State Bar of Michigan

Workers' Compensation Section Newsletter

Winter 2009

Medicare Conditional Payments Update

By Chuck Palmer

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Reminder:
The Winter Seminar is December 11, in Detroit. Details inside.

Several months ago I wrote about my federal court case in the Northern District of Ohio. The Medicare Secondary Payer Recovery Contractor (MSPRC) had ignored my requests for an appeal of a conditional payment letter until I filed the federal court case. The main issue was my assertion of the three-year limitation of conditional payments found in the Medicare Secondary Payer Act, 42 USC 1495y(b)(2)(B)(vi). After filing the case, the MSPRC initially offered my client an administrative appeal and later refunded the disputed conditional payments. Based on those actions, the federal district court judge granted the government's motion to dismiss our case. And because they had refunded all the disputed amounts, we did not need to utilize the appeal process.

If you receive a conditional payment letter that seeks recovery of conditional payments more than three years after the date of service, you should write to MSPRC and dispute their right to claim them, and request an appeal. There is also a waiver provision at 42 USC 1395y(b)(2)(B)(v), which permits CMS to waive an overpayment if the beneficiary is without fault, and when recovery would defeat the purpose of Title II or XVII of the Social Security Act, or be against equity and good conscience. See the regulations concerning "equity and good conscience" at 42 CFR 405.509. Also remember once you have a conditional payment letter, you need to send in the proposed redemption order showing the attorney's fees and costs, and MSPRC will then proportionately reduce the conditional payment. See 42 CFR 411.37.

If you protest the amount of the conditional payments, the MSPRC should then issue a redetermination on your appeal. The MSPRC decision can then be appealed to another private contractor, Maximus Federal Service, Inc., in King of Prussia, PA. Maximus will review the documents and issue a Medicare Reconsideration Decision, usually within 60 days. That decision can then be appealed to the Department of Health and Human Services (DHHS) Office of Medicare Hearings and Appeals for the Midwest Region in Cleveland, Ohio. You will be afforded an

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Tom Ruth, 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 Chair

By Joel Alpert, Chairperson

A fire on March 25, 1911, at the Triangle Shirtwaist Factory resulted in the largest industrial disaster in the history of the city of New York.[1] The conditions in the nine-floor factory were typical of the time. Flammable materials were stored throughout, scraps of fabric littered the floors, and patterns and designs on sheets of tissue paper hung above work tables. Some employees smoked in their work areas, illumination was provided by open gaslights, and there were only a few buckets of water to extinguish fires. There were only two exit doors, one of which was locked. The fire escape, which may have been broken prior to the fire, collapsed under the weight of the frantic workers, and 146 garment workers died either from the fire itself or by jumping to their deaths. As a result of ensuing public outrage, legislation requiring improved workplace safety standards was passed.

Jump ahead about 100 years and we find skyrocketing medical costs and limitations on remedy and benefits that have been judicially and legislatively introduced reveal a need for a realignment of the interests of employers and workers to allow fulfillment of the social contract that led to the introduction of the exclusive workers' compensation remedy. Some proposals are currently under development. What solutions should be considered? What will effectuate the goals of certainty of compensation for the injured worker, limitation of employer liability, and reasonable financial and social costs?

Evidence-based medicine (EBM) aims to apply the best available evidence gained from scientific method to medical decision-making. It is controversial as it can utilize biased studies and incomplete data, discount ethical and moral considerations, and there are competing EBM protocols, all of which claim they are the "gold standard". Most physicians agree that knowledge gained from clinical research does not directly answer the primary clinical question of what is best for the patient at hand. The danger of EBM was elucidated in a recent article in the *New York Times*. EBM guidelines for the treatment of diabetes had to be revised after they caused the deaths of many patients. (See "Diabetes Case Shows Pitfalls of Treatment Rules", *New York Times*, August 18, 2009.) Still, many advocate following EBM guidelines before they are perfected and giving them the force of law by presuming they are correct regarding the extent and scope of medical treatment, thereby minimizing or excluding the physician's clinical experience. It is apparent that EBM has not advanced to the point that its application is the most appropriate way to handle patient care. Perhaps we will soon have a health care bill that will reign in costs while providing high quality care for all, but that's a subject of a different debate.

The University of Michigan Hospital System recently adopted a system of transparency for dealing with medical errors. Rather than cloak them in secrecy, patients are informed when a medical error has occurred. Some predicted that this would result in a significant increase in litigation, but a report in the *Journal of Health & Life Sciences Law* authored by U of M risk management officers and medical staff acknowledges that injured patients want an acknowledgement of accountability, truthfulness, and assurance that future injury will be avoided. Litigation significantly decreased with the new plan. The article concludes, "Not only is there an ethical benefit to disclosure and transparency, but it also makes financial sense. At a minimum there is a practical alternative to deny and defend." Employers and workers' compensation insurers should take a lesson.

In Professor Welch's article, "What Should Be Driving Workers' Compensation Reform?", *IAIABC Journal*, Fall 2007, Vol. 44, No. 2, guidance is given:

> At the Worker's Compensation Center at Michigan State University we conduct seminars for workers' compensation professionals. Time after time we see people who show us how they have reduced their company's cost of worker's compensation by dramatic amounts. Usually this includes aggressive programs for safety and prevention and return to work. These companies are also seeking out and providing to their claimants the highest quality medical care available. They quickly and fully pay deserving claims but are not afraid to challenge and litigate claims that should be denied.

If costs are too high, employers should be controlling this within their own organization. It is evident that they have the power to do so.

Industry has made dramatic gains in the treatment of workers in the last 100 years.[2] Safety programs for preventing injuries are paramount. Excellent medical care that seeks to diagnose and treat injuries rather than categorize, ignore, or delay treatment must be mandated. These concepts coupled with employers practicing accountability, truthfulness, and sincerity for the well-being of workers while engaging in meaningful return-to-work/retraining programs within their own companies—not just tedious and extended job searches with different employers—will result in a synergy. The net effect will be fewer and less-expensive claims, increased profits, and workers who are healthier and more productive. We cannot allow a return to the Triangle Shirtwaist philosophy that marginalizes the fair, safe, humane, and moral treatment of workers. 🛠

(The opinions stated in this article are those of the author, and not necessarily those of the section council.)

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Endnotes

1 The tragedy of September 11, 2001 cannot be discounted but it was caused by a terrorist act, not by industrial considerations.

2 The reasons for these gains are the subject of another article.

Medicare . . .
Continued from page 1

opportunity to file a brief and any further information on your claim. A telephone hearing is then scheduled with a Medicare administrative law judge and a written decision issued. The next level of appeals is the DHHS Medicare Appeals Council in Washington, D.C. Finally, if you are still unsuccessful at that level, you may then file an appeal in federal district court IF the disputed amount involves more than $1,000.

I have an appeal before the Medicare Appeals Council in Washington, D.C., involving a claim for $1,700 in conditional payments that are far more than three years old. The appeal arose when MSPRC issued a conditional payment letter, which then caused us to redeem the case, and then several months later MSPRC issued a revised conditional payment letter seeking payment of more money and older payments. Obviously if you get involved in a dispute with MSPRC over conditional payments before a redemption, at some point most clients are going to want to get the redemption over and get their money. But in my case the dispute arose after the redemption, and the client understands the importance of the legal issue involved and has authorized me to pursue the appeal. I hope to be able to file a federal district court action after the Medicare Appeals Council and create some federal precedent on this issue. I will keep you posted.

By the way, I'm not aware of any appeals process for Medicare Set-Aside decisions. If anyone has been able to appeal a MSA, please let me know. 🛠

Editor's Note

It seems like our Section is in a constant state of change. As we know, the state of Michigan's budget concerns have-or will-significantly impact the way we practice. This fact, coupled with continued issues with ever present CMS and Stokes make it harder to manage what we do on a daily basis. It is for this reason that all of you should take the time to attend our upcoming section meeting in Detroit this December. Let's hope the weather cooperates!

I can tell you that the Section poll regarding emailing this Newsletter had seven respondents wanting the Newsletter by email and fourteen by paper. Obviously, there was not an overwhelming response. This issue will be discussed at the December meeting. Your input is important to the Council.

Finally, a publishing error was made in the last issue of the Newsletter regarding photographs of the honorees at the Spring Section Meeting. Peter Woll's last name was left out of the photograph of him accepting on behalf of his father. Peter, I apologize.

—*Tom Ruth*

Board of Magistrates Update

By Christopher P. Ambrose, Chairperson, Board of Magistrates

When I was approached with the offer of becoming the newest chairperson several weeks ago, I was both honored and somewhat apprehensive. These are very challenging times in state government, and I knew that this new role would be a situation unlike any I had faced in my legal career. Additionally, I have the unenviable position of having spent a great deal of time dealing with the Michigan budget crisis in a totally separate setting from our world in workers compensation. As a trustee of the East Lansing School District, I have spent the last couple of years preparing for the fallout from the perfect storm that has rained down upon us. Although it has not been the ideal scenario for running a school system, it has actually created greater efficiency, and the development of some very positive programs in our schools.

I hope that the process of downsizing, and in some ways, reinventing the way we do things on the Board, will make for an even better system than the one we have had for the last couple of decades. As you know, due to recent Executive Order 2009-53, signed by the Governor on October 29, 2009, we will be going down to 17 magistrate positions from the current 26. This will create challenges, and I certainly appreciate the anticipated cooperation of the bar as we transition to this new system after January 26, 2010. Please know that it will always be my policy to keep my office door wide open, and I invite all practitioners to make suggestions, comments, and observations as we move forward.

The Board will be convening for a Magistrate College in February, 2010. At that time, the agenda will include discussion and instruction on docket management and opinion writing. It is my expectation that we, as a body, will become more efficient in getting cases tried, and opinions issued in an expeditious fashion. I believe that even with a higher docket number per magistrate, we can work together to lessen the backlog that exists in our system. Additionally, the issue of facilitation will be discussed, with emphasis on an even greater push for settlement of cases where the parties are not far apart on either value evaluation, or factual issues.

On a more personal note, I certainly understand that these changes will not be easy, and in all likelihood not pleasant. The fact that the budget deficit has affected people in the Agency that we know and respect is not lost on me. I do appreciate the hard work that all of our current magistrates have done over the years. As we rapidly approach 2010, we will be faced with new challenges and circumstances, and the economic picture for our state in the near future is by no means a rosy one. I have worked with many of you for over twenty years. Fortunately for the people of Michigan, I know this to be a group of lawyers willing to work hard, be innovative, and overcome adversity. I do look forward to working with you in the future to see the results of that spirit of cooperation and good will. 🛠

RABA Bike Ride

By Ella Parker

Doug Kirk and Dave Merwin sponsored a RABA bike ride in October. For those of you not familiar with RABA, it is a Kalamazoo-area bar association developed by the infamous Joe Wilcox.

RABA has been around for more than 25 years and holds an annual golf outing each October. This year, noting the many attorneys who practice workers' compensation law that are involved in biking either recreationally or as a sport, Mr. Kirk asked if there would be any interest in having a bike ride that coincided with the golf outing. The suggestion was met with favorable responses; he and Magistrate Merwin led the charge.

LeAnn Latchaw, Dave Merwin, Ella Parker, Lisa Klaeren, Paula Olivarez, and Doug Kirk.

It was a beautiful day for a fall color tour either by bike or golf cart. The turnout had to be one of the most attended events in recent years for RABA. The dinner afterward allowed all the participants of both events to socialize and commiserate.

Thanks to Doug and Dave for all their effort in organizing the bike ride. Thanks also to Ron Ryan, who organized the dinner. 🛠

State Bar of Michigan

WORKERS' COMPENSATION SECTION

Annual Winter Seminar

FRIDAY, DECEMBER 11, 2009
Cadillac Place Building, Detroit

AGENDA

8:30 a.m.	Registration and Continental Breakfast
9:00	Opening Remarks: Joel Alpert, Chairperson
9:10–9:30	Report of the Director: Jack Nolish
9:30–9:45	Report of the Appellate Commission: Murray Gorchow
9:45–10:00	Report of the Board of Magistrates: Christopher Ambrose
10:00–10:15	Presentation of Scholarship
10:15–10:30	Break
10:30–10:50	State of the Law: Murray Gorchow
10:50–11:30	Disaster Planning: Your Firm's Technological Survival Kit Michael Morse, Adjunct Professor, University of Detroit Law School, Law Practice Management

WORKERS' COMPENSATION LAW SECTION COUNCIL

Chairperson: Joel Alpert; Vice Chairperson: David DeGraw; Secretary: John Sims; Treasurer: Denice LeVasseur; Council members: John Charters, J. Timothy Esper, Dennis Flynn, John W. Housefield, Charles Palmer, Ella Parker, Christopher Rabideau, Thomas Ruth, and Mark Viel

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

The Supreme Court has not released any full opinions in any workers' compensation cases since our last newsletter. However, there are three matters before the Court that warrant attention.

MCL 418.301(3)'s Social or Recreational Exclusion

In *Buitendorp v Swiss Valley, Inc* (SC Docket No. 138985, rel'd September 23, 2009), the Supreme Court vacated the opinion of the Workers' Compensation Appellate Commission and remanded the case to the Board of Magistrates for reconsideration under the proper legal standard. The case presents the issue: what is the proper focus for applying the social or recreational exclusion in MCL 418.301(3)? This provision says in pertinent part that "an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act."

The facts in *Buitendorp* were that plaintiff worked at various jobs for the Swiss Valley Ski Resort. He worked as a lift operator, a ski instructor, and a teacher. On the day of his injury, he had finished teaching students at the ski resort at approximately 9:00 p.m. He then skied to a particular ski jump at the resort to have his picture taken there for reasons unrelated to his employment. During the course of that ski jump, plaintiff was severely injured. The Appellate Commission, in a 2-1 opinion, affirmed the Magistrate's decision awarding benefits. In so doing, the Appellate Commission rejected defendants' argument that § 301(3) barred plaintiff's claim because plaintiff was pursuing an activity whose major purpose was social or recreational. As indicated, the Supreme Court vacated the Appellate Commission's opinion, saying in pertinent part:

> The magistrate and WCAC employed an improper legal framework in analyzing the facts of this case by assessing whether the major purpose of the plaintiff's *overall* activities were work-related. Under MCL 418.301(3) and *Eversman v Concrete Cutting & Breaking*, 463 Mich 86 (2000), the major purpose of the plaintiff's activity *at the time of injury* determines whether the social or recreational bar applies. (Emphasis in original).

The Court's order was unanimous. The Court did not retain jurisdiction in remanding to the Magistrate.

Other Cases Argued and Pending Before the Supreme Court

Two workers' compensation issues (in a total of three cases) are also before the Supreme Court. On November 4, 2009, the Court heard argument in *Loos v J. B. Installed Sales, Inc* (SC Docket No. 137987). The issue in *Loos* is the extent to which, if at all, income tax information can be used to determine whether the claimant is an employee or an independent contractor.

In the combined cases *Bezeau v Palace Sports & Entertainment, Inc* (SC Docket No. 137500) and *Brewer v A.D. Transport Express, Inc* (SC Docket No. 139068), the Court will hear oral argument on December 9, 2009 on the issue of whether this year's amendment to MCL 418.845 applies retroactively. Section 845 is the provision that addresses Michigan jurisdiction over injuries occurring outside of the state. Whereas the provision had previously contained two requirements for exercise of Michigan jurisdiction (residency in Michigan at the time of injury and a Michigan contract of hire), this year's amendment to the provision says that if either of those two criterion is met then Michigan can exercise jurisdiction.

Court of Appeals

There have not been any published Court of Appeals' opinions in workers' compensation cases since our last newsletter. However, there has been an important Court of Appeals' opinion relating to an appeal from the circuit court addressing the exclusive remedy provision of the Act. Also, there have been two unpublished opinions from the Court of Appeals. Although the unpublished opinions are not precedent, MCR 7.215(C)(1), they are summarized below given the dearth of published Court of Appeals' workers' compensation opinions.

Exclusive Remedy Provision

In *Fries v Mavrick Metal Stamping, Inc*, ____ Mich App ____; ____ NW2d ____ (2009) (CA Docket No. 283193, rel'd October 13, 2009), the Court of Appeals held that plaintiff's circuit court action against the employer for an intentional tort was not barred by the exclusive remedy provision of the Act, MCL 418.131(1). The exclusive remedy provision provides in pertinent part:

> An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer

> and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court.

The salient underlying facts of the case were as follows. Mavrick manufactured automotive parts. Plaintiff was assigned to operate an automatic stamping press. She wore a t-shirt under a long-sleeved shirt and a hooded zip-up sweatshirt. While operating the machine, plaintiff reached into the die area to remove some stamped parts. Her loose clothing triggered light sensors on the machine, which engaged the press. The press cycled before plaintiff could withdraw her hands and amputated both arms between the wrists and elbows. Plaintiff sued her employer for an intentional tort.

The employer moved to dismiss the case on the basis of the exclusive remedy provision. The trial court rejected the employer's motion. The employer applied for leave to appeal to the Court of Appeals. Leave was granted. The Court of Appeals then affirmed the trial court.

The Court of Appeals noted that plaintiff had produced testimony from a former press operator for the employer who explained that two years prior to plaintiff's accident the press had unexpectedly cycled when his loose clothing interrupted the light sensors. The former employee testified he had reported the event to supervisors. Also, there had been testimony that the press manufacturer had offered safety guards designed to prevent accidental activation by loose clothing. The employer was aware of the availability of the safety guards, but failed to install them.

The Court held that, viewed in a light most favorable to plaintiff, a reasonable jury could conclude the employer had actual knowledge that an injury was certain to occur through the use of the press and willfully disregarded that knowledge. The Court said, "we conclude that plaintiff introduced sufficient evidence establishing that a serious injury was inevitable when an unwarned worker used the press, and that Mavrick willfully disregarded and ignored its actual knowledge of the inevitability of injury."

Attorney Fees on Unpaid Medical Expenses

In *Neuhaus v Pepsi Cola Metropolitan Bottling Co, Inc* (CA Docket No. 274960, unpublished opinion rel'd September 8, 2009), the Court of Appeals decided an attorney fee issue on remand from the Supreme Court.

Plaintiff had suffered a lower back injury after he fell from a cart while working as a delivery driver. The Magistrate granted plaintiff an open award of benefits including payment of all medical benefits related to the work injury and added that "'any recovery for any such bills already incurred for medical treatment (including any bills which may have been paid by other providers) are subject to an additional attorney fee of thirty percent of the amount paid or collected . . . .'" The Appellate Commission affirmed. The employer appealed to the Court of Appeals and ultimately to the Supreme Court. The Supreme Court remanded the case to the Court of Appeals for consideration on leave granted with instructions the Court of Appeals consider the propriety of the award of attorney fees. The Court of Appeals then held its opinion in abeyance pending the Supreme Court's opinion in *Petersen v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009). After release of *Petersen*, the Court of Appeals applied the splintered *Petersen* opinion as follows.

The Court said that in *Petersen* "a majority of the Supreme Court concluded that employers and their insurance carriers, and not health care providers and employees, are the only parties subject to a proration of attorney fees" under the last sentence of MCL 418.315(1). And, the Court of Appeals added that the *Petersen* majority required the employer(s) and carrier(s) in that case to pay plaintiff's attorney's fees on unpaid medical expenses. Consequently, the Court of Appeals ruled that: "Pursuant to *Petersen*, defendants were the only parties subject to a proration of attorney fees under § 315(1) and the fees could be imposed against defendants in addition to the payments of plaintiff's medical expenses."

Bailey and *Res Judicata*

In *Robinson v General Motors Corp* (CA Docket No. 285643, unpublished opinion rel'd September 10, 2009), the Court of Appeals revisited the issue of reimbursement to employers or their carriers under the vocational disability provisions [f/k/a vocationally handicapped provisions], MCL 418.901 *et seq*., as the relevant provisions of this chapter had been interpreted in *Bailey v Oakwood Hospital and Medical Center*, 472 Mich 685; 698 NW2d 374 (2005).

In *Bailey*, the Supreme Court had held that the Second Injury Fund is obliged to reimburse employers or carriers under Chapter 9 even if they had failed to provide the Fund with timely notice of the injury as required by MCL 418.925(1). This ruling by the Supreme Court in *Bailey* overruled the Court of Appeals' earlier published opinion in *Robinson v General Motors Corp*, 242 Mich App 331, 335; 619 NW2d 411 (2000) . Following release of *Bailey*, General Motors filed another petition for reimbursement from the Fund on the strength of the *Bailey* holding. The Fund resisted on *res judicata* grounds. The Fund prevailed before the Magistrate and Appellate Commission.

On appeal to the Court of Appeals, the Court said *Bailey* has retroactive application. But, the Court added that ret-

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Recent Cases
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roactive applications are subject to certain limitations after consideration of the effect of retroactivity on the administration of justice. On this latter point, the Court said that to permit to General Motors to prevail in this appeal "would serve to eviscerate the doctrine of res judicata and open up the potential for unlimited re-litigation of cases," given that General Motors had already litigated this identical issue before the Court of Appeals and did not prevail prior to *Bailey*. Therefore, the Court affirmed the ruling below that there should be no reimbursement.

Workers' Compensation Appellate Commission

The Appellate Commission has released an important *en banc* opinion since our last newsletter. *En banc* opinions from the Appellate Commission are considered to "establish a precedent with regard to worker's compensation in this state." MCL 418.274(9).

Wage Loss Requirement/Second Sentence of MCL 418.301(4)

The *en banc* case is *Epson v Event Staffing, Inc*, 2009 ACO #152. *Epson* involved a professional football player, but the holding of the Appellate Commission is designed to speak to situations beyond seasonal employment. The flashpoint for the opinion was the defendant's argument that the plaintiff should not be entitled to weekly wage loss benefits during the off season because he would not have been playing football and earning a salary anyway during that off season. That is, even though Mr. Epson's physical problems extended into the off season, the defendant's position was that no weekly wage loss benefits are payable because there is no weekly "wage loss" due to the work condition.

In a 3-1 *en banc* opinion (there were only four Commissioners at the time), the Appellate Commission undertook an analysis of the second sentence of § 301(4), typically called the "wage loss" provision. Recall it says: "The establishment of disability does not create a presumption of wage loss." The precise meaning of this sentence had been addressed in *Haske*, in *Sington*, in post-*Sington* Supreme Court orders, the recent Court of Appeals case of *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1; 760 NW2d 586 (2008), and in other recent Appellate Commission opinions.

The *en banc* majority reviewed all of this history and came to the following conclusion on the meaning of the second sentence. The *en banc* majority said:

> The [Supreme] Court also noted it had previously disavowed the concept that a plaintiff was automatically entitled to wage loss benefits regardless of the reason for the plaintiff's unemployment. *Epson*, *supra*, slip op at p 28.
>
> * * *
>
> "'Under the wage-loss approach, an employee may prove a disability under the subsection 301(4) and thus be *eligible* for benefits and yet not be *entitled* to benefits because of other factors.'" *Epson*, *supra*, slip op at p 29 (emphasis in original).
>
> * * *
>
> Disability and compensable wage loss are separate issues. *Epson*, *supra*, slip op at p 27 n 1.
>
> * * *

Invite someone to join the section

http://www.michbar.org/sections/pdfs/app_03v2_exst.pdf

> The Michigan Supreme Court's *Haske* wage loss concept is perhaps best illustrated in the case of *Castellon v Delphi Automotive Systems Corporation*, 475 Mich 898 (2006). The magistrate agreed Ms. Castellon had work-related carpal tunnel syndrome. However, he denied wage loss benefits because the plaintiff went off work for a non-work-related condition, Bell's Palsy. *Epson, supra*, slip op at p 30.

The *en banc* majority noted that Chief Justice Kelly in the Supreme Court's *Castellon* opinion had said: "'In such a situation, plaintiff would not be entitled to benefits because she still would not be out of work due to a work-related condition.'" *Epson*, *supra*, slip op at p 30 (emphasis omitted). The Appellate Commission also said that the Supreme Court in *Harvey v General Motors Corp*, 482 Mich 1044; 769 Mich 590 (2008) remarked:

> "'…the Workers' Compensation Appellate Commission erred in stating that an employee does not need to demonstrate a connection between wage loss and the work-related injury. An employee is indeed required to demonstrate such a connection. See MCL 418.301(4); *Sington v Chrysler Corp*, 467 Mich 144, 160-161 (2002).'" *Epson*, *supra*, slip op at p 31 n 3.

The Appellate Commission then noted the recent unpublished Court of Appeals' opinion *Raybon v DP Fox Football Holdings* LLC, CA Docket No. 268634, unpublished opinion rel'd July 17, 2007, and said that, while seasonal employees are not automatically disentitled to benefits during the off season, employees – after proving *Stokes* "disability" – need to also demonstrate that such disability is the reason for their absence of wages. The Appellate Commission explained:

> … Mr. Epson does need to factually link his wage loss, during the season and after the end of the season, to his work-related injury. *Epson*, *supra*, slip op at p 32.

The case was then remanded "on the limited issue of whether Mr. Epson's wage loss is compensable." *Epson*, *supra*, slip op at p 33. ⚒

Michigan Workers' Compensation Agency Update

By Jack Nolish, Director

Each year, I do several presentations to groups including the Section spring meeting and others. For the last couple months I have been opening with a quote from Yogi Berea: "The future ain't what it used to be." I think it is now time to use a different quote, with apologies to PPM, "For the times they are a changing…."

On Friday, October 29, 2009, Governor Granholm signed Executive Order 2009-53 reducing the number of magistrates to 17 as of January 26, 2010. This difficult decision was made in the face of a perfect storm of severe budget issues and a steadily declining Workers' Compensation Agency caseload.

- In 1995, 22,293 contested cases were filed; this year we are on track to have less than 10,000.
- In 12/2003 we had 17,992 pending cases; by 12/2008 we had only 12,980.
- When I took the bench in 2004, the average docket was 705 cases per magistrate; as of the end of this past August, it was 523 and 46 of those are on AWAIT CMS status.
- In 2000-1 we had 12,337 redemptions with an average value of $37,884; in 2008-9 we had 7,410 redemptions with an average value of $55,386.

Remember, the WCA only has two sources of revenue: redemption fees and general fund appropriations. The numbers above describe the decline in RD fees. It is no secret that the economy has directly caused a significant decrease in state general fund revenue.

Is this bad news? Of course it is. For practitioners and their clients, it means there are fewer magistrates to hear cases and, as a result of office closures, more miles to drive. I am aware of the mantra I first used when I went on the bench: "Certainty of trial and certainty of adjudication." I understand that cases often do not resolve until the gavel is about to go down.

But, there are fewer cases to hear and fewer are being heard. I am fully aware that decisions such as *Stokes* and *Rakestraw* have made cases significantly more costly and complicated to adjudicate. The legal hurdles imposed by these decisions have impacted on the filing of cases. The fact is, however, that the number of cases that actually go to decision is down significantly. In 1996, the magistrates wrote a total of 1,672 decisions (including grants, denials closed awards and miscellaneous opinions) averaging 56 per magistrate; in 2008, that number was down to 441 with an average of 18

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Workers' Compensation Appellate Commission Update

By Murray A. Gorchow, Chairperson, Workers' Compensation Appellate

This is my first article for the *Workers' Compensation Section Newsletter* wearing my new hat as chair of the Appellate Commission. I very much enjoyed my role as a magistrate and as "chief judge" over the past five years. It was a wonderful and exciting learning experience working with the attorneys, the section, and the entire workers' compensation community. There have been many challenges that we have all had to deal with the past few years, and working together we have met those challenges. There are still difficult challenges before us today and there will certainly be more to come. I would like to express my appreciation to the members of the Board of Magistrates for their commitment and dedication to duty under extremely trying and uncertain circumstances. It was a pleasure to work together with you. I am confident Chris Ambrose will do a wonderful job as the new chairperson of the Board of Magistrates as we sail the troubled budgetary seas before us.

As everyone knows, the former chair of the Appellate Commission, Martha Gasparovich, left in June for her new position as an administrative law judge with the Social Security Administration (SSA). Martha, prior to her tenure on the Appellate Commission, had many years of experience successfully representing claimants seeking Social Security disability insurance benefits. I know she will do a wonderful job in her new position given her experience before the SSA and with the Appellate Commission. We will definitely miss her in the world of workers' compensation and wish her well in her new position. I have spoken to her several times recently and I am happy to report that she loves what she is doing!

So the secret is out: Murray Gorchow got the job to replace Martha Gasparovich as chair of the Appellate Commission because of his initials. You see, commissioners often communicate about a draft of a decision by signing off with their initials. Now they might think Martha never left. Maybe it's a comfort thing. Hmm … no, maybe it was actually a budget-saving measure to avoid replacing monogrammed pencils, pens, notepads, and other supplies. Hmm … no, we don't have any of those, either.

The reality is that I am, of course, not Martha Gasparovich. But what she and I have in common is our desire for prompt, efficient, and fair adjudication of the appeals that come before us.

So, what is it like switching chairs? It is the first time, I believe, that anyone has occupied both chairs. It's a bit like the Mad Hatter's tea party in Lewis Carroll's *Alice in Wonderland.* You know, *"Move down … Move down."*

To answer that question, it's different and not so different. How is it the same? Well, I'm dealing with the same body of law that I have worked with for 37 years. I strive toward the same goals—the prompt and fair adjudication of disputed claims consistent with the facts and the law. I will continue to try to find and implement more effective and efficient ways to achieve those goals. And I continue to work together with the workers' compensation community, albeit no longer face-to-face on a daily basis.

How is my new position different? For starters, I get to review the decisions that I used to write. Not the very same decisions I wrote as a magistrate, much as I would like to do so. With apologies to the "Pogo" comic strip, I have met the enemy, and [oops] it's me! It's a very different perspective from where I now sit.

Another difference: I am no longer the finder of fact. With rare exceptions, that's the magistrate's job. While I must give the record a qualitative and quantitative review to ensure there is CMS evidence to support the findings of fact, I have had to learn new lingo. My predecessor recently reminded me that I need to remember that for me, CMS no longer has anything to do with Medicare. Now, CMS is all about competent, material, and substantial evidence. I get to leave the Medicare version of CMS to the good hands of your new chief magistrate, Chris Ambrose, Jack Nolish, and all of you.

Yet another difference is that I can no longer simply write a decision on my own and trust the good graces of the Appellate Commission. Now I am an appellate commissioner and I have to work with the other members of commission panels to persuade them of the intuitive brilliance of everything that I write. In the rare circumstance where that sort of hubris does not receive a unanimous thumbs up, I will be open to listening to opposing views. I have learned over the years that learning does not happen without having an open mind and really listening. I expect the same from my colleagues and they will rightly expect it from me.

I expect there will be debate, and I look forward to it. I believe that a good open-minded debate produces a better

legal decision, just as strong advocacy and stiff cross-examination of witnesses in the courtroom produce a better trial decision. This Appellate Commission, I have already learned, can sometimes disagree, but we do so without being disagreeable. All of us want to work together for the prompt and fair adjudication of appeals that you and your clients expect and deserve.

Odds and Ends from the Appellate Commission

I recently spoke with Mary Hiniker from the Institute of Continuing Legal Education (ICLE), the liaison I worked with regarding the new *Michigan Worker's Disability Compensation Act and Administrative Rules.* I wanted to see how sales have been going on the joint enterprise between ICLE, the Workers' Compensation Section, and the Workers' Compensation Agency that produced the new "Blue Book."

She is very pleased, calling it a win-win publication. She admitted that she was not sure how well it would sell, but said that more than 800 copies have been sold to date. Of that number, about 500 copies were purchased by members of the Workers' Compensation Section. There were also two bulk purchases, one for 200 copies and another for 100 copies. It is my understanding that such bulk purchases will continue periodically.

Since the publication has been so successful, she is committed to reprinting as needed and publishing a new book when changes warrant a new edition. In the meantime, she would like to know about any typos, errors, or other suggestions for improvement that we may have, including additions to the index in which the commission and I were so deeply involved. Since we are all the beneficiaries of this useful publication, let's keep improving it. Please send me an e-mail at gorchowm@michigan.gov and I will be happy to pass your suggestions to ICLE.

One last item: The Appellate Commission would like to remind the practicing bar that Appellate Commission Rule 7 (R 418.7) dealing with motion practice was amended in 2006 to require:

> (4) A motion or response to a motion representing the existence of facts not in the record adopted by the magistrate *shall be accompanied* by an *affidavit* from a person with *personal knowledge* of any facts stated in the motion. (Emphasis supplied).

Caveat lawyer!

On the Move?

Be sure to change your address with the State Bar of Michigan

In order to safeguard your member information, changes to your member record must be provided in one of the following ways:

1. Login to SBM e-commerce with your login name and password and make the changes online.
   Complete contact information change form and return by fax or mail. Be sure to include your full name and P-number when submitting correspondence.
2. Fax changes to Member Records at (517) 372-1139.
3. Mail changes to State Bar of Michigan, Member Records, 306 Townsend St., Lansing, MI 48933-2012.

Please Note: On September 26, 2001, the Michigan Supreme Court amended Rule 2 of the Rules Concerning the State Bar of Michigan, eliminating the requirement that members of the Bar provide their home addresses to the Bar. Under the amendment, a business address will be sufficient unless it is a mailing address only. Although Rule 2 had included a "residence address" requirement since its inception, the Bar had not requested such information for many years.

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per magistrate. As of the end of September, 2009, the year to date number is only 292 which we could extrapolate to 389 for the year with an average of 16 per magistrate. Basically, to get back to the number of decisions we are seeing right now, the remaining 17 magistrates will have to average 23 per year, about half of the 1996 average.

We are mindful that this change in the number of magistrates is going to impact the practice of workers' compensation as we know it. Getting away from "as we know it" is the key to how we are going to cope with this situation. Creativity, cooperation and flexibility are the right tools for the job. By the time you read this, we will have already set in motion a process to find new ways to handle workers' compensation cases. Ed Welch, former "Bureau" director, former QAC chair, celebrated original author of *Workers' Compensation in Michigan, Law and Practice*, and now retired MSU professor, will be working with us to help build consensus over ways for the Agency to deal with the budget cuts and still serve the interests of our customers. In the coming weeks, Ed will be meeting with various individuals and groups with interests and expertise in the comp world. In the coming months we will be coming to the Section with and for new ideas in how we can more economically handle cases. Everything will be reviewed, rethought, reengineered and reworked. Just because we have always done things a certain way does not mean we should keep doing them the same way in the future.

The examination of the *status quo* does not only apply to the hearings process. We continue to review the rest of the Agency operations that go largely unseen by the public. We are reviewing all of our people, processes and places to make sure we are getting to the right size and are performing in the most efficient way possible. We have to make sure that what we have left after we right size continues to serve the interests of the workers and employers in this state.

The budget problem is expected to continue beyond just the 2010 fiscal year. As this is written we have begun the work on the 2011 Fiscal Year budget. We are facing the task of working out how we will operate with a budget that will be 20 percent less than the FY2010 budget we are now working under. Things are not getting any easier. Many things that we could do require capital expenditures we cannot fund. Changes that we have made in the last several years will yield savings but the full impact will take some time to realize. Identifying different sources of funding for the Agency is difficult in these economic times.

As we find our new way, I will keep the practitioners posted. As always, your suggestions are not only welcome but encouraged. As I have been know to say: **Fasten your seat belts and stay tuned.** 🛠