hamm



Sue DeLong accepting Murray Feldman's Hall of Fame honor from past-Chair Ella Parker



This table RULES!



Gregory Rapp accepting his Hall of Fame honor



A fancy dinner

Continued on next page





Bob Steelman inducts  
Greg Rapp into the Hall of Fame  
with a great speech



Pink Pony shenanigans



Magistrate panel discussion. Magistrate Slater was  
explaining that it was his understanding that it was our  
understanding...



The peaceful handover of power



Day 2 drinks and social



Day 2 drinks and social



## Board of Magistrates Update

By Hon. Lisa Klaeren, Chief Magistrate

For those of you that were not able to attend the Workers' Compensation Section Annual Meeting on Mackinac Island in June, I wanted to provide you with an update on the Board of Magistrates (Board), from a statistical standpoint. These statistics are computed through June 2017.

The Board has mailed forty-two decisions in the first six months of 2017 (eighty seven decisions were mailed in 2016). Of those forty-two decisions, forty-one were issued within the statutorily required forty-two days. The average number of days to issue a decision, from the closing of the record, was nineteen days. In 90% of the cases, the record was closed within thirty days from the date the record was opened. These numbers are consistent with where we were in 2016.

On average, each magistrate is disposing of forty cases per month. This would include withdrawals, voluntary payments, dismissals, decisions and redemptions. As you would suspect, this number has been trending down since 2012, when the average was fifty-one dispositions per month.

Facilitations have remained fairly steady, based upon an average calculation. So far in 2017, magistrates have averaged twelve facilitations per month. This same average was eleven per month in 2012, with a high of fourteen per month in 2014. These numbers show that facilitations remain a constant presence in pretrial efforts to resolve cases, and I do not believe this will change in the near future.

Another statistic of importance is the percentage of our cases that are older than twelve months. In 2012, 34.7% of the cases in active litigation were older than twelve months. Currently in 2017, 37.5% of the cases on our dockets (in active litigation) are older than twelve months. Since this is an increase in the past five years, you will continue to see all magistrates continuing to push the attorneys to move their cases through the litigation process.

As many of you are aware, the group of cases identified as the GM-CAP cases are moving to the active dockets. Letters were sent to the "attorney of record" listed with the Agency, and included a list of files associated with that name. Where firm changes could be identified, a copy of the letter and list was sent to the firm of record, at the time of the initial filing. All attorneys/firms need to review their files and file any necessary substitutions to ensure that you have appropriate notice of scheduled dates. An Acknowledgement & Notice of Hearing is not being sent on these 950 files, at this time. The attorneys are responsible for reviewing their files at the Agency and confirming any scheduled dates, and which magistrate will be handling the file further (as many have changed).

In the past few years, as many attorneys have expanded to a state-wide practice, there have been challenges scheduling hearings where all attorneys can be present. This is especially true if you take into consideration that the Administrative Rules for the Board of Magistrates require the attendance of the attorneys at the scheduling conference and the status conference. With this in mind, the magistrates are scheduling hearings on non-traditional hearing dates and at non-traditional times. We are all available five days a week and can accommodate any schedule.

The magistrates will be meeting in late August/early September, along with the entire Michigan Administrative Hearing System, to discuss issues applicable to all of us in the administrative law area. We hope to bring back some new ideas and new skills that will benefit all of us that work in the area of workers' compensation. ✂

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## News From MCAC

By Hon. George Wyatt III

As you know the Workers' Compensation Agency is working on developing a new computer system. As part of that process the MCAC is being invited to consider to what extent it wants to facilitate appellate practice in WC becoming electronic. It could be useful to this process for section members to offer suggestions about this subject matter. Please forward by e-mail any suggestions to Rita Jenks, our representative to the group working on program development. [jenksr@michigan.gov](mailto:jenksr@michigan.gov).

Patricia Halm has left the MCAC effective July 28, 2017. Hon. Kevin Weise has been appointed by Governor Snyder to MCAC. Commissioner Weise has experience in the field of workers' compensation practice. ✂

**Please see the link to MCAC and BOM decisions.** ([https://public.govdelivery.com/accounts/MILARA/subscriber/new?qs=CODE\\_RED](https://public.govdelivery.com/accounts/MILARA/subscriber/new?qs=CODE_RED)) Whenever they post a decision to the Agency website, they send you an e-mail with a link to all the new decisions.



WORKERS' COMPENSATION  
LAW SECTION

**Winter Seminar ■ February 11-18, 2018**  
**Riviera Maya**  
**Valentin Imperial Maya**

All Inclusive adult only resort [www.valentinmaya.com](http://www.valentinmaya.com)  
All rooms are junior suites with mini bar, 24-hour room service, seven a la carte restaurants, eleven bars, 3 pools, spa (fee), free WiFi and non motorized water sports

Flights are nonstop from Lansing Capital Airport  
February 11: 10:30 am arrive Cancun 2:15 pm  
February 18: 3:15 pm arrive Lansing 7:00 pm

**Price per person:**

Deluxe Junior Suite \$1,979  
Golden Superior Junior Suite \$2,229  
Golden Junior Suite Swim Up \$2,319  
Emerald Junior Suite Oceanfront \$2,469

Insurance is additional at \$134.99 per person.  
One checked bag per person is included in the insurance cost.  
The insurance is cancel for any reason.  
The bag fee is \$50 round trip per bag if you do not purchase insurance.

Valid passports are required. Your passport must be valid six months past your travel date.  
A deposit of \$300 per person is due by September 13, 2017  
Final payment is due on December 13, 2017

**Please contact:**

Alice Miller at Pro Travel (231) 733-8359,  
17220 Van Wagoner Rd, Spring Lake, MI 49456. [Atardani@hotmail.com](mailto:Atardani@hotmail.com)



Photos courtesy Valentin Imperial Maya

# Caselaw Update

By Martin L. Critchell

Since the last edition of the Newsletter, the Michigan Supreme Court has not announced a ruling concerning workers' compensation or accepted a case to consider a question concerning workers' compensation.

The Michigan Court of Appeals decided one case involving one of the circumstances allowing an employee to sue an employer for damages from a personal injury sustained at work, *Walrath v Witzemann USA, LLC*.<sup>1</sup> There, Lawrence W. Walrath said that he could sue Witzemann USA for damages from the injury that he had sustained at work on June 14, 2014 because Star Insurance had cancelled the policy of workers' compensation insurance on May 29, 2014 because Witzemann USA had not paid a premium.<sup>2</sup> Witzemann USA said that Walrath could not sue because Star reinstated the policy on June 18 retroactive to May 29, 2014.<sup>3</sup>

The Court of Appeals ruled that "when an employer secures compensation from an insurer pursuant to a reinstated policy, it has secured compensation as required... Accordingly, the employer cannot be found in noncompliance with MCL 418.611 for purposes of MCL 418.641 [allowing a lawsuit for damages from an uninsured employer.]"<sup>4</sup> There was no consideration of the prior, cancelled policy even though it was in-effect when Walrath was injured 16 days later owing to MCL 418.621(4). ("any termination of this policy shall not be effective as far as the employees of the insured employer are concerned until 20 days after notice of proposed termination or cancellation is received by the bureau...") That is, the policy that was purportedly cancelled was in-effect when Walrath was injured and obviated the arguments and the analysis of the effect of the reinstating policy of compensation insurance.

The Michigan Court of Appeals is expected to rule on the availability of the sanctions for pursuing a vexatious appeal shortly after September 7, 2017 when the case of *Collins v Detroit Radiator Corp*<sup>5,6</sup> will be submitted.

The Michigan Compensation Appellate Commission released three opinions about the extent of the authority that it and the Workers' Compensation Board of Magistrate could exercise. In *Larson v Crawford Co Rd Comm*<sup>7</sup> the Commission ruled that it had no authority to bar an employee from filing an application for mediation or hearing, only authority to dismiss a claim for review, assess costs or fine a party before it for the action by the party during an appeal. In *McQuiston v US Fabrication & Design, LLC*,<sup>8</sup> the Commission ruled that the Board of Magistrates had the authority to dismiss an application for mediation or hearing because the claimant did not meet the deadline(s) in a scheduling order without

conducting a hearing of the parties but had to provide an opinion explaining the circumstances that were thought to warrant that action. And in *Allen v Charlevoix Abstract & Engineering Co*<sup>9</sup> the Commission ruled that the Board of Magistrates had no authority to modify the terms of a voluntary payment agreement after 30 days from the endorsement and entry by a workers' compensation magistrate.

In *Nichols v Howmet Corp (On Remand)*<sup>10</sup> the Commission established the model for paying weekly compensation to an employee having a disability from an injury sustained while performing *reasonable employment* (favored work) provided because of an earlier injury at work when the employer was insured by a different insurer. The model is that the first insurer pays the employee weekly compensation based on the average weekly wage of the employee when first injured and the second insurer pays the first insurer the weekly compensation based on the average weekly wage of the employee when injured during the *reasonable employment*. This is the "weekly less weekly" model. The model is not a comparison of the average weekly wage when first injured to the average weekly wage during the *reasonable employment* or "wage less wage." And there is no separate payment by each insurer to the employee.

And in the case of *Sims v Spectrum Health Hosps*<sup>11</sup> the Commission reiterated the difference between *notice of injury* and *claim to compensation* and the circumstances that could and could not fulfill each. *Notice*, is reporting the occurrence of an injury while *claim* is actually asking for some benefit, weekly or medical. And claiming social security disability insurance benefits did not meet or suspend the time for claiming compensation because there was no indication that SSDI was actually paid. ✖

## Endnotes

- 1 \_\_Mich App\_\_;\_\_NW2D\_\_ (2017) (Docket no. 331953).
- 2 *Id.* at 1.
- 3 *Id.* at 2.
- 4 *Id.* at 5-6.
- 5 Docket no.
- 6 Martin L. Critchell represents an amicus curiae in the case.
- 7 2017 Mich ACO 24.
- 8 2017 Mich ACO 25.
- 9 2017 Mich ACO 13.
- 10 2017 Mich ACO 19.
- 11 2017 Mich ACO 14.