February 1999

# Workers Compensation Section Newsletter

Volume 39, No.1

State Bar of Michigan Workers Compensation Section

## Election Results: Workers Compensation Section Council Officers and Members 1998-1999

James D. Ryan was elected chairperson at the annual meeting of the Section in September, succeeding Rodger Will.

The other officers of the Section for 1998-99 are Martin D. Glista, Vice Chair; Richard G. Wood, Secretary; and Alexander Ornstein, Secretary.

Richard M. Skutt of Detroit was elected to the Section Council to take the vacancy created by the elevation of Mr. Ornstein.

Reach your officers and members this way:

**Section Officers: Pictured (left to right) are James D. Ryan, Chairperson; Martin D. Glista, Vice Chairperson; Rodger G. Will, immediate past Chairperson; and Richard G. Wood, Secretary. Not present at time this photo was taken: Alexander Ornstein, Treasurer. Photo provided by Ed Welch.**

| | | |
|---|---|---|
| James D. Ryan, *Ryan, Jamieson, Morris & Ryan*, Kalamazoo | (616) 382-5143; | Fax (616) 382-1896 |
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| Leonard M. Hickey, *Miller, Johnson, Snell & Cummiskey*, Grand Rapids | (616) 831-1700; | Fax (616) 831-1701 |
| Richard M. Skutt, *Glotta Skutt & Associates, P.C.*, Detroit | (313) 963-1320; | Fax (313) 963-1325 |
| Craig T. Petersen, *Chairperson, Board of Magistrates*, Lansing | (517) 241-9387; | Fax (517) 241-9379 |
| Rodger G. Will, ex officio, *Kelman Loria Downing, Schneider & Simpson*, Detroit | (313) 961-7363; | Fax (313) 961-8875 |

## In this Issue:

# RECENT COURT DECISIONS

By Jerry Marcinkoski

## SUPREME COURT

The Supreme Court has pending before it on leave granted the following cases: *Tyler v City of Livonia* (S.C. No. 109196) [coordination of a retirement pension]; *Camburn v Northwest School District* (S.C. No. 108080) [whether a schoolteacher injured while driving to a work-related seminar suffers a compensable injury]; *Hoste v Shanty Creek Management, Inc,* (S.C. No. 108599) [whether a ski patroller is an "employee" under the facts presented].

## COURT OF APPEALS

### Social and Recreational Exclusion

In *Angel v Jahm, Inc*, ___ Mich App ___; ___ NW2d ___ (1998)(C.A. No. 204255, released for publication October 27, 1998), the issue presented was whether plaintiff's injury was barred by Section 301(3). This section provides 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 of the case were that plaintiff, a vice president of engineering, went on a week-long senior management meeting that was held on a cruise ship. Spouses were also encouraged to attend. During some of the free time on the trip, plaintiff and his wife rented a motorbike on the island of Martinique. While riding back to the ship, plaintiff went off the road and was injured to the extent that an amputation above the right knee was required. Plaintiff sought specific loss benefits.

The Magistrate awarded benefits, finding that the major purpose of plaintiff's activity at the time of injury was not social or recreational. The Commission reversed, concluding that the major purpose of the activity at the time of the injury was social or recreational.

The Court of Appeals reversed the Commission and reinstated the Magistrate's award. The Court concluded that the question of whether the major purpose of an activity is social or recreational is a fact question. The Court said that at the time plaintiff was injured on the motorbike he was making his way back to the cruise ship to eat and prepare for a business meeting on the ship. The Court also noted that the entire trip was paid for by the employer, and that the trip was essentially mandatory. The Court found that since there was such evidence in the record the Commission exceeded its authority in displacing the Magistrate's factual conclusion that the social and recreational exclusion did not apply.

### Two Wholly Owned Subsidiary Corporations Have Exclusive Remedy Protection

In *James v Commercial Carriers, Inc*, 230 Mich App 533; ___ NW2d ___ (1998), the employee was an over-the-road truck driver for one wholly owned subsidiary of Ryder. He suffered a work injury and sued the defendant, a different wholly owned subsidiary of Ryder, on a premises liability theory. The trial court ruled that the defendant did not enjoy exclusive remedy protection. The Court of Appeals reversed.

The Court reviewed recent case law in this area and applied the economic realities test. The Court said that, given the totality of the circumstances, the parent corporation, Ryder, was plaintiff's employer for purposes of the exclusive remedy provision. Furthermore, plaintiff's immediate employer and the locale where plaintiff was picking up his cargo were both wholly owned subsidiaries of the parent corporation and as integral components of Ryder that they too enjoyed the exclusive remedy protection afforded by the act.

## WORKERS' COMPENSATION APPELLATE COMMISSION

### Penalties As They Relate To Redemptions

The Commission recently decided two cases relating to penalties relating to redemptions.

In *Abdelrahman v Hutzel Hospital*, 1998 ACO #612, the plaintiff and defendant entered into a redemption for $100,000 with the agreement routinely also noting that weekly workers' compensation benefits should continue to be paid until the expiration of the fifteen-day appeal period. The employer did not timely pay the weekly payments during the appeal period. Plaintiff claimed a penalty. The employer argued that, pursuant to such cases as *Ellison v City of Detroit*, 196 Mich App 722 (1992), the penalty provision does not apply to redemptions. The Magistrate agreed with the defendant.

The Commission reversed. The Commission said that prior case law stands for the proposition that the penalty provision does not apply to payment of the lump sum redemption amount, but the penalty provision does apply to the weekly compensation benefits ordered by the Magistrate while the period for appealing the redemption runs.

In *Kaminski v Sears, Roebuck & Co*, 1998 ACO #619, the issue was whether an agreement to pay reasonable and necessary medical bills from a specific physician as part of a redemption agreement is subject to the penalty provisions.

The facts were that defendants agreed to pay $32,500 in a lump sum redemption and, additionally, pay for reasonable and necessary medical services rendered by a particular physician pursuant to cost containment limitations.

Payment of the amount due the doctor was not made within thirty days after the redemption became final. Plaintiff sought penalties. The Magistrate denied penalties citing *Ellison, supra*.

On appeal, the Commission again disagreed with the Magis-

trate. The Commission said that the agreement to pay particular medical benefits was in addition to the agreed upon amount to settle the case. The Commission said that if the redemption order did not specify that the defendant would pay the medical bills, then defendant's liability would have been extinguished by the payment of the lump sum amount. However, since the redemption agreement mentioned the medical bills, it created an obligation over and above the lump sum redemption amount.

The Commission did affirm a denial of the penalty, however, on other grounds. The Commission said that no penalty could be imposed because there was an ongoing factual dispute about the bill precluding penalties under Section 801(3).

## Plaintiff Must Submit To Functional Capacity Evaluation

In *Madaski v Jac, Inc,* 1998 ACO #503, the Magistrate granted plaintiff an open award of benefits. On review, the Commission remanded for a supplemental opinion for the following reason.

The Magistrate refused to allow defendant to obtain an evaluation of plaintiff's functional capacity to work within her restrictions via a Functional Capacity Evaluation (FCE). The Magistrate opined that neither the act nor case law required that he compel a plaintiff to undergo a functional capacity examination where, as here, the claimant resisted. The Magistrate also reasoned that a pretrial functional capacity test is "putting the cart before the horse" since no determination has yet been made with respect to plaintiff's capacity for work.

The Commission disagreed. The Commission held that a functional capacity evaluation is a medical evaluation that the plaintiff is required to undergo when requested, pursuant to Section 385. The Commission said that if requests of functional capacity evaluations are overdone, then they can be unreasonable, but, "if temporally reasonable and conveniently scheduled, the FCE should not be avoided without good cause."

The Commission also disagreed that such a functional capacity evaluation would only assist a Magistrate *after* he had decided the case because "in analyzing plaintiff's claim of disability, the magistrate should have had these test results beforehand." The Commission agreed that the Magistrate does not have the power to compel a plaintiff to comply to undergo a functional capacity evaluation. However, the Magistrate is to evaluate plaintiff's case in light of plaintiff's noncompliance with the act. The Commission explained that, under Section 385, an employee who does not comply is subject to suspension of their right to compensation.

## Partial Rate Appropriate For Decreased Overtime Hours

In *King v Hastings Manufacturing Co,* 1998 ACO #622, the parties stipulated that plaintiff suffered a work injury limiting her thereafter to working no more than 40 hours per week. At the time of the injury, plaintiff's average weekly wage included overtime hours. Subsequent to her injury, overtime hours were no longer available in plaintiff's department. Even though her hourly rate of pay increased subsequent to her work injury, plaintiff nevertheless earned less per week because she was not working the overtime hours she had worked at the time of injury. The Magistrate said that plaintiff is entitled to a partial rate of compensation because her average weekly wage today is less than it had been at the time of her injury.

The Commission affirmed. The Commission said that the diminution in overtime was due to an economic downturn and, in general, an employee does not bear the burden of unfavorable economic conditions which combine with a disability to further diminish the ability to find work. The Commission noted that the plaintiff's forty-hour-per-week restriction precluded her from seeking other jobs in the employer's departments which had overtime available.

## Injuries And Car Accidents While Leaving Mall Not Compensable

In *Lindholm v Miners, Inc,* 1998 ACO #536, the employee worked at a supermarket located in a mall. The supermarket had a designated employee parking area within the mall. After work one day, plaintiff went into her car in the employee parking area and drove through the mall. Before she exited the mall's parking lot, she was involved in a automobile accident. The question presented was whether or not the injury was work-related under case law relating to employer premises.

After reviewing that case law, the Commission affirmed the Magistrate's denial of benefits. The Commission agreed with the Magistrate that once plaintiff exited the designated parking area she was like any other motorist and her method of egress from the mall parking lot was at her own option and control.

## Necessity To Give Notice In Different Situations

The Commission has released three opinions relating to different aspects of one party giving notice to another.

In *Smith v R.E. Dailey & Co,* 1998 ACO #584, plaintiff requested penalties for the defendants' failure to pay nursing care expenses in accordance with a prior decision by the Magistrate. The Magistrate denied penalties. The Commission affirmed.

The Commission and Magistrate did not read the penalty provision as saying that following a final order the plaintiff is no longer required to send the defendant notice of nonpayment of medical bills by certified mail. The Commission said that the Magistrate's order is not notice of nonpayment. Instead, the plaintiff must submit the bills (which are notices of nonpayment) to the defendants via certified mail, pursuant to Section 801(3), in order to successfully claim penalties.

In *Rodriguez v Van Buren Public Schools,* 1998 ACO #626, plaintiff claimed penalties for nonpayment of chiropractic bills. The employer argued that plaintiff had not provided notice of intention to treat, as required by Section 315(1). The Magistrate denied penalties. The Commission agreed.

Plaintiff admitted that he had not notified the defendant beforehand that he intended to treat with the doctor. The Commission said that the "intention to treat" statutory requirement can have no other meaning other than to require notification beforehand. The Commission acknowledged that treatment necessitated by an emergency could be justifiable on a case-by-case basis, but that no such circumstances were present under the facts of this case.

In *Robinson v General Motors Corp,* 1998 ACO #643, the ques-

tion was whether or not the Second Injury Fund (Vocationally Handicapped Provision) received timely notice of its potential liability.

The employer had not notified the Fund in a timely fashion that compensation may be payable beyond a period of 52 weeks after the work injury, as required by the vocationally handicapped provision of Section 925(1). The Magistrate excused the lack of notice. The Commission reversed.

The Commission said that the notice requirement is stated in mandatory terms and, therefore, the employer must notify the Fund not less than 90 days before the expiration of 52 weeks from the date of injury. The Commission also noted that the employer must file a motion in writing to join the Fund as a party to a workers' compensation suit. The Commission said that the mere fact that the statute does not provide sanctions when these provisions are not met is unimportant. The Commission explained that where the statutory provisions are not met, then the Fund is not joined.

## The Commission Examines *Arnold*

In *Schmidt v Genesee County Road Commission*, 1998 ACO #634, the Commission had its first opportunity to apply *Arnold v General Motors Corp*, 456 Mich 682 (1998). *Arnold*, which was summarized in the last Section newsletter, addresses the liabilities of different employers where the employee sustains an injury for one employer, stops working there, works for a second employer, and sustains a second injury at the latter employer.

This particular case presented the above factual pattern. The Commission said that, in light of *Arnold*, it must be remanded to the Magistrate. The inquiry to be undertaken by the Magistrate is whether, on the date of the last injury, the employee was still *also* disabled as a result of the first injury. Only in that way can a determination be made as to the first employer's continuing liability.

## Dual Employment

In *Rahman v Detroit Board of Education*, 1998 ACO #646, the Commission resolved two questions of first impression involving the dual employment provisions.

The first question was: does the Fund have liability under the dual employment provisions where plaintiff redeems with the second employer (the employer with whom he or she did not sustain the injury)? The Commission held that the dual employment provisions still apply despite the redemption with the second employer.

The second question was: how does Section 372's reimbursement calculation operate where the employer with whom the employee was injured coordinates its workers' compensation liability with alternative employer-provided benefits? The Fund urged that the correct way to calculate its reimbursement is to focus on the amount of workers' compensation benefits that the employer has paid out-of-pocket. The Commission disagreed, saying that the Fund's focus should be on the amount of weekly workers' compensation payable *before* coordination takes place.

In *Lewis v James L. Waters Law Firm*, 1998 ACO #533, the plaintiff worked for the law firm of Mr. Waters doing odd jobs, as well as at the Waters' home, and at a radio station owned by Mrs. Waters. Following a work injury, questions arose as to how to calculate plaintiff's average weekly wage and, especially, what wages ought to be considered in determining the Fund's liability under the dual employment provisions.

The Magistrate said that certain wages earned by plaintiff could not be considered because they had not been reported to the IRS until after the hearing via an amended federal income tax return. See, Section 372(2).

The Commission disagreed. After first explaining that the beginning point of reference is Section 371, the Commission said that so long as plaintiff properly filed an amended tax return such wages should be included in determining the Fund's reimbursement requirements under Section 372. Therefore, the Commission found that plaintiff complied with the IRS reporting requirement as contemplated by Section 372(2). After making that point, however, the Commission nevertheless agreed with the Magistrate that plaintiff had not timely presented his proofs of his amended IRS filings at the time of trial. Therefore, the Magistrate was justified in refusing plaintiff the opportunity to reopen proofs to submit the amended IRS filing.

## Other Cases

In *Storey v Party Time Ice Co*, the Commission undertook a detailed analysis of the law as it applies in situations where an employee sustains a work injury, recovers (at least to some extent) so as to be able to return to some work, and later suffers an injury outside of the workplace to the same part of the body. The Commission summarized the present state of the law by saying that, "In practical effect, when an intervening event becomes the true proximate cause of ongoing complaints, *Adkins* provides a legal foundation for denying benefits. When the ongoing complaints are really just a continued manifestation of the original injury, such that the original injury remains a proximate cause, *Feldbauer* provides the legal foundation for awarding benefits."

In *Williams v Dearborn Fabricating & Engineering Co*, 1998 ACO #568, the Commission - after first affirming the Magistrate on the merits - found that the appeal was vexatious. The Commission found that there was no reasonable basis for the appeal. The Commission ordered defendant to pay plaintiff $25.00 per week (for a total of $2,900) as a penalty.

In *Hernandez v General Motors Corp*, 1998 ACO #601, the Commission remanded for a second time a complicated matter involving attorney fees where there was a workers' compensation case, two third-party recoveries, and different attorneys representing a plaintiff and/or the plaintiff's estate.

The remand contained instructions that the petitioning counsel (plaintiff's workers' compensation counsel) was entitled to payment of attorney fees, costs, and interest from plaintiff's estate rather than from the defendant. The Commission also explained that the Magistrate can allocate proceeds from the third-party cases on remand, but cannot determine the division of attorney fees and apportionment of recovery expenses in the third-party cases. The Commission also noted that separate *Franges* calculations are necessary for each third-party case.

## Aggravation Of Symptoms Versus Underlying Pathology

In *Lanoye v Chrysler Corp*, 1998 ACO #477, the Commission - in the course of reviewing a question of whether work aggravated "in

# Bits and Pieces

● The Workers Compensation Section Council has scheduled the following meeting dates for 1999: January 19, March 16, April 20 and May 20. Meetings will also take place during the Winter Meeting in Hawaii and at the Spring Meeting on Mackinac Island.

● The Bureau is revising the Voluntary Payment Form, #115, and the new issue should be available shortly. The changes include a place to denote the service date and manner; a signature line for the claimant's attorney, if any; a place to note the federal tax identification number of the attorney for claimant; and a printed statement that "All benefits become due and payable on the day of personal service or the mailing date."

The Redemption Order form is also revised to show the claimant's attorney's taxpayer number. All fees distributed to lawyers in calendar years starting in 1998 will be subject to Form 1099 reporting by the payers to the IRS. This change was apparently required as part of the 1997 Federal Tax Act. So, unless you have a career suing only one employer, expect numerous 1099's in your mailbox this coming January.

● The workbook and guide published by the IRS for this coming year has some interesting and potentially troublesome language having to do with "return to work." The booklet reaffirms that Workers Compensation payments made pursuant to statute are not taxable as income, but disability retirement benefits are taxable even if paid for occupational disability. It then goes on to state:

> *If you return to work after qualifying for workers' compensation, payments you continue to receive while assigned light duties are taxable.*

Does this mean that the paycheck for performing the light duty is taxable? Of course. But does it mean that differential payments made to cover the difference between pre-injury income and post-injury light duty income is also taxable? The Section Council has sought an interpretation and received one at the December Council meeting from attorney Patricia Ouellette of Lansing, an officer in the State Bar Taxation Section. Digging deeper into the source of the italicized language above, she advises it was not intended to cover Michigan differential or supplemental benefits; those partial workers compensation wage loss benefits continue to be non-taxable payments received for personal injuries. If you have further questions, please call her at (517) 371-5361. Thank you, Patricia, for your assistance.

● The June Spring Meeting will be at the Mission Point Resort on Mackinac Island, **June 17 and 18, 1999.**

● Most members realize that the Board of Magistrates revised their rules recently. Now it is the Bureau's turn, and they have offered several amendments, which have been published and are posted on the Bureau website. Many of the changes have to do with insurance, reports, etc. However there is a substantive change to the attorney fees rule, to allow a maximum 10% attorney fee in cases that are being voluntarily paid. While commonly observed now as an appropriate percentage, the old rules did not treat this situation and a contested case redemption differently. Some plaintiff's attorneys have submitted written comments on the rule to the Bureau, accepting the new language but suggesting that it is time to remove the $25,000 limit on 15% attorney fees, too. We will keep you posted.

● **Newsletter Editor Sought:** The Newsletter has been edited for the last few years by Marty Glista, who has been on the Section Council and has recently been elected Vice-Chair of theSection. He will have plenty to do next year with executive decisions to make (what kind of finger food to serve at the cocktail party, red wine or white wine with dinner, etc.), and would like to be retired, replaced, and succeeded. This is a volunteer position, with a lot of help available from the State Bar, the abdicating editor, and the Council members. The Section has some equipment that goes along with the position. If you want to be considered or you want to nominate someone else, call Marty Glista at (616) 388-4353.

**WORKERS' COMPENSATION APPELLATE COMMISSION–*continued***

a significant manner" plaintiff's degenerative arthritis - historically reviewed the use of the terms "aggravation of symptoms versus underlying pathology" in determining liability or the extent of liability. The Commission concluded that case law does not support a distinction based on such a basis. The proper inquiry is not whether or not there is symptomatic aggravation, but whether "work produces a distinct and disabling medical condition as a result of a preexisting susceptibility" or, in the words of the concurring opinion, whether or not there has been a "temporary pathological aggravation."

After such background discussion, the Commission turned to the question of whether plaintiff's proof that work aggravated the symptoms of degenerative arthritis satisfied the "significant manner" work-relationship requirement of Section 301(2). Citing *Farrington v Total Petroleum, Inc*, 442 Mich 201 (1993), the Commission said that the work impact must cause more than a precipitation of symptoms. If not, "then the inquiry ends and the claim is not compensable.If the condition constitutes more than an aggravation of symptoms, the factfinder proceeds to apply the weighing of occupational and non-occupational factors in the causation of the injury." *See*, *Hogue v United Metal Products Corp*, 1998 ACO #557.

However, on leave to appeal by the Claimant, the Commission was **reversed** and remanded by an order issued November 18, 1998 by the Court of Appeals. The brief per curiam opinion before Smolenski, MacKenzie and Sawyer is reproduced here:

In lieu of granting leave to appeal, pursuant to MCR 7.205(D)(2), the August 3, 1998 decision of the Workers' Compensation Appellate Commission is REVERSED in part in light of the Supreme Court's decision in *Layman v Newkirk Electrical Associates, Inc,* 459 Mich 494, 504; _ NW2d _ (1998), in which the Court held that application of the "significant manner" test presents a factual issue and the WCAC exceeds its authority when it engages in impermissible fact finding. In this case, there was evidence in the record to support the magistrate's finding that plaintiff's arthritis was accelerated in a significant manner by the duties of his employment. Under MCL 418.861a(3), MSA 17.237(86la)(3), the magistrate's findings of fact must be considered conclusive if so supported. In contrast, there was no support in the record for the WCAC's factual conclusion that plaintiff's arthritis was only temporarily aggravated by his employment.

# LANOYE: The Logical Absurdity of the Appellate Commission

By Michael R. Dunn

*Editor's note: Mr. Dun represents the claimant in* Lanoye v General Motors, *discussed in Mr. Marcinkoski's report*.

The logical absurdity of the opinion authored by the Appellate Commission is best demonstrated by simply summarizing the facts as found by Magistrate Zettel at trial. It was his finding that Plaintiff had an underlying bilateral degenerative arthritis of the knees. He specifically concluded from the lay and medical testimony that Mr. Lanoye's work activities had aggravated the symptoms of this underlying condition, "in a significant manner," to the point that the symptoms became intolerable and he was required to undergo bilateral knee replacements as treatment for the work-caused symptoms. These facts were also conceded by the Defendant's medical examiner in his testimony. Thus, benefits were awarded.

Commissioner Leslie authored the controlling opinion for the Commission; Commissioner Skoppek a concurring opinion and Commissioner Garn a two-sentence concurrence. Collectively, they reversed Magistrate Zettel's opinion, purporting to set forth a new rule of law that disability based upon incapacitating work caused symptoms can never be compensable, when the underlying condition is one of the aging process, They did this by concluding that symptomatic aggravation of a condition of the aging process can never be aggravation "in a significant manner."

In so doing, they ignored several logical inconsistencies created by their opinion, and glossed over questions which would have highlighted those inconsistencies, For example: Are the ***symptoms*** of a condition and the underlying condition itself, truly separate entities? If the disability is found to be based upon work-caused symptoms only, does that still come under the "significant manner" test when aggravation of the underlying condition of the aging process is not an issue? On the other hand, if the increased symptoms necessitate bilateral knee replacements, the presence of which disable the Plaintiff from returning to his prior occupation, can it really be said that the disability is based solely upon work caused or aggravated symptoms? Doesn't the rather dramatic pathological changes caused by the knee replacements and disabling the plaintiff from returning to work, necessitated as treatment for the intolerable work-caused symptoms, constitute aggravation of the condition "in a significant manner"? And isn't the question of work aggravation "in a significant manner" a question of fact reserved for the trial magistrate?

Not only did the Commission ignore these problems, they also dispensed with the constraints placed upon them by the principles of *stare decisis.* They made it clear that they were well aware of the controlling appellate court cases holding that disability due to work aggravated or caused symptoms is compensable. They **just refused to follow them.** In discussing the Court of Appeals and Supreme Court cases, they criticized such ill-advised decisions, and castigated the appellate justices. They scolded the Court of Appeals for not recognizing the "more subtle and complex..." basis underlying earlier appellate decisions; for "misreading" earlier holdings, and for basing their reasoning on "misinterpretation" of prior case law. Worse yet, they accused the Court of Appeals and Supreme Court of "incessant doodling" by an "activist judiciary", engaged in "legislative-like manipulation" of the workers' compensation law in Michigan. Why would our appellate courts engage in such inappropriate conduct? According to Commissioners Leslie and Skoppek it is because they are "politically inspired judges."

Having thus discarded existing case law precedent, they reversed Magistrate Zettel, judicially creating an immunity for employers for work disabilities, when the disabling factor is the symptom level and the underlying condition one of the aging process. Obviously, this immunity is nowhere contained in the statute, nor is it anywhere even suggested by statutory language. Thus, it would appear that the Commissioners engaged in a little judicial legislation of their own.

As troublesome as the decision is, the worst part is the language employed. The Commissioners' opinion suggests that they perceive the overall state of workers' compensation law in Michigan as a political battleground, and that the political issues override legal principles. This they blame on the appellate courts. By so doing, they are repudiating the constitutional authority and mandate given the judicial branch of our government, as elected by our citizens. I fear that the Commissioners own "politically inspired" language has called into question the integrity of the system. I urge attorneys on both sides of the political fence to carefully read this opinion and fully appreciate its implications. Then dwell for just a moment upon the importance to our society of a consistent rule of law, applied by a politically independent and fair-minded fact finder/judiciary.

Hypothetically, if the Appellate Commission were to decide its cases on the basis of political allegiance, rather than basing decisions upon the facts and applying the law as contained within the statute and interpreted in the controlling appellate case law, wouldn't that constitute an intolerable impropriety? And wouldn't allowing even the appearance of such be equally intolerable? My client is a very astute gentleman, and when he read this opinion he called me and said, "in other words, under the law I am entitled to the benefits, but because of some political dispute I am being denied. Is that it?"

How do I answer that question? More importantly, where do we go from here?

## Addendum

On November 18,1998, in lieu of granting leave to appeal the Court of Appeals reversed in light of the Supreme Court's decision in *Layman* v *Newark Electrical Associates, Inc.*, 458 Mich 494, 504, __ NW2d __(1998). The Court held that application of the "significant manner" test presents a factual issue and the WCAC exceeds its authority when it engages in impermissible fact finding. The matter was remanded for consideration of other issues. The Court of Appeals went on to state: "In this case, there was evidence in the record to support the magistrate's finding that plaintiff's arthritis was accelerated in a significant manner by the duties of his employment. In contrast, there was no support in the record for the WCAC's factual conclusion that plaintiff's arthritis was only temporarily aggravated by his employment."

# Workers' Comp Web Site News

The Section's Web Site is finally up and running. It needs some refinement, but at least it is an available tool for the Workers Compensation Practitioner. All are encouraged to visit the site at

www.michbar.org/sections/workcomp


So what's on the site? First it provides easy access to all other web sites of interest to the practicing workers compensation attorney. At the October section meeting in Detroit, several web site addresses were given out as sources of information of significance to the @on. Several of those in attendance were seen to be writing frantically to keep up with the addresses as they were read by the speakers. If you didn't get them don't be concerned. The @on web site has a link to each of those sites. The sites included are :

1. Workers Compensation Bureau site - information on the bureau including proposed rule changes, various forms that can be downloaded and used by practitioners, etc.,

2. Board of Magistrates site - information on individual Magistrates including terms and productivity, statistics on decisions and backlog of cases, forms, map to individual hearing sites that can be downloaded and sent to clients and witnesses, etc.,

3. Appellate Commission site - information on the statistics for the Commission productivity, 1997 and 1998 decisions, (1996 is expected to be added along with possible head notes) etc.

4. ICLE site - extensive research information including Court of Appeals and Supreme Court Decisions.

The Section Web Site also has a file where individual members of the Section can request a listing indicating plaintiff or defendant practice area and geographical area of practice. This file is intended to be a resource for help with conflicts or assistance in any given location. Take a look at it. It obviously needs some refinement, but the basic format is there. Since the section has a policy against releasing a listing of its members, inclusion on the list is voluntary and requires that the practitioner request to be included. Requests for inclusion should be sent to:

**Al Helmore, W. C. Section Webmaster**
**Sullivan, Ward, Bone, Tyler and Asher PC**
**1000 Maccabees Center**
**25800 Northwestern Hwy.**
**P. O. Box 222**
**Southfield, NE, 48037 - 0222**
**Fax # (248) 746 - 2760 or**
**e-mail: ahelmore@swbta.com**

All requests should identify whether to list as plaintiff or defendant and city. Any requests not specifying this information will be listed according to the best information available to the Webmaster based on the State Bar Journal address and personal experience. The Webmaster and Section will not be responsible for errors. Additions to the site listings will be made during the first week of the month. It is anticipated that each year, the file will be deleted and a new file created. Authorization to re-fist will be requested at or before the State Bar Convention in September.

The site also contains the Section Calendar of events, listing of officers and members of the Section Council, and the Section By-Laws.

Is there an interest in a file for classified adds? This would not be provided for advertising as such, but might be used as a help wanted or position desired tool for our members or a listing of attorneys available for deposition assistance or brief writing. This file is not under construction yet, but the Section is considering it. All members are encouraged to send your comments to Al Helmore.

For those who are not well versed on the use of the net, here's the easy way to get to the site:

1. Bring up your Internet program ie. America on Line, Mcrosoft Network, or other

2. Enter www.michbar.org in the dialog or address box and hit Enter

3. You will now be in the State Bar Siteon the left side of the screen, scroll down to "sections" , double click on it.

4. In the center of the screen, you will see a box listing the sections scroll down to Workers Compensation and click on it

5. Congratulations ... you are at the Workers Compensation Law Section Site.

Want to go to another site?. ... Just go to the listing on the right side of your screen, scroll down to what you want to see and double click on it .... in a flash, you are there.

Yes you can bypass the State Bar Site ... www.michbar.org/sections/workcomp will take you direct, but if you haven't visited the State Bar Site, you should.

Any comments? Send them to Al. This site is intended to help you. Your comments are always welcome.

# Social Security Drops Plan to Ignore Allocation of Lifetime Benefits in Redemptions

The Social Security Administration, in response to a "deluge of forceful, pointed and credible letters" and comments, has dropped the proposed rule change, published in April 1998, to ignore lifetime allocation of workers compensation settlement proceeds. The Baltimore staff of Social Security, speaking at the recent meeting of the International Association of Industrial Accident Boards and Commissions, called the proposal "completely dead."

Readers will recall that the published rule was intended to reduce social security disability benefits by received workers compensation benefits. The change would have ignored the common practice of the parties and magistrate, by agreement, on the redemption order, setting forth a reasonable allocation of the proceeds for medical, past and future; other compensable benefits not included in income or medical, such as rehabilitation expense and other attendance; and wage loss, past and future, divided by the worker's life expectancy, producing a reasonable value for the future benefits received in the lump sum. In most cases, with an allocation of the proceeds over the worker's lifetime, there is little or negligible effect of such a redemption on the worker's calculated social security disability.

Council member Richard Skutt reports that the old POMs are still in effect. The Administration will look first to the allocation in the redemption order in determining whether to take a credit for workers compensation benefits. If nothing is in the order, the administration will look to benefits paid prior to the redemption to calculate a credit. If nothing is in the order allocating the proceeds, and workers compensation was not paid prior to the redemption, the Administration will assume a workers compensation payment at the maximum rate for the year of injury. This last method would reduce the monthly social security benefit the most, but should do so for the shortest time.

The Workplace Injury Litigation Group reports that the opposition to the rule change was received from not just workers and their attorneys, but also industrial accident board members, state legislators, state attorneys general, members of congress and many other elected and appointed officials.

# From the Board of Magistrates

By Craig Petersen, Chairperson

### Hearing Site Closings and County of Injury Reassignments

The Port Huron and Marquette hearing site locations will be closed with new claims being reassigned to new hearing sites. They will now assign claims assigned to Port Huron to the Mt. Clemens docket. They will now assign Marquette claims to the Escanaba docket. Pending claims on the Port Huron and Marquette dockets will be transferred to the new hearing site if not resolved on the next docket date.

In addition, several changes have been made regarding which county of injury is assigned to which hearing site location. Provided below please find the hearing sites and counties affected along with the new hearing site location.

**Gaylord Hearing Site**

| *County* | *Old Site* | *New Site* |
|---|---|---|
| Emmet | Gaylord | Traverse City |
| Charlevoix | Gaylord | Traverse City |
| Ogemaw | Gaylord | Saginaw |

**Benton Harbor Hearing Site**

| *County* | *Old Site* | *New Site* |
|---|---|---|
| Cass | Benton Harbor | Kalamazoo |
| Van Buren | Benton Harbor | Kalamazoo |

**Kalamazoo Hearing Site**

| *County* | *Old Site* | *New Site* |
|---|---|---|
| Allegan | Kalamazoo | Grand Rapids |

**Dolman Court Reporting Information**

*Pricing for Workers' Compensation Transcripts*

| | |
|---|---|
| Original + 1 Copy = | $4.00 per page |
| Original + 2 Copies= | $5.00 per page |
| Expedited Transcripts = | $7.50 per page |

*Filing of Transcripts with the Workers' Compensation Appellate Commission*

Beginning on January 1, 1999, Dolman will no longer assume the responsibility of filing the transcripts directly with the Appellate Commission. Dolman will send transcripts, including the original in a sealed envelope, to the requesting litigant upon receipt of payment for the cost of the transcript.

Appellants will assume responsibility for serving the original transcript upon the Commission in a timely manner along with copies to the other litigants involved in the claim on appeal.

Dolman may request a deposit from the requesting litigant before processing the transcript order.

# Court Reporters Disclosure Law Enacted; Contract Rates and Copy Costs Regulated

By Patricia Moretti, Gerger & Moretti Reporting

How would you feel if you found out opposing counsel got their transcript before you and you paid more for your copy than they paid for the original? Are you tired of transcripts that arrive AFTER your hearing date? Are you tired of transcripts riddled with errors? Are you receiving a full page of text or do you notice a lot more white on your page than printed words? Are you sure you're using a certified shorthand reporter or a certified electronic recorder? Have you filed an appeal on a Workers' Compensation matter only to find out the transcript never made it to the Appellate Commission and your case was dismissed?

The following are excerpts of PA 249 and MCR 8.108. At the conclusion of this article the proper authorities are listed to address your questions, concerns or complaints if the court rule or law is not followed or if you're just plain unhappy with the transcripts and/or court reporting services you've been receiving.

Public Act 249, a bill signed into law by Governor Engler on July 10, 1998, is a disclosure law which states, in part, in Sec. 1491 (1) "A court reporter, court recorder, stenomask reporter, or owner of a court reporting firm shall not do either of the following: (a) Enter into or arrange for any financial relationship that compromises the impartiality of court reporters, court recorders or stenomask reporters or that may result in the APPEARANCE that the impartiality of a court reporter, court recorder, or stenomask reporter has been compromised. (b) Enter into a blanket contract with parties, litigants, attorneys, or their representatives

> *UNLESS ALL PARTIES TO THE ACTION ARE INFORMED ON THE RECORD IN EVERY DEPOSITION OF THE FEES TO BE CHARGED TO ALL PARTIES FOR ORIGINAL TRANSCRIPTS, COPIES OF TRANSCRIPTS, AND ANY OTHER COURT REPORTING SERVICES TO BE PROVIDED...*" (Emphasis supplied)

Clearly, impartiality is the issue and the state legislature agreed. The Senate vote was 35 yes, 2 no and the House vote was 90 yes, 1 no.

In the case where a blanket contract is in existence, if the court reporter fails to put their fees on the record, they are in violation of PA 249. The penalty could be loss of their state certification.

One way to assure compliance with this law is if the attorney incorporates an additional item in with the usual stipulations. For example, after asking the usual "Are there any defects in the notice?" or "any objections to the time, place and taking of the deposition?" any counsel present could ask: "Does the court reporter/recorder have any financial arrangements with any of the parties to this action?" If the court reporter/recorder says "No," then the deposition may continue. If the court reporter/recorder says "Yes," then the obvious request would be, "Please state your fees at this time." If the court reporter/recorder says, "I don't know whether our firm does or not," the reporter/recorder should be instructed to call the office to get the answer.

It is the responsibility of each individual court reporter/recorder, under the provisions of PA 249, to state at the beginning of the deposition, on the record, the existence of a contract with one of the parties, and what the itemized fees are to be charged not only to the moving party but to all other parties involved. It is not the attorneys' responsibility to inquire about same, but the attorney might be enlightened by the answer if he or she asks.

Also in Sec. 1491 (2)(b) it states: "…shall not charge more than 2/3rds of the price of an original transcript for a copy of that transcript."

Court reporters/recorders have been known to cut a "deal" with one side and then make up the shortfall by charging more for copies. Court reporters/recorders have a responsibility to treat all parties fairly and impartially. They are not supposed to give an advantage to anyone by expediting the transcript to one party and holding the transcript up for other ordering parties.

They also must stay "on the record" unless all parties agree they can go off the record.

Court reporters/recorders sign a document, when they renew their certification, to follow the State Court Administrative Office's transcript guidelines, yet many do not. Pursuant to MCL 600.2510 a transcript page consists of 25 lines, 10 characters to the inch, left-hand margin one and three-eighths inch and the right-hand margin three-eighths inch. These are only a few of the guidelines set forth by SCAO. You may contact their office for all the guidelines.

A court rule that went into effect January 1, 1998, states that all Michigan court reporters and court recorders must be certified to record or prepare depositions pursuant to MCR 8.108 (G)(1)(a). *This rule also applies to the preparation of transcripts of videotaped courtroom proceedings or videotaped or audiotaped depositions, but not to the recording of such proceedings or depositions by means of videotaping.* A recorder holding a CEO certification under subrule (G)(7)(b) may record proceedings but may not prepare transcripts.

Pursuant to 8.108, a certified shorthand reporter must display to all counsel present, before the deposition and without being asked, a blue card and a certified electronic recorder must display to all counsel present a yellow card. These cards prove that the reporter/recorder is indeed certified by the State of Michigan to perform the duties of a court reporter/court recorder.

Failure to produce such a card may mean the reporter/recorder is not certified. Possible penalties for a noncertified reporter/recorder taking the deposition include publishing of the reporter and firm name in Lawyers Weekly and possibly the State Bar Journal as being in violation of MCR 8.108; placing the certification of the firm owner in jeopardy for using uncertified reporters in contravention

**Court Reporter Disclosure-continued**

of MCR 8.108; recommending to the bench that depositions prepared by uncertified reporters not be accepted for filing in court proceedings; the reporter and/or firm owner repay the cost of the deposition taken by a noncertified reporter to the ordering party; plus any other disciplinary action appropriate to the circumstances.

Due to the passage of 8.108 and PA 249, you now have an outlet for your questions/concerns/complaints.

If a court reporter/recorder fails to produce the appropriate card signifying their certification, or if a reporter/recorder you know is contracting fails to put the full disclosure on the record at the time of the deposition, you can send your complaint letter to:

State Court Administrative Office
Board of Review
P.O. Box 30048
Lansing, MI 48909

If you've lost a Workers' Compensation appeal because of an untimely transcript, or have any other concerns regarding the Workers' Compensation Bureau transcripts or reporting/recording procedures, send a letter, with a copy to your State Senator and Representative, to:

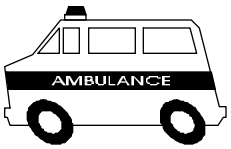
Mr. Bruce Walker
State of Michigan
Department of Management & Budget
P.O. Box 30026
Lansing, MI 48909

(Editor's note: Craig Petersen at the Board of Magistrates would like notice of this also.)

If you have any questions or comments regarding this article, please direct them to the Michigan Association of Professional Court Reporters, 3300 Washtenaw Avenue, Suite 220, Ann Arbor, Mi 48104.

# Enforcement of Medicaid Reimbursement Claims and Liens

By Ray W. Cardew, Assistant Attorney General




This article is an explanatory comment from counsel for Department of Community Health regarding its view of statutory subrogation rights which should be of concern to all compensation attorneys. Magistrate Peterson suggested publishing in the newsletter as a follow-up to the comments offered at the recent section meeting.

**MEDICAID REIMBURSEMENT CLAIMS UNDER MCL 400.106; MSA 16.490(16)**

Medicaid is a joint state/federal benefit program in which an eligible recipient's medical bills are paid by the Medicaid program. If Medicaid benefits are paid as a result of injuries received for which a third party may be liable, and if the injured party attempts to make any type of tort, no fault or workers compensation recovery for those injuries, then the injured party or his/her representative (including his/her attorney) must notify the Michigan Department of Community Health (MDCH) upon commencement of the action seeking recovery for the injuries. Under MCL 400.106; MSA 16.490(16), MDCH has a statutory right to seek Medicaid recovery from a responsible third party. The statute provides in part:


The state department shall be subrogated to any right of recovery which a patient may have for the cost of hospitalization, . . . and other medical services... The injured, diseased, or disabled persons shall notify the state department of the action or proceeding entered into upon commencement of the action or proceeding.

To enforce its rights, MDCH may either join or intervene in the injured person's action for recovery, or MDCH may bring a separate action against a responsible third party for Medicaid reimbursement.

Attorneys who determine that their client's medical bills were paid by Medicaid should contact:

Linda C. Hart, Supervisor
Michigan Department of Community Health
Revenue and Reimbursement Division
Casualty Unit
3423 North Martin Luther King, Jr. Boulevard
Baker Olin West Building
P.O. Box 30435
Lansing, MI 48909

If you are contemplating settling any type of tort, no fault, or workers compensation case, it is strongly suggested you contact MDCH if you suspect Medicaid benefits paid your client's medical bills. Failure to timely notify MDCH of potential Medicaid claims could result in unexpected liability for clients.

# Fireman's Rule Distinguished Again

*Editor's note: The Fireman's Rule in civil liability litigation has been extremely frustrating for lawyers who have been consulted by injured public service workers during the course of their employment. The general rule has been that these firefighters and police officers could not recover for their injuries sustained while doing their jobs, as a matter of public policy, under the theory that those in need would be reluctant to call for help if an injured public safety officer could sue them for negligence. The Court of Appeals recently revisited this issue and allowed a volunteer firefighter to recover where the injury came from a negligent third party. We have reproduced pertinent parts of the decision below:*

DONALD JAMES ENBODY,

Plaintiff-Appellant,

v

CHRISTOPHER BRENT ACKLEY and GLEN J. ACKLEY,

Defendants-Appellees.

FOR PUBLICATION
December 29, 1998
9:15 a.m.
No. 199953
Kent Circuit Court
LC No. 96-003651 NI

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Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

MARKMAN, J.

Plaintiff is a volunteer fire fighter and rescue worker for the Oakfield Township Volunteer Fire Department. On August 15, 1993, he received a dispatch call at his home regarding a possible drowning incident at a nearby pool. Plaintiff immediately responded to the call, turned on the overhead lights and siren on his vehicle and proceeded toward the incident site. En route, his vehicle was hit just behind the driver's door by a vehicle operated by defendant Christopher Ackley and owned by defendant Glen Ackley. Plaintiff stated that as he approached a curved, gravel section of Stacey Road, he was traveling only twenty-five to thirty miles per hour. Defendant's car, containing defendant and three friends, approached the curve from the opposite direction. Plaintiff stated that defendant lost control of his vehicle, crossed the center of the unmarked road and struck his vehicle, even though he attempted to avoid the accident by moving to the shoulder of the road. Defendant disagrees and claims that he did not cross the center of the road.

After the accident, plaintiff began to suffer from pain in his neck and arm. He subsequently brought this negligence suit against defendants, and in response defendants filed a motion for summary disposition on the basis of the 'fireman's rule'. The trial court granted summary disposition to defendants pursuant to MCR 2.116(C)(8) and (C)(10), stating, "I have to conclude that going to the scene of a fire or a rescue, in this case a drowning person that he was going to try to revive, is inherent to being a fireman."

* * *

The common law 'fireman's rule' was adopted in Michigan in *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich 347, 370; 415 NW2d 178 (1987). The 'fireman's rule' prevents police officers and fire fighters from recovering for injuries sustained in the course of duty. *Id.* at 371. The Supreme Court adopted this rule mainly on the basis of "the foundational policy rationale that the purpose of safety professions is to confront danger and, therefore, the public should not be liable for damages for injuries occurring in the performance of the very function police officers and fire fighters are intended to fulfill." *Id.* at 368. Generally, the rule applies to two types of injuries: (1) "those deriving from the negligence [requiring] the safety officer's presence;" and (2) "those stemming from the normal risks of the safety officer's profession." *Woods v City of Warren*, 439 Mich 186, 196; 482 NW2d 696 (1992). The focus must be on whether the injury stems directly from the safety officer's professional functions

***

Thus, we next address plaintiff's claim that since he was not engaged in a professional function as envisioned by the policy at the time that he was injured, the 'fireman's rule' should not be applied to bar his suit. It is clear that the first type of injury to which the 'fireman's rule' has been held to apply, that "deriving from the negligence causing the safety officer's presence;" is not relevant to this case. *Woods, supra* at 196. Plaintiff was called to attend to a drowning victim and was still en route when he was injured in a car accident. If he had been on the scene of an emergency at the time of his injury, and thus performing some part of his official functions, the fireman's rule would likely apply. … Not only was plaintiff not actively engaged in the duties that he was called on to deliver at the scene of the drowning, he was not even "on patrol" at the time of the accident or driving a fire department vehicle or other fire fighters to the scene of the rescue. Instead, he was merely en route to the scene of a drowning accident. His specific duties were to help in the rescue and/or resuscitation of the drowning victim. Although the trial court correctly pointed out that plaintiff could not perform his rescue duties if he did not first get to the scene, in our judgment, driving to the scene was merely incidental to his duties as a fire fighter and rescue worker. … As a fire fighter, it was not plaintiff's duty to patrol the streets or confront the ordinary dangers of negligent drivers. A traffic accident, where not caused or contributed to by plaintiff's own actions in attempting to function as a safety officer, was not a normal, inherent or foreseeable risk of his job as a fire fighter or rescue worker.

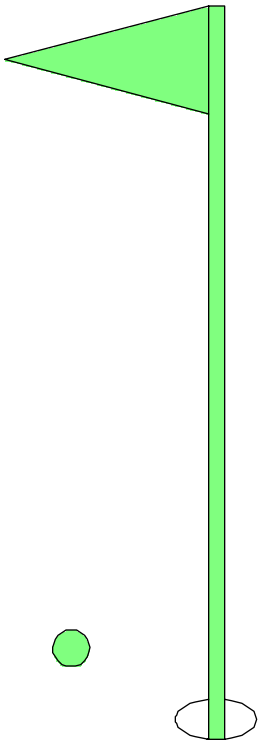
We also believe that, unlike the officer in *Woods, supra* at 192, who was chasing a suspect in icy conditions, plaintiff's status or actions as a fire fighter and rescue worker here did not increase his risk of injury.

***

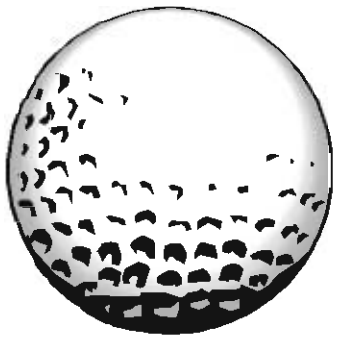
In addition, we believe that the recent decision of *Gibbons v Caraway, supra*, leads us to the conclusion that the 'fireman's rule' does not apply where the safety officer is injured as a result of an act by a third party unconnected to the original duty of the officer. In *Gibbons, supra* at 317-8, a police officer, who was directing traffic at the scene of an accident, was hit by a car that allegedly was operated "in a wanton, reckless, careless, negligent, or grossly negligent manner." The Supreme Court failed to produce a majority

opinion in *Gibbons.* However, subsequent decisions of this Court have suggested that five justices appeared to agree that the 'fireman's rule' should not be applied where "a police officer has responded to a call or an offense and is injured as a result of the wanton, reckless, or grossly negligent conduct of an independent third party unconnected to the situation that brought the officer to the scene." *Harris-Fields v Syze,* 229 Mich App 195, 198; 581 NW2d 737 (1998); see also *McCaw, supra*. In our judgment, looking to the lead opinion of Justice Cavanagh, with Justices Mallett and Kelly concurring, and the concurring opinion of Justice Weaver, a plurality of the justices would have also agreed that the 'fireman's rule' does not apply where the negligent conduct of a third party injures the officer. … Here, defendant's allegedly negligent driving was unrelated to the event giving rise to plaintiff's duty, i.e., the drowning, did not occur at the scene of the drowning, and plaintiff's performance of his duties in relation to the drowning did not cause or contribute to the accident. Applying these facts to the apparent rule of *Gibbons, supra,* we conclude that the 'fireman's rule' does not apply here for this reason also.

The scope of the 'fireman's rule' does not include all risks encountered by a safety officer, nor is it a license to act without regard for the well-being of the safety officer. … Thus, on balance, the interest of allowing recovery outweighs the policy arguments against holding defendants potentially liable. *McCaw, supra.* Consequently, we hold that the 'fireman's rule' does not apply in the instant case and the trial court erred in granting summary disposition to defendants.



# Past Chairpersons' Golf Outing



# Wish You Were Here! St. Kitts

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State Bar of Michigan
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**James D. Ryan, Chairperson**
**Martin D. Glista, Newsletter Editor**

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