State Bar of Michigan

Workers' Compensation Section Newsletter

Winter 2005

Governor Granholm Makes Appointments to Workers' Compensation Board of Magistrates

Governor Jennifer M. Granholm announced the following appointments and reappointments to the Workers' Compensation Board of Magistrates:

Michael T. Harris of Okemos, magistrate for the Workers' Compensation Board of Magistrates. Mr. Harris is appointed for a term expiring January 26, 2006. He succeeds Patrick J. MacLean who has resigned.

Timothy M. McAree of Rockford, attorney for Timothy A. McAree, P.C. Mr. McAree is appointed for a term expiring January 26, 2009. He succeeds Kenneth Frankland whose term has expired.

Thomas G. Moher of Sault Ste. Marie, attorney for Moher & Cannello, P.C. Mr. Moher is appointed for a term expiring January 26, 2009. He succeeds Michael D. Wagner whose term has expired.

Alexander T. Ornstein of Farmington Hills, partner at Ornstein & Woll, PLLC and principal attorney for Alexander T. Ornstein, P.C. law firms. Mr. Ornstein is appointed for a term expiring January 26, 2009. He succeeds Susan B. Cope whose term has expired.

Paul M. Purcell of Saginaw, attorney for Purcell, Tunison & Boardman, P.C. Mr. Purcell is appointed for a term expiring January 26, 2009. He succeeds Kenneth Block whose term has expired.

Michael J. Thiele of Flushing, attorney in private practice. Mr. Thiele is appointed for a term expiring January 26, 2009. He succeeds Nancy Day whose term has expired.

Joy A. Turner of Grosse Pointe Park, attorney and shareholder for Sachs Waldman law firm. Ms. Turner is appointed for a term expiring

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Murray Feldman, 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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Article submissions are due for:
Spring issue March 15, 2005

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January 26, 2009. She succeeds Molly Cooke whose term has expired.

George J. Quist of Grand Rapids, magistrate for the Workers' Compensation Board of Magistrates. Mr. Quist is reappointed for a term expiring January 26, 2009.

Andrew G. Sloss of Clinton Township, magistrate for the Workers' Compensation Board of Magistrates. Mr. Sloss is reappointed for a term expiring January 26, 2009.

These appointments are subject to the advice and consent of the Senate.

From Your Editor

Murray Feldman, Strobl Cunningham & Sharp, PC

Changes in Attitudes; Changes in Latitudes

As you read this newsletter, the terms of long-serving Magistrates have already expired, while new Magistrates have already been appointed to serve in their place.

To remind us even further that the only certainty is change, your Editor, among many others, attended the retirement party for Larry Beidelman, Bill Listman, Tom McNally, and Mark Mellen, held on December 15, 2004. It was a real pleasure to see so many of us, including retired attorneys and former members of the administration, among many others representing all aspects of the workers' compensation community.

Reflecting on these events, I was reminded that each of us brings something special to the practice of workers' compensation. To honor our retirees and those who have gone before, here are some ideas to consider:

Join a committee or volunteer to serve on behalf of the Section in some way. Contact Alan Helmore, Chairperson, for details.

Write an article or column for this newsletter, sharing your thoughts, concerns, and areas of interest with other members of the Section.

Participate in one of several golf tournaments held to honor those who have gone before us and celebrate those who are still with us, such as the Harold Dean WC Open, the Rapaport/Greene Memorial, or the Larry K Good Health Day.

By actively participating in our Section, we can honor all those who have come before us and leave a legacy for those who will follow.

Happy New Year

from the Workers' Compensation Section Council

Farewell to Commissioner Leslie

Commissioner Richard Leslie Moves to Supreme Court

On January 3, 2005, WCAC Commissioner Richard B. Leslie left the WCAC to accept an appointment as a Commissioner of the Michigan Supreme Court. Mr. Leslie's career with the WCAC began in 1997 when Governor John Engler appointed him to replace Commissioner Molly Cooke. His service as a Commissioner was briefly interrupted in 2002 when he was appointed to a Magistrate position only to return to the WCAC several months later, this time as Chairperson. When the "new" WCAC started operations in December 2003 as a result of Governor Granholm's executive order, Mr. Leslie was one of five Commissioners named to the new panel. Mr. Leslie worked for over 20 years as defense counsel with LeVasseur & Leslie before his time with the WCAC. He lectured and wrote widely on such workers' compensation issues as the definition of disability, the concept of wage-earning capacity, retroactivity and many others. He presented his views before such groups as the Institute for Continuing Legal Education, the Workers' Compensation Section of the State Bar of Michigan, the Michigan Self-Insurers Association and the Michigan Trial Lawyers Association. At the Detroit College of Law, he taught workers' compensation principles to law students for 20 years. During his tenure with the WCAC, Mr. Leslie issued a great number of scholarly, crisply written opinions on nearly any workers' compensation issue imaginable. Many of his opinions are favorably cited in subsequent Commission and appellate court decisions. As compiler/editor of the WCAC research database and the "Recent Cases of Interest" section of the WCAC website, Mr. Leslie made a significant contribution to advancing the quality of research materials and tools available for members of the Workers' Comp bench and bar. We at the WCAC will miss Richard for many reasons. So far as the high quality of his legal work and expertise are concerned, his record speaks for itself. Those contributions along with his professionalism and willingness to discuss and share his knowledge with us will not be forgotten. We will, on a lighter note, also miss his seemingly endless supply of candy, amusing witticisms and – last but not least – the most florid Hawaiian shirt collection this side of Maui. 🛠

Winter Crossword Puzzle

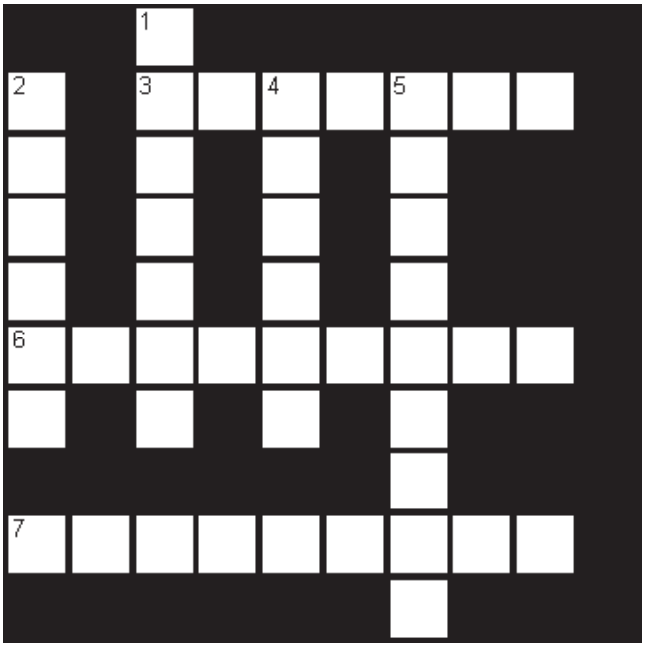
By Michael Mason

Across

3. Waives goodbye?
6. Ultimate survivor
7. Knower of all

Down

1. Poet Laureate
2. Biblical author now a teal?
4. Settle or...
5. Distinguishable farm work?



Report from the Board of Magistrates

JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
LANSING

DAVID C. HOLLISTER
DIRECTOR

December 15, 2004

Mr. Nolan Finley
Editorial Page Editor
Detroit News
615 West Lafayette
Detroit, Michigan 48226

Re: Workers' Compensation in Michigan

Dear Mr. Finley:

I write in response to Daniel Howe's article in the Detroit News Business section for Sunday, November 14, 2004. In that article about Governor Granholm's trip to Germany in support of Michigan business, Mr. Howes quoted some unidentified "cynics" who think the Governor's time would be better spent on dealing with "…the onerous workers' compensation laws…" As Chairperson of the Workers' Compensation Agency Board of Magistrates, let me assure you that the cynics are misinformed about Workers' Compensation in this state. The Board of Magistrates 26 members are the trial level judges for the Workers' Compensation system in this state. This number is the result of a reduction in the number of Magistrates brought about by the Executive Order of December 2003.

Rather than being "onerous" as the unnamed cynics suggest, Workers' Compensation claims and costs have been steadily declining in Michigan for several years. The Workers' Compensation insurance industry looks to the Data Collection Agency Board for information on Workers' Compensation insurance premium rates. According to that Board, there will be an 11.2% decline in Michigan rates for 2005. With the exception of the two years following 9/11/01, there has been a steady decline in Michigan premiums for the last ten years. As demonstrated in "Michigan Workers' Comp Reporter"(10/04), in 2002, Michigan Workers' Compensation costs per $100 of wages was only $.94 as compared to Ohio at $1.34, Illinois at $.99, Pennsylvania at $1.32, Wisconsin at $1.06 and Minnesota at $.97. In the region, only Indiana was cheaper at $.64. From 1998-2002, Michigan costs did not change and from 2001-2002 went up only .02% in the return to the same rate as 1998. This is particularly encouraging in light of rising medical costs that are included in those figures. This past October, to further reduce costs and in light of the reduction in the number of magistrates, three hearings offices were closed. It is expected that at least one more hearings office will close in the next year and consolidation of other hearings facilities is under discussion.

Mr. Noland Finley
December 15, 2004
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In addition to a steady decline in premiums, there has been a significant decline in the filing of contested cases. A contested case is one where an employer/carrier is disputing the benefits claimed by a worker. In 1993, 22,496 such cases were filed. However, by 2003, that number declined to 16,727. As of the end of September 2004, only 11,612 claims have been filed compared to 12,771 for the same period in 2003. The flow of case filings is relatively constant through the year so it appears that the total filings for 2004 will likely be 10% less than 2003. It should be noted that the number of case filings has declined since 1993, with the exception of 1997 which was 113 higher than 1996 and 2000 which was 67 higher than 1999. The overall trend is clearly downward.

Maximum weekly benefits available for an injured worker have barely kept pace with inflation. In 1982, the maximum rate was $307 per week and for 2003 the maximum was $653. Simply adjusting the 1982 rate for inflation would bring the rate to $592. Over a twenty-one year period, Michigan injured workers would at best only see an increase in the maximum rate that was only $61 over the rate of inflation. Although maximum rates have increased, more workers find themselves in lower paying jobs, they are less likely to qualify for the maximum rate. In fiscal year 2002/3, the total of all Michigan Workers' Compensation benefits of all types paid, including those paid voluntarily, came to $963 million while in the past fiscal year 2003-4, that amount declined to $919 million.

Rather than criticizing Governor Granholm for travels to promote Michigan business, perhaps Mr. Howe's cynical contacts should devote their time to joining her in the promotion of Michigan as a good place to do business where the costs of Workers' Compensation are in steady decline.

Very truly yours,

Magistrate Jack A. Nolish
Chairperson
Board of Magistrates
Workers' Compensation Agency
Michigan Department of Labor and Economic Growth
(313) 456-3673

cc: Mr. David Plawecki, Deputy Director's Office, Department of Labor & Economic Growth, Cadillac Place, Suite 13-650, 3024 W. Grand Boulevard, Detroit, Michigan 48202

Medicaid Liens in Workers' Compensation Cases

By Barry D. Adler, Adler & Associates. PLLC

Friend of the Court. Health insurance carriers. Blue Cross Blue Shield. Blue Care Network. HAP. STD/LTD Carriers. Pension plans. Medical providers. Medicare/CMS/United Government Services. Medicaid. Divorce Judgments. Bankruptcy Trustees. The list goes on and on.

The workers' compensation attorney, primarily claimants' attorneys, are all too familiar with the myriad of potential liens that exist on the proceeds of a workers' compensation claim. If the above listed liens are not enough to cause overworked and underpaid claimant's attorneys to pull their hair out when trying to settle these cases, well then think again.

The State of Michigan has amended a law, effective November 29, 2004, that makes the claimant and his or her attorney personally liable for the payment of expenses paid by Medicaid per Public Act No. 409, House Bill 5414. (MCLA 400.106). What is this new law and how will it work? First, a little background.

Medicaid is a public assistance program funded by state and federal money. It is administered by the State of Michigan through the Department of Community Health. An individual must meet requirements based on income and other factors to be eligible. Medicaid is the payer of last resort, serving the poorest of the poor. Title XIX of the Federal Social Security Act and Section 400.106 of the Michigan Social Welfare Act **require** that if a Medicaid beneficiary receives payment for medical expenses from **any** other resource, the beneficiary is required to repay Medicaid expenditures made on his or her behalf.

The Social Welfare Act has always required that Medicaid beneficiaries report to Medicaid if they file an action (insurance claim or lawsuit) as the result of a personal injury. H.B. 5414 now places the responsibility on the **claimant's attorney** to notify the Medicaid program whenever you are representing a client who has received or is currently receiving Medicaid benefits. Failure to comply may result in legal action against you and/or your client to recover Medicaid funds. This requirement applies to every conceivable personal injury action, including worker's compensation claims.

What to do? *First, ask your client if he or she has Medicaid benefits or had Medicaid benefits or intends to apply for Medicaid.* When? At the earliest opportunity (first consultation) and throughout the litigation. It is possible that an injured worker may not have Medicaid at the start of the case, but due to worsening financial circumstances, qualifies during the pendency of the claim. In fact, it is always good advice to recommend that your client apply for Medicaid if they have no other source to pay for medical treatment.

The Michigan Department of Human Services (formerly FIA) processes applications for Medicaid. Each county has an office. The Michigan Assistance and Referral Services (MARS) provides information regarding program eligibility. Their website is *www.mfia.state.mi.us/mars.com.*

If you are in doubt about whether your client has Medicaid, you must contact the Michigan Department of Community Health to find out.

When should you notify Medicaid that your client has a claim? NOW. The sooner you notify Medicaid the sooner the answer. If you have any reason to believe your client has Medicaid contact them to find out.

How to Contact Medicaid. *Requests for Medicaid lien information must be in writing* and sent to:

MI Dept.of Community Health
Revenue & Reimbursement Division
Casualty Unit
P.O. Box 30435
Lansing, MI 48909

517-335-8784 (phone)
517-346-9864 (fax)
e-mail: *morscheckp@michigan.gov*

The contact person is Patricia Morscheck. She is very professional and diligent. She has been doing this for years and works very well with attorneys. She understands the issues in workers' compensation cases. She will return your phone calls....really.

What information to send to Medicaid: Include the following information with your request:

- Client's name, DOB, and social security number
- Date of injury or disease
- Nature of injury/disease (How it happened and body parts affected)
- Name, address, phone number, claim representative name, and claim number of insurance company/ third party administrator/ employer, as applicable
- Copy of the Application for Mediation or Hearing (Form 104)

All Requests for information require an MDCH Authorization. To get information from Medicaid you must send an "Authorization to Disclose Protected Health Information", formally known as DCH-1183. You can obtain this form from the MDCH via their website: *www.michigan.gov/documents/DCH-1183(E)_91753_ 7.doc.*

Medicaid Contractors/Qualified Health Plans. A qualified health plan is a health maintenance organization (HMO) that the State of Michigan has contracted with to provide medical services to Medicaid beneficiaries. You may notice that your client has a card that looks like an insurance card that lists for example "Total Health Care". This is a contractor. They work like most HMOs. They limit the choice of providers.

It is important to note that your client may have received fee for service benefits (non-HMO) and have been enrolled in different HMOs during the period reviewed. Even if you know that your client was enrolled in a Medicaid HMO, do not contact them directly. *Send all requests for Medicaid information to the address above*. They will notify you if a contractor is involved and provide the information necessary to contact the contractor directly. If you have a problem with the contractor that cannot be resolved with them, contact the MDCH. They will intervene and help. After all, they gave the HMO the contract to serve our citizens. The HMOs are not omnipotent; they must answer to the State, which is omnipotent!

Attorney Fees. Medicaid and the HMOs are paying attorney fees for recovering their expenses pursuant to Rule 14 (15% on Redemptions; 30% on voluntary payments and awards).

Conclusion. As a workers' compensation practitioner you must be aware of your duties under this new provision of the Social Welfare Act. Medicaid is one more hand in the ever-shrinking cookie jar that is your client's workers' compensation claim in Michigan. It is incumbent that you protect your client and yourself from liability by following the procedures identified herein. When in doubt always contact the Medicaid program.

A Review of Recent Changes in Tort Law for Workers' Compensation Practitioners

By Michael R. Dunn

Part Two of a Two Part Series

As was discussed in the last quarterly Workers' Compensation Newsletter, workers' compensation claimants often have other rights associated with the occurrence of their injury that require evaluation and legal advice. I last wrote about other claims that can arise from work-related construction site accidents. I am now shifting my focus to recent changes in the law that affect work related motor vehicle accidents.

The Supreme Court issued its decision in *Kreiner v Fischer*, 471 Mich 109, 683 NW2d 611 (2004) interpreting and applying the statutory language establishing the injury threshold that must be met in order to bring a third party motor vehicle tort claim. Before addressing the impact of *Kreiner*, let's first review the issues presented by a work-related motor vehicle accident.

The work-related motor vehicle accident presents numerous potential pitfalls for the practitioner unfamiliar with this area. The injured worker may have three distinct claims. He/she may have a claim for workers' compensation benefits, a claim for no fault benefits to the extent such benefits exceed what is payable under the workers' compensation act, and a tort claim, if the worker's injuries are serious enough to meet the statutory threshold. Because of the relatively short notice requirements under the No Fault Act, it is critically important to properly identify and notify the no fault carrier as soon as possible, otherwise benefits may be lost. Depending upon the circumstances of the accident, there may be several potential no fault policies to choose from. There are statutorily mandated priorities that determine which policy applies. It is incumbent upon the worker and his attorney to identify and give notice to the proper carrier.

Settlement of a workers' compensation case can have significant consequences on a potential no fault claim. The Workers' Compensation Act is primary and No Fault is secondary. No fault only pays benefits in excess of workers' compensation benefits, or for things not covered by the Act, such as replacement services. If the workers' compensation claim is settled, the no fault carrier gets a credit for all benefits that potentially could have been payable under the Act. If there are significant issues with the workers' compensation case you may not be able to settle the case because of the effect settlement would have on the no fault claim and you may decide not even to bring a workers' compensation claim. However, no fault only provides three years of wage loss benefits. Thereafter, liability for wage losses is in the tortfeasor. If you anticipate long term disability and if third party liability is poor, or there is no collectible tortfeasor and no insurance or small insurance limits, then you must look to the uninsured and under insured provisions of the applicable no fault policy. If there is no such coverage or it is inadequate, then the workers' compensation act is your client's primary source for wage loss relief and must be pursued.

Typically, the workers' compensation carrier has a right of reimbursement out of third party tort claims for compensation benefits paid. However,

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in the context of a motor vehicle tort claim, medical benefits and the first three years of wage losses are payable by the no fault carrier and are not collectable from the tortfeasor. Therefore, the compensation carrier has no right of reimbursement for those economic losses out of the tort claim. Wage losses beyond three years are collectible from the tortfeasor, and are subject to the compensation carrier's lien.

But what if the negligent driver was uninsured or under insured and your client has to proceed against the uninsured or under insured provisions of the applicable no fault policy? Some of these contracts contain specific language that reduces the damages collectable by the amount of wage loss benefits paid by the employer or its workers' compensation carrier.

In *Kreiner*, the Supreme Court interpreted and applied the statutory threshold language, i.e. serious impairment of an important body function, to the particular facts of that case. The Supreme Court in *Kreiner* engaged in extensive judicial legislation to give us some guidelines in applying this language. Essentially, the Supreme Court held that to establish a serious impairment of an important body function, you determine if the course of the person's normal life has been affected so as to meet the threshold. By comparing the person's life before and after the accident, you must determine if the person's general ability to conduct the course of his life has been affected.

In ruling that Mr. Kreiner did not meet the threshold, the Supreme Court stated:

> First, we find that Kreiner's medically documented injuries to his lower back, right hip, and right leg constitute an impairment of an important body function that was objectively manifested. Thus, the issue is whether the impairment affected his general ability to lead his life. We find that Kreiner's impairment did not affect his overall or broad ability to conduct the course of his normal life. In fact, his life after the accident was not significantly different than it was before the accident. He continued working as a self employed carpenter and construction worker and was still able to perform all the work that he did before, with the possible exception of roofing work. His injuries did not cause him to miss one day of work.
>
> Kreiner states that he can no longer stand on a ladder for longer than twenty minutes, can no longer lift anything over eighty pounds, and was forced to limit his workday to six hours because he can no longer work eight hour days. Kreiner does not contend, however, that these limitations prevent him from performing his job. He also has difficulty walking more than a half-mile without resting and can no longer hunt rabbits, although he continues to hunt deer.
>
> Looking at Kreiner's life as a whole, before and after the accident, and the nature and extent of his injuries, we conclude that his impairment did not affect his overall ability to conduct the course of his normal life.

Likewise, in the companion case, the Supreme Court described Mr. Straub's injuries as follows:

> First, we find that Straub's injuries to his nondominant hand (a closed fracture, open wounds, tendon injuries to two fingers, and a quarter size wound on the palm) constituted an impairment of an important body function that was objectively manifested.
>
> Thus, the issue is whether the impairment affected his general ability to live his life. In determining whether Straub's general, overall ability to lead his preaccident life was affected, we consider his functional abilities and activities. ...

How these rulings will be interpreted and applied at the trial court level remains to be seen. It is generally thought that serious cases will still meet the threshold but that what might have previously been considered a borderline case clearly will not.

For the workers' compensation practitioner, it behooves us all to try to stay current on the dramatic changes taking place in Michigan's tort law, at least in a superficial sense, so that we may identify the issues for our clients. Ultimately, if you believe that your client may have other viable claims besides his workers' compensation case, you must advise your client of the issues presented. Be sure to get an early evaluation of the other potential claims by an attorney knowledgeable in that area and be sure to document the results of the evaluation to your file and your client. Then, if appropriate, handle the case if you are able or refer it to someone who can. Remember, in this business, what you don't know can hurt you.

Michael Dunn can be contacted at 313-964-2770.

Recent Decisions

By Jerry Marcinkoski, Lacey & Jones

Late Breaking News

As we were going press, the Michigan Supreme Court issued an order in a non workers' compensation case where it invites the Workers' Compensation Section of the State Bar to file briefs amicus curiae. The case is *Reed v Yackell/Hadley/Herskovitz/Mr. Food, Inc.* (SC No: 126534). The order was entered January 13, 2005.

The *Reed* case emanates from a circuit court case. The issue the Supreme Court is interested in is: whether the plaintiff was an employee within the meaning of § 161(1)(l) and (n) of the Worker's Disability Compensation Act so as to trigger the exclusive remedy provision barring the circuit court action.

The underlying facts of the case are that plaintiff had been fired five months earlier by the defendant company. However, afterwards, a different employee of the employer occasionally hired plaintiff to help him at his work of delivering meat products in a cargo van for the company. While helping one day, plaintiff was injured while riding in the passenger seat of the cargo van. Plaintiff sustained a closed head injury and was awarded more than one million dollars in damages.

The Section Counsel will be considering the Supreme Court's invitation to file briefs amicus curiae.

Supreme Court

There have been no new decisions from the Supreme Court since our Fall 2004 newsletter.

Two workers' compensation cases remain pending on leave granted before the Supreme Court. They have been orally argued and could be decided at any time.

The first case is *Bailey v Oakwood Hospital and Medical Center/Second Injury Fund/Director of Bureau of Workers' and Unemployment Compensation* (SC Nos. 125110 and 125171). The Court of Appeals' decision in the case is found at 259 Mich App 298; 674 NW2d 160 (2003). The issues in this case relate to operation of Chapter 9's vocationally disabled (f/k/a vocationally handicapped) provision, particularly the notice provision in Chapter 9 requiring the carrier to notify the Fund within certain time limits.

The second case is *Cain v Waste Management, Inc/Transportation Insurance Company and Second Injury Fund* (SC Nos. 125111 and 125180). The Court of Appeals' decision in this case is found at 259 Mich App 350; 674 NW2d 383 (2004). The issues in this case relate to plaintiff's claim for specific loss benefits for a non-amputated leg, as well as total and permanent disability benefits. Among the issues being considered is whether the Supreme Court should overrule *Pipe v Leese Tool & Die Co,* 410 Mich 510; 302 NW2d 526 (1981), which allows for a "loss of industrial use" standard to be applied in determining specific losses.

The Supreme Court also heard oral argument on whether it should grant leave to appeal in the case *Gordon v Henry Ford Health System* (CA No. 244596, unpublished decision dated November 18, 2003). Following oral argument, the Supreme Court declined to grant leave. This is a case where the employer had been paying plaintiff under a final open award of benefits. Years later, an activities investigation disclosed that plaintiff was operating two adult foster care homes. Consequently, the employer filed a petition to stop on the basis of plaintiff's alleged earning capacity there. The employer prevailed with its petition to stop at the Court of Appeals and, as indicated, the Supreme Court denied plaintiff's application for leave to appeal after oral argument.

Court of Appeals

The Court of Appeals has not released any published workers' compensation decisions since our last newsletter. We normally do not report unpublished Court of Appeals' decisions because they do not constitute precedent. However, given the absence of any published Court of Appeals' decisions recently, we will report on the following two unpublished workers' compensation cases released since the last newsletter.

Injury Sustained While Traveling

In *Scott v Electronic Data Systems Corporation* (CA No. 248458, unpublished decision dated October 28, 2004), plaintiff worked for Electronic Data Systems [EDS] in Flint. He would occasionally be sent from the Flint office to address problems for EDS customers at the customers' worksite. One day, he drove from Flint to a customer's worksite in Warren, Michigan. He completed his task there at about 4:10 p.m. and began returning to the Flint area. He received mileage for his travel to and from the clients' location. He was involved in an automobile accident while returning to Flint. The Magistrate found that plaintiff was most likely going directly home, rather than back to the office, given the hour of the day.

The Court of Appeals, reversing the Workers' Compensation Appellate Commission, held plaintiff's injury was compensable. The Court explained

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that, although the general rule is that injuries sustained going to and coming from work are not compensable, two exceptions to that general rule applied here. The Court said plaintiff was on a "special mission" for the employer at the time of his injury and the employer's payment of mileage made the injury compensable.

Expert Opinion Based Upon Hearsay

In *Conley v Suburban Mobility Authority for Regional Transportation* (CA No. 249590, unpublished decision decided December 21, 2004), the Court of Appeals said that an expert opinion based on hearsay evidence was admissible and constituted viable evidence.

Plaintiff offered the testimony of a Dr. Lockhart whose opinion was based on an MRI report never admitted into the record and the MRI had not been performed at Dr. Lockhart's request. The Magistrate relied upon Dr. Lockhart's opinion nevertheless in awarding benefits. On appeal, the Workers' Compensation Appellate Commission reversed the award. The Commission held that the doctor's opinion, based as it was on the MRI report, was not competent evidence.

The Court of Appeals disagreed with the Commission. The Court said that, although hearsay evidence is generally inadmissible, the doctor's opinion – even though based on inadmissible hearsay evidence – is viable evidence to support the Magistrate's ruling. The Court held:

> "… 'an expert may base an opinion on hearsay information or on findings and opinions of other experts.' F*orest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 73; 577 NW2d 150 (1998). Any hearsay basis for [Dr.] Lockhart's opinion affects the opinion's weight, not admissibility. Id. Therefore, even assuming the MRI report itself was inadmissible and could not have been used to support a finding of disability, Lockhart's opinion/diagnosis was admissible-regardless of the fact that it was based on inadmissible hearsay evidence."

Workers' Compensation Appellate Commission

The Workers' Compensation Appellate Commission has released a number of notable cases since the last newsletter.

Injury Climbing Steps En Route to Employer's Breakroom Is Compensable

In *Castill v Peterson Farms, Inc*, 2004 ACO #366, plaintiff was climbing steps during the workday to go to the breakroom when she slipped on slippery steps, fell backwards, and injured her back. The Magistrate denied benefits on the basis that plaintiff sustained "an injury incurred in the pursuit of an activity the major purpose of which is social or recreational" per MCL 418.301(3).

The Commission reversed the Magistrate's denial of benefits. The Commission reasoned that: plaintiff had yet to commence her break; the employer derived a benefit from plaintiff resting on a ten-minute break; and, ascending stairs was not risk free behavior particularly where, as here, the stairs were slippery. The Commission distinguished prior cases where injuries had been sustained while playing basketball on the employer's premises and while smoking during a smoking break on the premises saying those activities were more recreational or social in nature than climbing steps.

Rakestraw's Application To Pre-Existing Work-Related Injuries

In *Lapham v Engineered Plastic Components, Inc*, 2004 ACO #394, the Commission recognized that application of *Rakestraw* where the pre-existing condition is a work-related injury "has been the subject of disagreement at the Commission level." Specifically, there have been cases saying that *Rakestraw* principles apply to claims that work activity aggravated a pre-existing work-related condition. E.g., *Zanskas v National Staff Management, Inc,* 2003 ACO #224. Other cases imply *Rakestraw* is confined to assessing work aggravation of prior non-work-related problems only. E.g., *Burnaska v Ford Motor Co*, 2004 ACO #110.

After reviewing differing opinions on this subject, the Commission concluded that "any discord among [the cases] is more perceived than real." The Commission said the case law "stand[s] for the proposition that an employee sustains a new date of injury when it is shown the employee has sustained a permanent worsening in the disability due to subsequent injury or work activity." The Commission held:

> "Phrased in proper post-Sington and post-Rakestraw terms: An employee sustains a new compensable personal injury where the employee proves a permanent decrease in ability to perform work within the employee's qualifications and training. Naturally, as with all injuries, this must be accompanied by a showing of loss of wages due to the injury."

Applying this rule, the Commission affirmed the Magistrate's finding of a new and later date of injury based an aggravation of a prior work-related problem.

Fatal Injury Is Compensable And Not Excluded By Social And Recreational Exception

In *Beus v Broad Vogt & Conant, Inc,* 2004 ACO #300, the Commission reversed the Magistrate's denial of death benefits where an employee was killed in an automobile accident in Mexico.

The deceased and his family were driving in Mexico to relocate there as well as to attempt to land a client in Mexico for the defendant-employer. While traveling on a treacherous Mexican road with his family, the deceased lost control of his van and it swerved off the road. The deceased was thrown from the vehicle and died shortly thereafter, with his family surviving the accident. The Magistrate held that the major purpose of the trip was social or recreational given the deceased's intent to relocate his family in Mexico.

The Commission found it a close case and noted that the law in this area is "complex and varied." The Commission disagreed with the Magistrate saying, "we do not find there exists the requisite evidence to support the magistrate's finding that the Beus family … was on a social/recreational trip at the time of their accident." In so ruling, the Commission emphasized that the deceased had made a sales call on a customer while on the trip; the employer agreed to reimburse the deceased for meals, lodging, and incidental expenses; and, there was no deviation from the business route on the particular leg of the trip where the deceased sustained his accident even though earlier there had been a vacation aspect to the trip. The death was therefore deemed compensable.

Defendant's Burden To Prove Coordination And Unemployment Compensation Offset

In *Carroll v Delphi Automotive Systems*, 2004 ACO #390, plaintiff cross-appealed an open award by the Magistrate to argue the Magistrate should not have permitted coordination of a disability pension nor an offset of unemployment compensation benefits because there was nothing in the record to establish that plaintiff received such benefits.

The Commission agreed. The Commission said that:

> "Absent a stipulation regarding co-ordination of benefits, defendant/employer bears the burden of entering the necessary proofs on that issue. [Citation omitted.] No such proofs were offered. Accordingly, we modify the magistrate's award striking the language regarding co-ordination of disability pension and unemployment benefits."

The Parties' Respective Burdens Of Proof In *Sington* Cases

The Commission has issued a major pronouncement with regard to the burdens of proof in cases involving the disability issue and *Sington v Chrysler Corporation*, 467 Mich 144; 648 NW2d 624 (2002). The case is *Wegienka v Monsanto Chemical Co, Inc*, 2004 ACO #324. The case builds upon *Riley v Bay Logistics*, 2004 ACO #27 and purports to describe the shifting burdens of proof where disability is at issue. The Commission explained:

> "Thus as we have often stated in our post Sington decisions, in order to establish a **compensable (threshold) disability** under Section 301(4), plaintiff must prove he or she unable to physically or mentally perform **all** of the jobs within his/her pre-injury qualifications and training paying wages **at that** person's **maximum** pre-injury earning level, or that such jobs are not reasonably available.
>
> Much of the parties' arguments reflect a lack of understanding concerning the respective burdens of proof in a *Sington* trial. For clarity, we repeat our statement of those burdens found in *Riley v Bay Logistics*, 2004 ACO #27:
>
> In reaching her decision on remand, the magistrate should make the specific determinations and findings enumerated in *Kethman v Lear Seating*, 2003 ACO #205 and *Sington* (On Remand):
>
> 1. Has plaintiff established the universe of jobs for which he or she is qualified and trained, and how much do they pay?
>
> 2. Has plaintiff established his or her work-related physical or mental impairment, which does not permit him or her to perform jobs within his qualifications and training causing him to lose wages?
>
> 3. Has plaintiff established that he or she was either unable to perform (or obtain because such jobs were not reasonably available) all the jobs within his qualifications and training that pay his maximum wage (for the purpose of establishing his Section 301(4) threshold disability)?

At this point, if each question is answered by the fact finder in the affirmative, according to the express language of Michigan Supreme Court[6] in *Sington*, plaintiff has proven a threshold disability (or stated differently, plaintiff's work injury has caused his Sec-

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Recent Decisions
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tion 301(4) disability):

> If an employee is no longer able to perform any of the jobs that pay the maximum wages, given the employees training and qualifications, **a disability has been established under Sec. 301(4)**. [Emphasis added.]

However, in order to receive benefits, plaintiff also has to establish a wage loss as required by Section 361. He or she does so by proving either an inability to perform (or to obtain because such jobs were not reasonably available) all the jobs within his or her qualifications and training that pay lesser wages,[7] establishing a prima facie wage loss (for the purpose of Section 361).

If the magistrate finds plaintiff has put in a prima facie case as outlined above, the burden of persuasion shifts to the defendant, and she should then determine if defendant has brought forth sufficient proofs to show there did exist jobs (real jobs in the real world) within plaintiff's qualifications and training, and physical ability to perform, which were reasonably available to him or her and paid either the maximum wage (rebutting plaintiff's threshold disability under Section 301(4), or a lesser wage for the purposes of rebutting plaintiff's prima facie showing under Section 361.

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6 Cited above, but recited here for emphasis. This language is used several times in the Supreme Court's decision in *Sington*, see pages 155, 157 and 159.

> 7 This record makes it clear plaintiff made a good faith offer to determine which such jobs were reasonably available within her work restrictions. (Emphasis in original).

The Commission then applied this analysis to remark that the Magistrate "astutely followed the *Sington* decision" by "[f]ollowing the *Riley* model." The Commission affirmed the Magistrate's open award and, in so doing, also made the following three points.

First, the Commission "reject[ed] outright plaintiff's contention that her qualifications and training can only consist of the jobs skills at the position she was injured performing, or even limited to those she has actually performed in the past."

Second, the Commission agreed with defendant that "plaintiff is incorrect when she claims absent offering a new job to the claimant, defendants cannot claim she has failed to prove wage loss." "Wage loss" is the last threshold requirement under the methodology described above. The Commission explained the "wage loss" as follows:

> "… we have stated that credible testimony from plaintiff accepted by the magistrate as persuasive, that because of his disability, he is no longer able to perform any of the jobs for which he is qualified and trained, can establish a prima facie case of wage loss. If the magistrate finds that plaintiff has put in a prima facie case, having established wage loss, the burden of persuasion then shifts to the defendants, and it must be determined if defendants have brought forth sufficient proofs to show there did exist actual jobs (real jobs in the real world) within plaintiff's qualifications and training,[28] and physical ability to perform, which were reasonably available to him or her. *Holden v Cannon Muskegon Corporation*, 2004 ACO #271.

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28 For the purposes of wage loss determination under either §361 or §301(5), we are now concerned only with those jobs paying less than the maximum.

Third, the Commission said for defendants to offer "definitive proofs rebutting that prima facie case…a vocational rehabilitation expert" must offer more definitive proof than merely evidence that "a 'class' of jobs plaintiff may be able to perform may exist." In this particular case, the Commission said plaintiff was properly cooperating with defendant's vocational expert's job placement efforts.

Sington Remand

In *Sorensen v Manpower Temporary Services*, 2004 ACO #294, the employer appealed an award of disability benefits arguing the Magistrate's *Sington* analysis was inadequate. The Commission agreed finding "the magistrate made no finding concerning which jobs plaintiff was qualified or trained to do, the salary each paid (or which paid the maximum or less), nor whether there were jobs he was either unable to perform physically which were reasonably available." The Commission said it has been attempting "to give some guidance to the fact-finders regarding the necesssary steps in such an analysis in a series of cases beginning with the two *Sington* decisions we have rendered on remand from the Supreme Court, in *Riley v Bay Logistics*, 2004 ACO #27 and several subsequent decisions." The Commission says that "we require

a more detailed explanation" than that provided by the Magistrate in this case thus requiring a remand.

Opening Statements

In *Wetoszke v Cintas Corporation*, 2004 ACO #336, defendant specifically denied plaintiff was "disabled" during the stipulation process at the outset of trial. The Magistrate then asked for opening statements. Plaintiff's counsel and defendants' counsel provided opening statements with respect to the issues to be litigated. In those opening statements, counsel concentrated on discussing whether "favored work" offered plaintiff was within his capacity to perform.

The Magistrate denied plaintiff benefits on the basis the proofs proffered by plaintiff were insufficient to demonstrate "disability" in the first place, thereby negating any favored work issue. On appeal, plaintiff argued that due process required vacating and remanding the case because plaintiff was misled on what was at issue.

The Commission agreed with plaintiff and remanded the case to allow plaintiff to proffer proofs on "disability".

Logging Industry Reimbursement

In *Jager v Rostagno Trucking Co, Inc*, 2004 ACO #311, the issue presented was whether plaintiff – who was being voluntarily paid for his work injury – was engaged in employment in the logging industry at the time of his injury such that the Silicosis, Dust Disease & Logging Industry Compensation Fund is liable to reimburse the employer under MCL 418.531(1). The "logging industry" for Chapter 9 reimbursement purposes is defined by statute as the employment described in drivers code no. 2702 filed with the Commissioner of Insurance. MCL 418.501(4). That code describes logging or lumbering drivers as "includ[ing] transportation of logs to mill, construction operation, maintenance, or extension of logging road or logging railroads."

Plaintiff's job involved driving trucks and hauling logs to sawmills. He was injured while taking chains from the load of his truck. He testified the trucks he drove had logging plates and they only allowed for hauling raw wood and forest products. The Magistrate found plaintiff was engaged in the transportation of logs to the mill and unchaining the load was a necessary part of the transportation process. Consequently, the Magistrate ordered the Fund to reimburse the employer for amounts in excess of the statutory threshold in MCL 418.921.

The Fund challenged the Magistrate's decision arguing plaintiff was not employed in the logging industry at the time of the injury but instead employed in the trucking industry.

Applying a three-point analysis, the Commission concluded this employer was insured under an industry code for "driver's trucking" not the logging industry. The Commission noted that all of the employer's workers, including plaintiff, were insured under such classification. Therefore, the Commission held the employer was not within the purview of the legislation, which seeks to protect the logging industry and, therefore, could not obtain reimbursement.

From the Chair

First: A little preaching

The frustrations associated with the practice continue to mount and are taking a toll on all of us. The CMS, Medicaid and Friend of the Court liens have significantly impacted our ability to resolve cases and the effort necessary to resolve them. The number of cases has dramatically dropped over the last few years. The work required to properly develop each individual case has increased substantially. Record keeping has become a major part of the work. Fees have remained the same in spite of increased costs and effort. It is certainly a difficult time to be a lawyer.

This situation has undoubtedly had a personal impact on each of us. As a result of the pressures there seems to have been a significant increase in incidents of questionable professional conduct or at least a lack of courtesy and respect toward our fellow attorneys. Some attempts to circumvent the CMS requirements appear to have been ethically questionable. (I do not wish to go into specifics.) The point here is that we must remember that we are all professionals and strive to maintain the highest standards in our ethics and courtesy to the bench, our fellow attorneys, and the general public. This will make the practice much more pleasant for everyone in spite of the frustrations that we all face.

Joining forces to deal with CMS issues

We will be joining forces with other state workers' compensation sections in supporting the Workers' Compensation Division of the Tort Law Section American Bar Association effort in asking the ABA to pass a resolution seeking some relief from Congress in resolving the problems associated with the CMS issue. Specifically, the resolution will ask Congress to establish guidelines and procedures

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From the Chair
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to be followed in seeking reimbursement and set-aside trust matters. Keep tuned on this issue.

Annual Meeting Change Proposed

Your Section Council has been considering changing our bylaws to permit the Annual Meeting of the Section to coincide with the Spring Meeting (this year it will be on Mackinac Island - July 27, 28.) A formal amendment will be proposed and voted on at the Annual Meeting that must be held during the State Bar Annual Meeting this year. If you have any comments, please send them to me by email (*ahelmore@SWAPPC.com*) or a note sent to my office.

Newsletter by e-mail proposed

The Council has also been considering sending the newsletter by email in an effort to save costs. The newsletter is the greatest expense to the Section. If you have comments on this issue, please send them to me. Please note that the current newsletter is posted on our web page (*www.michbar.org/workerscomp/*)

As always, the members of the Council and I welcome any thoughts or comments from the membership.

Alan Helmore, Chairperson,
Workers' Compensation Law Section

Poetry

By Magistrate Mike Barney

Mystery Man

The crack is moving down the wall.
Defective plaster isn't all the cause.
We must remain until the roof falls in.

It's mildly cheering to recall
that every building has its little flaws.
The crack is moving down the wall.

Here in the kitchen, drinking gin,
we can accept the damndest laws.
We must remain until the roof falls in.

And though there's no one here at all,
one searches every room because
the crack is moving down the wall.

Repairs? But how can one begin?
The lease has warnings buried in each clause.
We must remain until the roof falls in.

These nights one hears a creaking in the hall,
the sort of thing that gives one pause.
The crack is moving down the wall.
We must remain until the roof falls in.

The above, one of *Five Villanelles*, illustrates the two contradictory sentiments that make the author, Weldon Kees, both the best unknown poet of the Twentieth Century, and one of its most important. The mordant jauntiness and detached repulsion evident in the above lines is truly unique to Kees, giving him what poets prize most and most often fail to acquire, even after years of craft: his own voice.

Weldon Kees was born in 1914 in Beatrice, Nebraska, in country that gave us such American icons as Marlon Brando and Henry Fonda. Beatrice itself could have passed for that most American of towns, the fictional Bedford Falls of Frank Capra's classic *It's A Wonderful Life*. Yet like Brando and Fonda, and like the American Dream they came, in many ways, to stand for, Kees had a dark side; a knowledge (or perhaps just a hunch) that behind the public façade of the shiny small town lay unspeakable horror ineradicable from the human condition.

After graduating from the University of Nebraska in 1935 (his fiction had already started appearing in noted literary magazines prior to graduation) he moved, as many small-town up-and-comers do, to a series of bigger arenas; first Denver, then New York (where he worked as a staff writer in the Luce magazine empire of Time, Life and Fortune) and finally, San Francisco. In between earning a living, he managed to publish three well-received volumes of poetry, exhibit his

paintings alongside those of more recognized painters such as Hans Hofmann, Willem de Kooning, and Jackson Pollack, play world-class jazz piano and compose music, make experimental films, and co-author a standard text on non-verbal communication (illustrated with his own photographs.) Yet he was always haunted by what he called "…our present atmosphere of distrust, violence, and irrationality, with so many human beings murdering themselves—either literally or symbolically…". This hauntedness is what gives his poems such power; there is a combination of disgust at the botched civilization Whitman's promise of America had (to him) become, and at the same time a serene acceptance of the abhorrence this engendered, that is quite unlike anyone else.

His most famous work is a series of four poems about an "everyman" named Robinson, man-about-town, sophisticate, empty vessel. Here is an example:

Aspects of Robinson

Robinson at cards at the Algonquin; a thin
Blue light comes down once more outside the blinds.
Gray men in overcoats are ghosts blown past the door.
The taxis streak the avenues with yellow, orange and red.
This is Grand Central, Mr. Robinson.

Robinson on a roof above the Heights; the boats
Mourn like the lost. Water is slate, far down.
Through sounds of ice cubes dropped in a glass, an osteopath,
Dressed for the links, describes an old Intourist tour.
—Here's where old Gibbons jumped from, Robinson.

Robinson walking in the park, admiring the elephant.
Robinson buying the *Tribune*, Robinson buying the *Times*.
Robinson
Saying, "Hello. Yes, this is Robinson. Sunday At five? I'd love to. Pretty well. And you?"
Robinson alone at Longchamps, staring at the wall.

Robinson afraid, drunk, sobbing Robinson
In bed with a Mrs. Morse. Robinson at home;
Decisions: Toynbee or luminol? Where the sun
Shines, Robinson in flowered trunks, eyes toward
The breakers. Where the night ends, Robinson in East Side bars.

Robinson in glen plaid jacket, Scotch-grain shoes,
Black four-in-hand and oxford button-down,
The jeweled and silent watch that winds itself, the brief-
Case, covert topcoat, clothes for spring, all covering
His sad and usual heart, dry as a winter leaf.

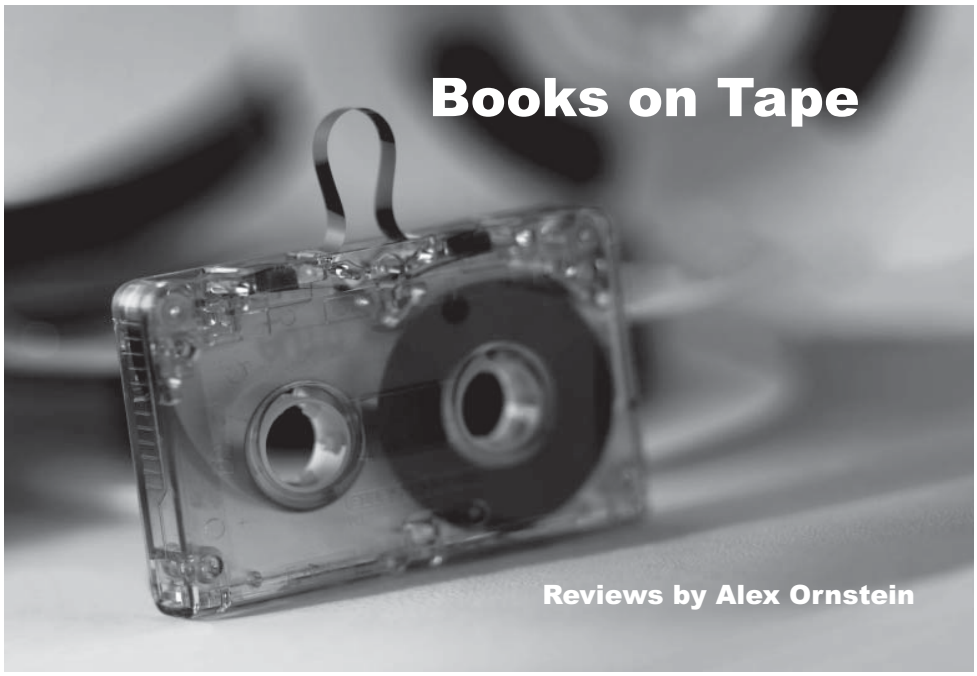
One wonders what Kees would have made of the escalating craziness and cruelty of today's world. We will never know. Kees talked about dropping out, going somewhere primitive where he might exist unrecognized and unbothered by modern madness. He often also talked of suicide. On July 18, 1955, his car was found abandoned on the approach to the Golden Gate Bridge. Kees was never seen again. He leaves behind a legacy of bitter beauty, of raging quietly against the darkness that will encompass us all, and that we must eventually accept:

Small Prayer

Change, move, dead clock, that this fresh day
May break with dazzling light to these sick eyes.
Burn, glare, old sun, so long unseen,
That time may find its sound again, and cleanse
What ever it is that a wound remembers
After the healing ends.

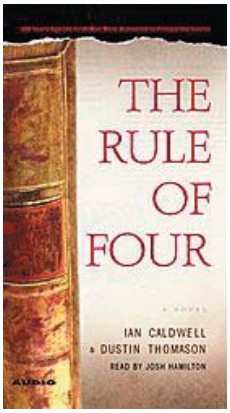
Weldon Kees

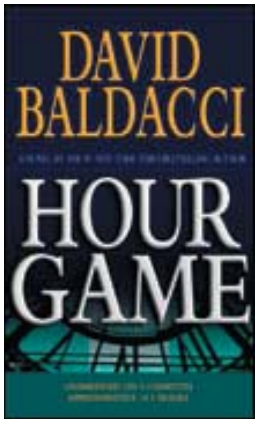
Weldon Kees preparing to paint



The Rule of Four, by Ian Caldwell and Dustin Thomoson. This book has a thirteen-hour runtime. It was released in 2004 by Simon and Schuster, Audio Division. This mystery centers on Princeton University and the Hypnerotomachia Poliphili, a work from the Middle Ages. As to Princeton, it mentions the private dining clubs and their place on the social roster, the underground tunnels, various and sundry buildings and museums and halls. The two principal characters are Paul Harris, an amazing youthful scholar, and Tom Sullivan, the son of a famous scholar on the Hypnerotomachia. Paul has deeply admired the work of the senior Sullivan and wants to forward it. A must audio for Joel Alpert and his son, Jeffrey.

Hour Game, by David Baldacci, 6 hours, Warner Books Someone is replicating the methodology of famous killers of the past. Each turns up with a watch that is set and stopped at an hour after the previous killing. Two agents, one active in the FBI, and one retired, team up to track down the killer. The culprit seems to anticipate all their moves covering the tracks by murder. This work moves at a fast pace but the ending was predictable, but that doesn't mean this wasn't a good read. 🛠





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