Workers Compensation Section
Fall 2001
State Bar of Michigan Workers Compensation Section

Despite National Disaster, Section Met and Elected New Officers on September 14, 2001

The national disaster of September 11, 2001, resulted in very low attendance at the Workers' Compensation Section Meeting held at the Lansing Center on September 14, 2001. Because of the disruption of air traffic, our guest speaker, Dr. Rick Brinkman, was unable to leave his home in Portland, Oregon. Nonetheless, the Council met over breakfast at 7:30 a.m., and the annual meeting and election of officers began at 9:30 a.m. as scheduled. The membership present unanimously voted in all of the individuals recommended by the selection committee. Alexander T. Ornstein is the new Chairperson, Charles A. Gilfeather is the new Vice-Chairperson, Michael J. Flynn is the new the Secretary, and Alan S. Helmore is the new Treasurer.

Standing (left to right): Martin Glista, Richard Skutt, Crary "Rick" Grattan, Deb Strain, Alan Helmore, Jerri Marcinkoski, Richard Warsh. Sitting (left to right): Tim McAree, Alex Ornstein - chairperson, and Richard Wood - past chairperson.

With Alan Helmore moving up to the Treasurer position, there was an opening for a council position for the term expiring in 2003. Attorney Deborah Strain was elected to fill that position. Also, Sandra L. Ganos, whose term also is scheduled to expire in the year 2003, had resigned from the council, and her position has now been filled by Mr. Richard Warsh. Lastly, Richard M. Skutt and Leonard M. Hickey, whose terms expired at this very meeting, were asked to accept reappointment to the council for the terms to expire in the year 2004. Both of these individuals accepted the invitation and were elected by the membership.

New Chairperson's Priorities

Alexander Ornstein spoke to the membership indicating various priorities for his term as Chair, as follows:

(i) a visit to each and every Bureau site in the State;

(ii) a change in the Subpoena procedures to either allow pre-signed Subpoenas, or to authorize attorneys to sign Subpoenas as they are so allowed in Circuit Court matters;

(iii) to change the cost containment roles in order to make them apply to both Plaintiffs and Defendants. As pointed in out in cases of voluntary payment, or in Redemptions where the Plaintiff is required to pay medical bills that are outstanding, the Plaintiff should be allowed to invoke the cost containment rules to reduce the amounts paid out;

(iv) to install defibrillators and other life saving equipment at each Bureau site;

(v) to produce a written explanation in the form of a Section letter, which members of the Bar can show to their clients in order explain why there are delays in the processing of cases. This may help to reduce the frustration and anger observed in many litigants;

continued on page 11

In this Issue:

LETTERS TO THE EDITOR

Tim,

In that we are all in the same boat here, I thought I would share this with you and the members of the Section. If you have any questions, please email me back here or call at 248-362-8450 ext. 39.

I have found a new tool which will make research of the online Appellate Commission opinions much easier. The problem has been as I am sure all are aware that there has been no way to word-search for terms in that database. The State Web page folks have been telling us that it would be very difficult to put such a capability into their site.

Well, it is no longer necessary to wait. A free, third-party utility is available from a trusted source and it works! In fact it is an offshoot of the famed Google search engine. It is called the Google Toolbar, and allows for a word search of any Web site (as well as the entire Web, which may be a bit large for our usual purposes), site ranking, and a few other less-important features.

To get this tool, just log on to the Google site (*www.google.com*) using Internet Explorer (it does not work for Netscape) and follow the prompts to (About Google) or (Explore Site) and then find the little box for the Google Toolbar. It downloads quickly and installs easily. Just follow the prompts for installation (I used the simpler form of the 2 available) and a new toolbar will pop up on your IE browser.

When you use it at the Appellate Commission site, the results you get will be the actual computer filenames for the cases. A few minutes' looking will allow you to decipher the year (01 or 00 or 99, etc.) in the file name which will give you at least a rough idea of the most recent cases using your search term. For example I found some 1660 entries under "reasonable employment" as a test search.

The program will give you some spurious results, pointing you to advertiser sites, but these will usually be marked as such ("Google partner" or some such language) and can safely be ignored.

I think that this new tool will give us a lot more research capability.

Please pass this along to the Section membership.

- Michael J. Mason

I'm a paralegal at Peter J. Johnson's office. Just thought you might like to know that I caught a problem with your Summer 2001 newsletter under the section entitled "Law firm created bureau forms". You mention a telephone number to call if you need to order forms in bulk - 517-322-1441. I called that number to order forms and was instructed that all orders must be placed through this number: 1-888-396-5041 - following instructions for an option to order bulk copies.

I also went into the bureau's web page to see what it had to say about ordering bulk forms. It, too, gave the number you printed in your newsletter. I called the 517 number to advise them that their web page wasn't accurate but that change will probably be long in coming. Just for your information, our Magistrate Bernard Kielton, does not like us to use the web-site downloaded forms because they can't be printed on carbonized paper. He doesn't like to sign 5 copies of an order. We certainly understand but the computer-generated forms are so useful to use.

- Karen Johnson

News From The Bureau

Craig Petersen

Exciting Changes to Insurance Coverage Lookup Pages

The bureau is pleased to announce that we have improved our workers' compensation insurance coverage lookup pages on the web.

A few of the new and exciting features include:

- The ability to enter the employer name in upper, lower, or mixed case without the need for a % wildcard when searching the web.
- The list of search results can be sorted alphabetically by employer name, employer address, city, or state by simply clicking on the appropriate column title.
- Now, up to 20 employer names at one time will be displayed on the search results page with a maximum of 200 names. If the search record count is exceeded, then a message will be displayed so that the user can refine the search criteria.

You can perform insurance coverage lookups by going to the Michigan Workers' Compensation website at *www.cis.state.mi.us/wkrcomp* and clicking on the Ins. Coverage link at the top right hand of any page.

Doug Langham Receives Michigan Rehabilitation Association Excellence Award

Doug Langham with MRA Excellence Award

I am pleased to announce that Doug Langham, admini-strator of the bureau's Vocational Rehabi-litation Division, is the recipient of the 2001 Michigan Rehabilitation Association Excellence Award. Doug received this award on October 30, 2001, at the annual Michigan Rehabilitation Conference in Traverse City.

This award is given by his peers for demonstrating a strong positive effect upon the quality of life or employment opportunities for individuals with disabilities and other barriers to employment in Michigan.

Please join me in congratulating Doug on this achievement.

Travel Reimbursement Rates Effective 10-1-2001

The Department of Management and Budget has advised that the travel reimbursement rates effective October 1, 2001 are as listed in the table to the right.

The rate for private car is **$.345** per mile.

Department of Health and Human Services Issues New Policies

The Dept. of Health and Human Services has issued a 15-page memorandum on its new regulations and policies on Medicare liens and set-asides, which now make a distinction between lump sum workers' compensation settlements that are commutations of future benefits and those that are due to a compromise between the carrier and the individual. A complete copy of the memorandum is available to download from the bureau website: *www.cic.state.mi.us/wkrcomp/bwdc*. Questions can be directed to DHHS contacts: Sharon Johnson at 3'12.353-9332 or Roberto Tirado Velez at 312.886-4937.

Policy Directive: **Employer/Insurance Coverage Information**

Claims will not be processed if the redemption or green sheet order do not match the carrier(s) listed by the bureau. The carrier information is provided on the Notice of Hearing issued by the bureau.

Litigants should check the bureau insurance coverage information listed on the Notice of Hearing when filing a Carriers' Response form. The carrier on the date of injury is noted next to the carrier, or if self-insured, next to the employer. If the bureau insurance information does not match the information supplied from the client, then the litigants should immediately contact the Compliance Division of the bureau at 517/ 322-1195.

The litigants cannot stipulate to correct insurance coverage or carriers without providing the proper coverage documentation to the bureau staff in Lansing. You must contact the bureau to correct this information before any change in the parties to the claim will be made. Otherwise, the bureau insurance coverage information will stand.

Litigants should not wait until the claim is being resolved (green sheet or redemption order) to bring this issue to the bureau and magistrate's attention.

Magistrates have been instructed not to resolve a claim until the insurance coverage information is correct and matches the order.

We are asking for your cooperation with this policy directive.

If you have any questions, please contact us.

State,City County/Area	Breakfast	Lunch	Dinner	Lodging
In-State (all other) Cities	$7.00	$7.25	$16.50	$65.00 + taxes
Michigan Select (higher cost) Cities All of Wayne County All of Oakland County Ann Arbor, Charlevoix, Gaylord, Mackinac Island, Petoskey, Traverse City	$8.75	$8.75	$21.00	$65.00 + taxes

RECENT COURT DECISIONS

By Jerry Marcinkoski

Here is a summary of the Supreme Court and the Court of Appeals workers' compensation decisions since the Spring 2001 Newsletter, along with noteworthy decisions from the Worker's Compensation Appellate Commission. Please remember we only summarize published Court of Appeals decisions because only published decisions are precedential. All Supreme Court and Commission opinions are published.

Supreme Court

"Like Benefits"

The Supreme Court has released a decision addressing "like benefits." The case is *Crowe v City of Detroit,* 465 Mich 1; 631 NW2d 293 (2001). The "like benefits" provision says that police officers, firefighters, and employees of police or fire departments can opt out of the workers' compensation system in terms of receiving periodic wage loss benefits. In place of such benefits, the employees can elect other similar benefits that the municipality might provide. Such similar benefits are called "like benefits."

In this 4 – 3 decision, the Court held that employees who opted for "like benefits" cannot later opt back into the workers' compensation system when their "like benefits" diminished under their municipality's charter.

The employees were Detroit police officers. After they received work-related disabling injuries, they accepted disability benefits under the City of Detroit's charter, rather than under the workers' compensation act. The officers' "like benefits" exceeded the amounts they would have received under the workers' compensation act during their "working life." The city's charter defined "working life" as 25 years from the time their service as an officer commenced. The city charter further provided that upon expiration of that 25-year "working life" period, police officers thereafter received the same amount of periodic payments as uninjured police officers who retire under normal circumstances. That amount is less than what the injured officers would obtain under the workers' compensation act.

Because of that change in the benefit level under city's charter, the police officers brought this case to argue that they should be allowed to change their election and opt into the workers' compensation system once their "working life," as defined in the charter, ended.

The Court disagreed with the employees. The Court said that the employees' choice at the outset was between the entire city plan or the workers' compensation system. The Court said that the "like benefits" provision of §161(1)(c) of the Act "does not call for waiver of some [workers' compensation] benefits; it requires a waiver of the provisions of the [Act] itself." In reaching this decision, the Court also noted that for benefits to be considered "like benefits" the municipality's benefits need not be identical in every detail to the benefits afforded by the workers' compensation system. The municipal plan here was "sufficiently similar" because they were "periodic payments for disability."

The Court's opinion was authored by Chief Justice Corrigan with Justices Taylor, Young, and Markman concurring. Justice Cavanagh dissented and Justices Weaver and Kelly concurred with Justice Cavanagh's dissent.

"Threat to Industry" Proofs

You might recall that the Court of Appeals in *Alston v Chrysler Corp and Silicosis, Dust Disease and Logging Industry Fund,* 243 Mich App 201; 622 NW2d 795 (2000) had held that the dust disease fund need not reimburse the employer where the employee suffers from pneumoconiosis unless the employee proves that this disease posed a "threat to [the employer's] industry." The employer appealed to the Supreme Court.

In an unanimous order entered June 12, 2001, 464 Mich 864; 630 NW2d 619 (2001), the Court reversed the Court of Appeals, saying:

> Chrysler Corporation need not show a threat to the automobile industry from asbestos in order to receive reimbursement from the fund when the dust disease is pneumoconiosis.

As a result, the employer can be reimbursed from the fund under §535 for weekly compensation which exceeds $25,000 or 104 weeks, whichever is greater.

This ruling returns the law to the way the fund had applied it in the past. That is, when the disease at issue was silicosis, phthisis, or pneumoconiosis, the fund did not generally require employers to prove a "threat to industry" before it would reimburse.

Age-Reduction Provision Of §357 And Coordination Under §354 In *Stozicki v Allied Paper Company, Inc,* 464 Mich 257; 627 NW2d 293 (2001), the Supreme Court resolved a question regarding different types of reductions in employees' rates of weekly compensation.

Specifically, the age reduction provision of the Act, §357, provides for an annual 5% reduction in the employee's weekly compensation rate beginning at age 65, but the reduction cannot be applied to "person[s] whose payments under this act are coordinated under Section 354." The controversial question that has arisen in a number of cases over the years is: does this prohibition in the §357 age-reduction provision mean that an employer cannot simultaneously apply both the age-reduction and coordination of benefits provisions? Or, does this prohibition

mean that once an employer elects one type of reduction, it may not later switch to the other type? The Court of Appeals had said that once an employer elects one reduction provision over another, it could not later switch. The lead case has been *Saraski v Dexter Davison Kosher Meat & Poultry*, 206 Mich App 347; 520 NW2d 383 (1994).

In *Stozicki*, the Supreme Court held that *Saraski* was wrongly decided. The Supreme Court says that §357's prohibition prevents an employer only from simultaneously taking both reductions. Section 357's prohibition does not mean that an employer who once took the one reduction cannot later take the other.

The Court's decision was concurred in by all the Justices. Justice Kelly wrote a separate concurring opinion.

Pending Cases On Leave Granted Before The Supreme Court

As of this writing, the Supreme Court has pending before it to be decided in the 2001-2002 term the following cases, all of which were argued in succession on November 7, 2001:

- *Robertson v DaimlerChrysler Corp*, SC No. 116276 [work-relatedness of mental disabilities].
- *Cain v Waste Management, Inc. and Second Injury Fund (Total And Permanent Disability Provisions)*, SC Nos. 116389 and 116945 [the major is: in determining loss of industrial use of the leg for total and permanent disability purposes, do you use a "corrected" test which takes into account corrective devices such as a prosthesis or leg brace or an "uncorrected" test]. (Incidentally, the Supreme Court invited the Section to file *amicus curiae* briefs on behalf of each side in this controversy and that has been done by the Section).
- *Lesner v Liquid Disposal, Inc*, SC No. 116205 [how to calculate benefits for partial dependents in death cases].

Court of Appeals

250 Week Presumption Is Rebuttable

In *Maier v General Telephone Company of Michigan*, ____ Mich App ____; ____ NW2d ____ (2001)(CA No. 227825, decided September 28, 2001), the Court of Appeals held that the 250 week-plus presumption in §301(5)(d)(i) is rebuttable. This provision says that there is a presumption that performance of "reasonable employment" for 250 weeks or more creates a new wage earning capacity.

The facts of the case were that the employee sustained a compensable injury, worked thereafter at an accommodated job ["reasonable employment"] for more than 250 weeks, and then was terminated. The Worker's Compensation Appellate Commission held that a new wage-earning capacity was conclusively presumed under §301(5)(d)(i), and no proofs by plaintiff could rebut the presumption.

Reversing the Commission, the Court of Appeals said that the word "presumption" is not defined in the statute and, therefore, the Court would refer to its dictionary definition. After doing so, the Court said that it found no basis to conclude that the statute's presumption was conclusive. The Court said that since the presumption was not conclusive, plaintiff has the opportunity to rebut the presumption. The case was remanded for purposes of considering the rebuttal proofs.

This case overrules the Commission's view of the presumption, a view that the Commission has held for sometime in a number of different cases.

Non-Work-Related Seizure At The Workplace

In the consolidated cases *Hill and Automobile Club of Michigan v Faircloth Manufacturing Co/Frazzini and AAA of Michigan v Total Petroleum*, 245 Mich App 710; 630 NW2d 640 (2001), the Court of Appeals resolved the following legal question: can an employee recover workers' compensation benefits for injuries sustained in a vehicular accident where the employee's diabetic seizure caused the vehicular accident?

Relying upon Professor Larson's treatise, the Court of Appeals held that the employees can recover. The Court said that the employees were driving their vehicles for job-related purposes and, while doing so, had diabetic seizures that resulted in new orthopedic injuries attributable solely to the work-related car accidents. The Court said that, although the origin of the accident was a non-work-related seizure, the employees could recover for the automobile-induced injuries because driving the vehicle for work purposes increased the risk of injury.

Exemption From Liability For Imprisonment Or Commission Of A Crime

In *Sweatt v Department of Corrections*, ___ Mich App ___; ____ NW2d ____ (2001)(CA Docket No. 226194, released for publication September 25, 2001), the Court of Appeals split three ways with the net effect being affirmance of the *en banc* decision of the Appellate Commission. The case required interpretation of the exemption from liability under §361(1). The exemption says that the employer is not liable if the employee "is unable to obtain or perform work because of imprisonment or commission of a crime." MCL 418.361(1).

Plaintiff worked as a corrections officer for the Department of Corrections. He sustained a work-related injury. He was voluntarily paid benefits for that injury. While being voluntarily paid, he was convicted of delivery of heroin and imprisoned. The commission of that crime terminated his employment and there was no dispute that he was disentitled to weekly worker's compensation benefits while imprisoned.

After his release, he worked at lesser paying jobs and sought resumption of partial weekly compensation benefits. However, while plaintiff was in prison, the Legislature had passed a statute which forbade the Department of Corrections from hiring or re-hiring anyone who had been convicted of a felony, such as

continued on page 6

Recent Court Decisions
continued from page 5

plaintiff. Since plaintiff was considered a new-hire given that his employment relationship had been severed by the commission of the crime, defendant took the position that plaintiff was unable to obtain or perform work for defendant "because of commission of a crime" given that the defendant was statutorily precluded from re-employing plaintiff.

The Magistrate held for plaintiff. In its *en banc* decision, the Commission split 4–3 with the majority affirming the Magistrate. The Commission majority held that defendant was obliged to prove that it would have offered plaintiff reasonable employment but-for the statutory prohibition and defendant failed to meet that burden of proof.

A majority of the Court of Appeals affirmed, but reached no consensus on their reasoning. Judge Neff agreed with the Commission result, but for different reasons than that offered by the Commission. Judge Neff believed that the statute barring reemployment of plaintiff amounted to a permanent forfeiture of benefits contrary to §301(5) and the *Russell*/*McJunkin*/*Perez* trilogy which eschews permanent forfeiture. Judge White agreed with the Commission result and with the Commission's reasoning. Judge Griffen dissented on the basis that the causal connection between plaintiff's injury and defendant's liability was broken as a matter of law under the terms of §361(1), *i.e.,* defendant was not liable because plaintiff could no longer obtain or perform work for defendant "because of his commission of a crime."

Average Weekly Wage

In *Toth v Auto Alliance International,* 246 Mich App 732; 627 NW2d 599 (2001), the Court of Appeals resolved an average weekly wage question on remand from the Supreme Court.

The facts were that plaintiff worked for defendant several years, developed work-related carpal tunnel syndrome, was off work for a period of time, had surgery, and then returned to work for defendant. She returned to work for less than 39 weeks and was laid off. She prevailed before the Magistrate on the basis of a last day of work date of injury. The question presented was how to calculate her average weekly wage.

The Magistrate and Commission calculated plaintiff's average weekly wage with reference to §371(3). This section applied "[i]f the employee worked less than 39 weeks in the employment in which the employee was injured, . . ."

The Court of Appeals held that this subsection of §371 was not the correct referenced point because "while plaintiff worked less than thirty-nine weeks after returning to work . . . she had been employed by and worked for defendant for several years. Therefore, subsection (3) does not apply to the present case."

The Court held that the appropriate subdivision of §371 for determining plaintiff's average weekly wage was subsection 6, the "special circumstances" provision. The Court explained the calculation pursuant to that subsection as follows:

> On remand, the WCAC shall divide plaintiff's aggregated earnings during the relevant period prior to the injury, which neither party disputes were $12,270.91, by the eighty-two days plaintiff worked, and multiplied that amount by the number of days the WCAC determines to be customary in the employment, but not less than five. . . The resulting sum must then be rounded to the nearest dollar to arrive at plaintiff's average weekly wage.

Compensation Appellate Commission

Reasonable Employment Issues

Offers

In *Smith v Peterson Farms, Inc,* 2001 ACO #274, the Commission held that a valid offer of "reasonable employment" must include the following: (1) a job is within the employee's capacity to perform; (2) a job that is not a proximate threat to the employee's health and safety; (3) a job within a reasonable distance from the employee's home; and, (4) the offer must be "bona fide", meaning that the employer is acting in good faith.

Applying these criteria, the Commission said that an offer of reasonable employment that did not specifically suggest a time frame or commencement date was valid. The Commission said that "there is no statutory or factual basis on which to find that the absence of a starting date in the offer of employment in this case was good and reasonable cause to refuse the offer of employment."

Ending The Period of Refusal To Work

In *Barber v Unisys Corp,* 2001 ACO #273, plaintiff had previously been denied benefits on the basis that he unreasonably refused post-injury "reasonable employment" offered by defendant. Plaintiff filed another application contending that he was now available to work for defendant but defendant had withdrawn the previously extended job offer.

The Magistrate held for defendant. The Magistrate said that plaintiff did not offer sufficient proof that he had ended his unreasonable refusal to perform the previously offered favored job. The Magistrate said that plaintiff failed to inform the defendant of his restrictions outside of the litigation process, failed to apply for reasonable employment elsewhere, and had never indicated to his treating doctor an interest in returning to the favored work. The Magistrate said that "the mere filing of an application stating that he was willing to do unspecified work within his restrictions without providing evidence of his restrictions [to defendant] is not sufficient to end plaintiff's unreasonable refusal to perform the [favored] job."

On review, the Commission affirmed adopting the Magistrate's opinion as its own. The Commission said that under *Perez v Keeler Brass Co,* 461 Mich 602; 608 NW2d 45 (2000), the availability of a particular favored job is irrelevant to the question whether a claimant remains "voluntarily removed" from

the work force. And, the fact that one particular job is no longer available "says nothing about a claimant's decision to withdraw from the work force." The Commission said that, rather than contacting the employer and informing it that he was ready to return to work, plaintiff merely filed an application for benefits. For these reasons and those recited by the Magistrate, the Commission concluded that plaintiff "was simply not credible and not serious about returning to reasonable employment at Unisys or any other employer."

In *Dyer v Asplundh Tree Expert Co*, 2001 ACO #206, the Commission affirmed the Magistrate's suspension of benefits for failure to accept reasonable employment.

The Magistrate found that plaintiff suffered a work-related injury which disabled him. But, the Magistrate also found that plaintiff's entitlement to benefits was suspended when he unreasonably refused an offer of reasonable employment. The Magistrate found that a later non-work-related injury which left plaintiff with more restrictions did not change the suspension of benefits. And, defendant's termination of plaintiff's employment did not change the result.

On appeal, this plaintiff also argued that the Supreme Court's *Perez* decision entitled him to a resumption of benefits because he was no longer "voluntarily" off work given that the new additional medical restrictions now precluded him from performing the reasonable employment.

The Commission disagreed. The Commission said that *Perez* means that the employee must rescind a prior refusal to work by taking "an affirmative action on the part of the employee, nor merely advising of additional medical restrictions. The essence of the *Perez* decision is the employee must advise the employer that he or she is now available for work." Applying this rule, the Commission affirmed the Magistrate.

New Wage-Earning Capacity

In *Massengale v Lakeland Regional Health System*, 2001 ACO #269, the Commission spoke to the question of whether a new wage-earning capacity was established by post-injury work of more than 100 weeks but less than 250 weeks. The Magistrate held that defendant did not prove that a new wage-earning capacity had been established because plaintiff's return to work was at lower paying part-time work.

The Commission said, first, that the employee bears the burden of showing that work performed for 100 weeks or more but less than 250 weeks did not create a new wage-earning capacity. Therefore, the Magistrate erred by placing the burden of proof on the employer to prove that work did create a new wage-earning capacity. Second, the Commission remanded the case for a determination of whether the post-injury work did establish a new wage-earning capacity, saying that performance of lower paying part-time work, in and of itself, does not mean no new wage-earning capacity was created. Instead, the test is whether the employee returned to regular work with the ordinary conditions of permanency, two separate requirements. The first inquiry is: whether "the job performed [was] one which was modified to fit the employee's injury-related restrictions or was the job one which, even though it accommodated the employee's limitations, did not require any further modifications in order to place the employee in it." And, the second inquiry is: "whether the job is one with the ordinary conditions of permanency."

The Commission also noted that if a new wage-earning capacity has been created by such post-injury work, "the employer must still pay benefits based on the difference between the employee's average weekly wage at the time of injury and the average wages earned in reasonable employment."

In *Steward v Grand Haven Brass Foundry*, 2001 ACO # 328, the Commission affirmed the Magistrate's denial of benefits where the employee had worked post-injury at reasonable employment for more than 250 weeks. In light of *Maier* (summarized under the Court of Appeals' section in this newsletter) which held that the presumption that a new wage-earning capacity can be rebutted by the employee, this case is important because it suggests a method for employees to rebut the presumption.

The Commission said that "Plaintiff's own testimony concerning a fruitless search for suitable work or vocational testimony that suitable work is unavailable to plaintiff would be competent evidence, if accepted, to rebut the presumption. Because plaintiff did not provide such evidence, and because any reasonable employment job performed for 250 weeks or more creates a presumption of new wage-earning capacity, the magistrate's decision was correct."

"Constructive" Refusals To Work

In *Chapin v Oven Fresh Bakery*, 2001 ACO #302. The plaintiff suffered a disabling work injury, was offered a light job, but at times would refuse to show up for work on certain days without calling in sick. The Magistrate concluded that plaintiff "constructively refused" an offer of reasonable employment. However, the Magistrate further found that when plaintiff filed a grievance to get his job back, he ended that period of refusal thereby entitling him to a resumption of benefits from that point forward.

On review, the Commission first noted that this was not a "pure" constructive- refusal case. Instead, the constructive refusal cases are those "where the employee is present and at least feigns an effort at attempting the favored work, yet showed such a total lack of good faith that in reality he or she is not really trying to do the job at all." The Commission gave as an example someone hypothetically accepting an offer to perform light work such as sitting at a desk and answering the phone. If such a hypothetical employee sat at the desk but intentionally did not answer the incoming calls, then he or she would knowingly and persistently be engaging in conduct designed to avoid the performance of favored work, thereby constructively refusing it under §301(5)(a). The Commission said constructive refusals occur "when the employee's actions reveal the lack of a good faith effort to perform an integral part of the reasonable employment." The Commission did not find that this plaintiff's

continued on page 8

Recent Court Decisions

Continued from page 7

lack of calling in sick fell into the category of "constructive refusal."

Second, the Commission affirmed the Magistrate's ruling that plaintiff's filing of a grievance constituted in this case a good faith revocation of his refusal to perform reasonable employment, thereby entitling him to a resumption of benefits.

A somewhat similar issue arose in *Pacheco v Sam's Club*, 2001 ACO #245, an employer alleged that a change in plaintiff's baby-sitting/childcare circumstances prevented plaintiff from working post-injury at jobs within her limitations. The Commission reviewed a number of its earlier cases and summarized the operative rule as follows:

> Taken as a whole, these four cases stand for the proposition that an employee has an obligation to mitigate the employer's loss resulting from a work injury. As part of this obligation an employee may not engage in conduct which forecloses an employment offer.

Applying this rule, the Commission concluded that the employee in this case did not fail to mitigate the employer's loss. The Commission concluded that the employee did not use childcare limitations as a pretext to refuse to return to work. The Commission says that in situations, not present in this particular case, where there is an actual offer of "reasonable employment," then childcare concerns may not be good and reasonable cause for refusing work. But, where there is no firm offer (as here), the employer must demonstrate "egregious conduct on the part of the employee precluding a return to work" in order to prevail.

Significant Manner Cases

In *Victor v Honeywell, Inc.*, 2001 ACO #283, the Commission said that before the "significant manner" work-relationship test in §301(2) and §401(2)(b) can be deemed applicable, "there must be specific testimony establishing the degenerative condition as a condition of the aging process." The Commission found that the medical testimony here did not support a finding that plaintiff's degenerative knee problem was "a condition of the aging process." The Magistrate therefore was correct in applying not the more demanding significant manner work contribution but rather the general work-relationship standard. The Commission therefore affirmed the Magistrate's open award.

In *Cohen and Connecticut General Life Insurance Company v River Rouge District*, 2001 ACO #262, the Commission remanded the case to the Board of Magistrates for a finding on whether plaintiff's work contributed "in a significant manner" toward her disability in accord with *Martin v Pontiac School District*, 2001 ACO #118. In so doing, the Commission also made some general points regarding lay and medical evidence and MESSA liens.

Plaintiff claimed a work-related psychiatric disability. The primary question was whether alleged events in her work environment, "discrimination and segregation," contributed "in a significant manner" toward her mental condition, under §301(2). She also had non-work-related stressors (divorce, deaths in the family), as well as a possible biological disposition toward depression.

The Magistrate found significant work contribution significant and found plaintiff credible. On appeal, defendant argued that the histories plaintiff provided her expert witnesses and the hypothetical questions posed to those witnesses by plaintiff's counsel did not comport with plaintiff's trial testimony. The Commission found merit in defendant's charge and found the inconsistency crucial insofar as it bore on plaintiff's credibility. The Commission explained that, while it generally defers to magistrates' credibility determination if supported by the record, where the witness' testimony is contradicted by serious inconsistencies, the Magistrate must explain the inconsistencies. The Commission concluded that resolving the credibility question regarding live witnesses is best done at the Magistrate level and, therefore, remanded the case.

In remanding the case, the Commission said that the Magistrate should apply the Commission's *en banc* decision in *Martin v Pontiac School District*, 2001 ACO #118 (summarized in the spring, 2001, section newsletter). *Martin* is a multi-factor test offered by the Commission to assist magistrates in the exercise of their factfinding discretion. The four-factor test is: (1) count the number of occupational and nonoccupational contributors; (2) determine which contributors contributed most with particular reference to medical opinions; (3) consider the duration of each contributor, the longer the duration suggesting more contribution; and, (4) determine whether any permanent effect resulted from any contributor. See also, *Gasiorek v Aramark Corp*, 2001 ACO #170.

Finally, the Commission affirmed the Magistrate's ruling that MESSA's "lien" must be rejected. The Magistrate held that MESSA's claim must be denied because the real party in interest was Connecticut General Life Insurance Company and it never appeared at trial. Under such circumstances, the Commission said that the Magistrate's denial of the intervening plaintiff's claim was correct and need not be revisited on remand.

In *Mattison v Pontiac Osteopathic Hospital*, 2001 ACO #255, the Commission decided a "significant manner" case on remand from the Court of Appeals.

You will recall that the Court of Appeals in a prior published decision in this matter had held that plaintiff could prevail under the significant manner standard without the necessity of proving a pathological aggravation of the underlying problem. The Court said that so long as work contributes toward a significant escalation of the symptoms, the significant manner standard is satisfied. The Court remanded the case to the Commission for a

determination of whether plaintiff's work aggravated the symptoms of her condition in a significant manner.

On remand, the Commission applied the *Martin* four-factor test on remand and concluded that plaintiff did not meet her burden of proving a significant symptomatic aggravation of her arthritic condition. The Commission summarized its application of *Martin* to the facts as follows:

> In summary, the occupational and nonoccupational factors are equal, age versus continued work. No expert testified as to the relative contribution of either factor. As far as duration, the degenerative arthritis pre-dated plaintiff's 1992 [work] injury, and her symptoms related to the arthritis date from 1994 when she returned for treatment to Dr. Basch. However, Dr. Basch's records reveal that plaintiff complained of pain in both ankles in 1994 and 1995. Because of this we cannot contribute permanent duration of plaintiff's pain in the left ankle to the effect of work. As a result, plaintiff has not shown that her left ankle symptoms were significantly aggravated by her employment.

Haske Issues

In *May v City of Inkster*, 2001 ACO #249, the Commission offered a concise summary of the present state of the law on the definition of disability as interpreted by *Haske v Transport Leasing, Inc., Indiana*, 455 Mich 628; 566 NW2d 896 (1997).

After reviewing the legal principles involved, the Commission summarized them saying:

> In summary, then, to qualify for an award of weekly benefits, a claimant must establish (1) a workplace injury, (2) a disability, and (3) a wage loss due to the injury. If a claimant proves a workplace injury, disability and subsequent wage loss, the employer then has the opportunity to present proofs that wage loss is not related to the injury, but is instead due to other, non-**work-injury-related factors.**[6] Such factors might include avoidance of work, malingering, termination from employment for reasons unrelated to the injury, the claimant's voluntary choice to pursue other activities or any other relevant facts which a defendant may choose to present to the trier of fact. The claimant only receives weekly benefits if the trier of fact concludes the relationship between the work-injury and subsequent wage loss has been proven.

[6] Explicitly rejected by the Supreme Court was the concept "that wage loss from any source and a personal injury automatically mandate maximum benefits." The Court stated that "[u]nemployment or reduced wages must be causally linked to the work-related injury, and a plaintiff may not reject actual wages reasonably offered or avoid or refuse actual wages." It was the Court's holding that "for an employee to carry his burden of proving an impairment of wage-earning capacity, he must prove (1) a work-related injury, (2) subsequent loss in actual wages, and (3) that the injury caused the subsequent wage loss." The Court explained that "[a]n employer may refute the causal connection between the partial disability and the employee's employment with evidence that other factors are the cause of the unemployment, e.g., an employee's ailments that are unrelated to his previous employment or malingering." 455 Mich at 661, fn. 38.

Applying these principles, the Commission affirmed the Magistrate's open award. The Commission said that there was "nothing in the record below concerning job offers made and rejected by [plaintiff], or job opportunities otherwise avoided. Rather, the record shows, and the Magistrate found, [plaintiff's] numerous offers to return to work were rejected by Inkster."

The Commission also had occasion to apply *Haske* to three cases that had previously gone through a number of remands and amassed significant litigational history. One such case was *Riepen v Kelsey Hayes Company*, 2001 ACO #276. Plaintiff in this matter claimed a physical and mental work-related disability. He prevailed in proving that his physical problem was a work-related disability, but did not so prevail with the mental claim. Plaintiff refused an offer of reasonable employment on the basis that his non-work-related mental condition precluded him from accepting it. In the initial round of proceedings, the Commission had concluded that plaintiff was not entitled to benefits. The case was appealed by the plaintiff to the Court of Appeals. The Court issued an unpublished decision remanding the case to the Commission. The Court of Appeals concluded that plaintiff's refusal of reasonable employment due to a non-work-related condition did not bar benefits, citing *Powell v Casco Nelmor Corp,* 406 Mich 332 (1979). The Court of Appeals also said that *Haske* addressed §301(4) [the definition of disability] and this case involved §301(5) [the "reasonable employment" provision] and, for that reason, a *Haske* analysis did not apply. With these principles in mind, the Court remanded the case for a redetermination by the Commission.

On remand, the Commission affirmed an open award of benefits. The Commission rejected the defendant's argument on remand that the true reason why plaintiff refused the reasonable employment was his physical condition, rather than his mental condition. The Commission said that the factfinding on that point had already been finally resolved.

In *Trumbull v Battle Creek Health Care Systems,* 2001 ACO #183, the Commission decided a case that had initially been resolved under a *Sobotka* v *Chrysler Corporation*, 447 Mich 1; 523 NW2d 454 (1994) analysis and had been remanded by the Courts for analysis under *Haske.*

The Commission explained that the *Haske* "court built upon (it certainly did not reject) its reasoning in *Sobotka*" with *Haske* "emphasizing that the fact finder plays a key role in assessing

continued on page 10

Recent Court Decisions
Continued from page 9

the employee's claim of a relationship between wage loss and injury and that in addition [to] the actual wages earned, the fact finder could consider wages rejected *or avoided"* (emphasis in original). Applying *Haske* on remand, the Commission affirmed the Magistrate's decision that plaintiff was only entitled to a closed period of benefits because she retained "extensive ability to perform work in the broad field of nursing", had been presented "[i]nformation about the availability of numerous jobs [she] was able to perform in her field . . . between 60 and 103 job openings for plaintiff in her locality, but plaintiff failed to engage in an effective job search because she made the decision to go to school."

In *Bailey v Sensations,* 2001 ACO #281, the Commission reversed the Magistrate's denial of benefits and granted plaintiff an award on the basis of *Haske.*

In an initial round of proceedings, plaintiff proved a work-related injury, the need for medical expenses related to that injury, but did not prove a compensable disability. Therefore, the Magistrate denied benefits.

After the completion of that litigation, plaintiff quit work for defendant and later filed for benefits again upon being unable to work because of injury-related surgery. The Magistrate denied benefits on the basis that the initial decision did not indicate an intent that plaintiff could receive benefits during recuperation following surgery. The Magistrate also said that the Supreme Court's *Perez* decision precluded benefits because plaintiff was refusing to perform work.

The Commission rejected both reasons for denying plaintiff's claim and granted plaintiff the closed award he sought. With respect to the first point, the Commission said that as of the time of the initial Magistrate decision, there was no compensable disability because plaintiff had no wage loss at the time of that hearing. He was working. However, plaintiff's work-related surgery subsequent to the initial hearing did produce a period of disability with wage loss directly attributable to the work injury. With respect to the Magistrate's second point, the Commission said that *Perez* did not apply because plaintiff had been performing regular work duties when he left defendant-employer, not reasonable employment under §301(5). The Commission added that, even if this were a *Perez* case, the change of condition (the surgery) made it impossible for him to continue to perform the work he had previously performed for defendant-employer through the recuperation time from his surgery.

Section 222

In *Jawad v Hamtramck School District,* 2001 ACO #230, the Commission reversed the Magistrate's decision which had refused to grant defendant's 222 motion.

At trial, defendant moved under §222 for a ruling that plaintiff be prohibited from proceeding because he had failed to convey the names of all the treating health care professionals to defense counsel. Plaintiff's counsel argued that he did provide the name of one treating doctor and other doctors were more for evaluation purposes. Also, plaintiff's attorney did not know of the other doctors until plaintiff testified at trial. The Magistrate denied defendant's motion.

The Commission reversed. It held that the Magistrate misread subsection 3 of §222. The Commission said that, while subsection 3 specifically requires plaintiff to provide the name of treating doctors, that is a broad term which "includes doctors who consult with or evaluate a patient's condition for purposes of treatment." Also, subsection 3's requirement to provide the names of "any witnesses" includes "every witness, even non-treating doctors who could provide evidentiary support about plaintiff's condition or her statements during the 'one-time visits'." The Commission said that plaintiff saw these other, non-disclosed doctors in relationship to her mental condition, yet their names were withheld until trial. The Commission said that plaintiff's efforts extended to keeping the names of these doctors from her own attorney, and that plaintiff offered no reason for her violation of the statute.

For these reasons, the Commission found the nondisclosure willful and denied plaintiff's request for benefits.

Joining Subsequent Employers

In *Stanley v Waste Management,* 2001 ACO #285, the defendant argued that the Magistrate abused his discretion when he denied defendant's request to add subsequent employers and adjourn the trial.

Plaintiff had disclosed certain subsequent employers on his application for mediation or hearing. The primary defendant had been joined by those employers as defendants. However, on the morning of trial, plaintiff's employment with a new subsequent employer surfaced. Defendant requested the opportunity to add that employer and adjourn the trial. The Magistrate relied upon old case law to the effect that a plaintiff can select particular employers as his target and proceed solely against them. The Magistrate said that the liable defendant was free to pursue a subsequent employer in a separate action.

The three Commissioners issued separate decisions, with the effect being reversal of the Magistrate's decision. The lead Commission opinion found that the Magistrate abused his discretion in denying defendant's request to add the subsequent employer. This Commissioner concluded that defendant was denied due process and fair opportunity to prove that liability is the responsibility of that employer. In a separate concurring opinion, one Commissioner said that, while there could be circumstances where the Magistrate is justified in not granting joinder in the exercise of the Magistrate's discretion, there was no such justifiable reason recited in this particular record. The

third Commissioner dissented and would affirm. The case was therefore remanded to the Magistrate with instructions that he re-open the record for purposes of joining the last employer and taking additional testimony.

Vocational Rehabilitation

In *Stocki v Sperry-Son Drilling Services, Inc,* 2001 ACO #304, the Commission undertook a historical review of the vocational rehabilitation provision of the Act, §319(1). The Commission's review was prompted by defendant's contention that the Magistrate and Mediator below erred by ordering defendant to reimbursement plaintiff for college tuition and related expenses where there was no specific report from a certified rehabilitation expert that college classes were necessary and appropriate. Defendant claimed that such a report was a necessary precondition for such an award of vocational rehabilitation.

The Commission disagreed with defendant. The Commission said that the statute "is broad enough to include university education as vocational rehabilitation." As part of its review, the Commission did note in passing that "'job placement' is a related but separate function which may also be performed by plaintiff himself, or by a specialized provider of vocational rehabilitation services or even by an employment specialist."

Income Tax Records In Independent Contractor Case

In *Gray v Kroll Construction, Inc,* 2001 ACO #244, the Commission reversed the Magistrate's conclusion that the plaintiff constituted an employee of the defendant.

Plaintiff's job was installing siding and windows for the defendant construction company. Plaintiff worked exclusively for defendant, but paid self-employment taxes, declared business income on his tax forms, and took deductions for his depreciating assets. Although finding that plaintiff was a sole proprietor at one point, the Magistrate used the economic realities test to determine that plaintiff constituted an "employee" of defendant. The Commission reversed. The Commission emphasized the preeminent role of income tax forms in determining whether a plaintiff maintains a separate business so as to be excluded from workers' compensation protection under MCL 418.161(n). The Commission concluded that plaintiff's tax filings revealed that he maintained a separate business and, therefore, is excluded from workers' compensation coverage.

Despite National Disaster, Section Met

continued from page 1

(vi) to look into changes in the locations for various meetings and seminars in order to reduce the costs and therefore to allow more members to attend;

(vii) to move for greater civility within the entire system in order to avoid threats that have been made to Judges, staff, and attorneys.

Update from the Bureau Director

Craig Petersen advised that the State budget has not as yet been approved for future funding of the Bureau. To date, there was no revenue source after 10/01/01.

Craig Petersen addresses the group.

Craig also discussed a report from the GOA, which indicated that action is needed in order to avoid delays in the Workers' Compensation arena. A study produced in May of 2001, Number GOA-01367 discussed the impact of lump sum settlements on Social Security Disability. Members are invited to read the GOA report which can be found from a link to the GOA report from the Bureau website at *http://www.cis.state.mi.us/wrkcomp*.

Craig Petersen also discussed the need to include the proper name of the employer and carrier on redemption papers, and that when files are opened and before the Carrier's response is filed, any questions should be resolved by calling the Bureau's Compliance Department at (517) 322-9155 or by contacting the Compliance Department by e-mail to make sure that the correct party is in the case.

Mr. Petersen discussed the fact that updates are being made to the calculation program, which was discussed in the Summer 2001 Newsletter. The programs will take care of partials and they are also looking to add coordination features in the future. After the 2002 rate tables are available, next February, you may download this program by visiting the Bureau website at *http://www.cis.state.mi.us/wrkcomp*.

Mr. Petersen noted that the new Bureau policy for retention of video court reporting tapes and live body court reporting notes is five years from date of hearing. Transcripts contained within the contested case of file of the bureau will be retained for twenty years. He recommends parties order transcripts of redemption hearings which involve statements of conditions on the record.

continued on page 12

Despite National Disaster, Section Met

continued from page 11

Lastly, he indicated he will be attending a meeting this October in Portland, Maine of the International Association of Industrial Accidents Boards and Commissions (IAIABC). Please note that Michigan will be hosting the IAIBC Annual Meeting in October of 2002 in Detroit.

Dr. Rick Brinkman had expressed his sorrow at being unable to attend the meeting and he did donate a number of CDs and books, which were given away to members in a drawing.

James Geroux addresses the group as Al Ornstein looks on.

Substitute Speaker

James Geroux was gracious enough to fill in for the Ron Brinkman by speaking to the group about the importance of obtaining a trial book. He indicated that such a book became the genesis for Ed Welsh's now famous manual on Workers' Compensation in Michigan. Mr. Geroux showed examples of laminated sheets, which are updated periodically and kept by various attorneys in his firm in order to give them quick reference to the latest cases on a variety of subjects, as well as quick reference to various sections of the Workers' Compensation act. He explained how these come in handy during the course of a trial when arguments develop over anything from admissibility of evidence to relevancy of testimony. The Section would like to than Mr. Geroux for providing this informative talk on such short notice.

Early Dismissal

Because Friday, September 14, 2001 was to be a day of National reflection in observance of the many victims of the terrorists attacks in New York City and Washington, D.C., and many prayer vigils were to began at 12:00 noon, the State Bar essentially ended the convention early, effective 11:00 a.m.

"The faithful remnant"

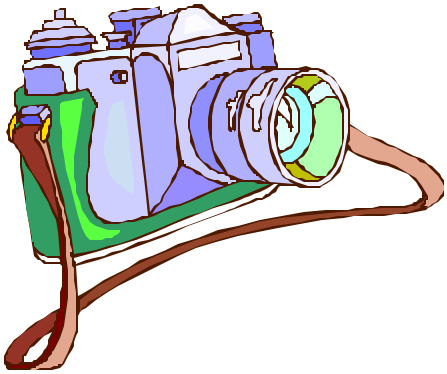
Workers' Compensation Annual Meeting Photos September 14, 2001

Al Ornstein addresses the group

Richard Wood passes the gavel on to Al Ornstein

Council Meeting (left to right): Martin Glista, Leonard Hickey, Alan Helmore, Crary Grattan, Gerald Marcinkoski, Tim McAree, Richard Wood, Al Ornstein and Craig Petersen.

Left to right: Richard Skutt, Martin Glista, Leonard Hickey, Alan Helmore, and Crary Grattan

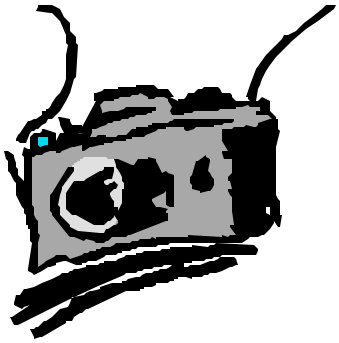


Reception fun

Al Ornstein

Judge Claudia Morcom and Sue Weisenfeld

Thursday Evening Reception



Melody Page, L'Mell Smith and Sue Weisenfeld

Ken Franklin, Dick Wood, Mike Brenton, and L'Mell Smith

Workers' Compensation Law Section
State Bar of Michigan

Workers' Compensation Seminar

November 30,2001
Detroit Workers, Compensation Bureau
1200 Sixth St., Rooms 21B and 21C
Detroit, Michigan 48226

NO REGISTRATION FEE- compliments of Workers' Compensation Section
Seminar will be video taped for out-of-state showing

Morning Guest Speaker -- Attorney General Jennifer Granholm

Program

8:30 a.m. to 9:00 a.m.	Registration and continental breakfast
9:00 a.m- to 9:05 a-m.	Welcome and introduction – Richard L. Warsh
9:05 a.m. to 9:40 a.m.	Report from Lansing – Craig R. Petersen and Bruno Czyrka
9:40 a.m. to 10:15 a.m.	Guest Speaker – Jennifer Granholm. Report from the Attorney General
10:15 a.m. to 10:45 a.m.	Report from Lansing continued – Crary Grattan and Douglas Langham
10:45 a.m. to 11 :00 a.m	Break
11 :00 a.m. to 11 :15 a.m.	The State of the Law – Jurgen Skoppek. Chairperson, Workers' Compensation Appellate Commission
11:15 a.m. to 12:00Noon	The State of the Law – Mike Reinholm, Lacey & Jones

Please refer all questions to:
Richard Warsh
248-357-7013

Seminar sponsored by
Workers' Compensation Section
State Bar of Michigan

Richard Warsh, co-chair
Mark Robbins, co-chair
Denise LeVasseur, co-chair

Winter Seminar

Las Vegas, Nevada

March 8 through 11, 2002

The dates are set now, so go ahead and mark your calendars accordingly.

Those attending the trip will be flying out of Detroit Metro on Friday March 8, 2002 to Las Vegas and will return to Detroit the following Monday, March 11, 2002. The entire package will include:

- round trip airfare
- passenger facility charges and segment tax
- hotel accommodations
- Funjet Vacations Las Vegas Funbook
- Services of Funjet Vacations representative in Las Vegas.
- hotel taxes

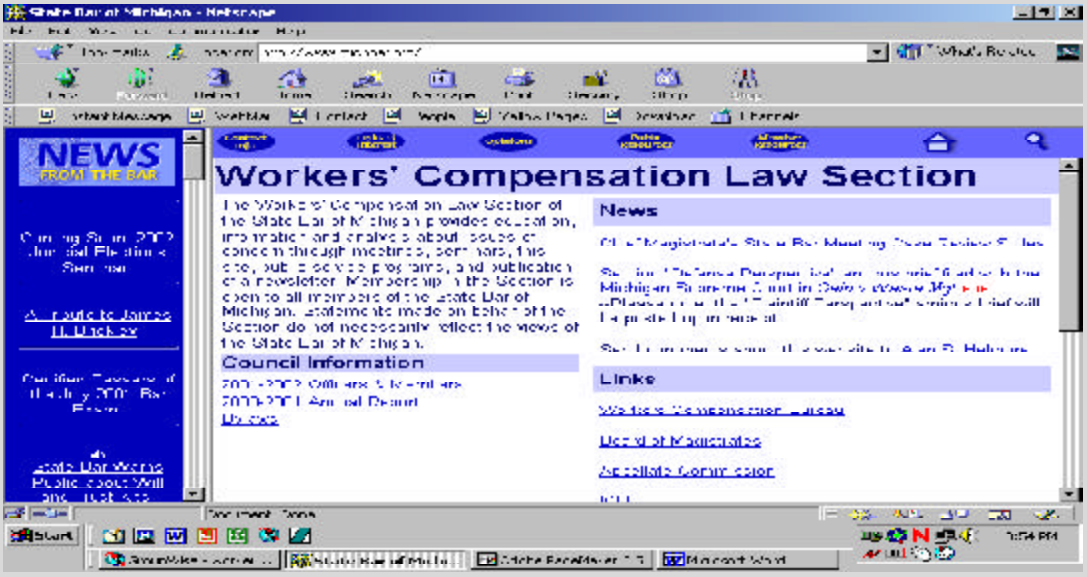
The rate per person, based on double occupancy will be under $600.00 for 4 days and 3 nights at either the New York, New York or the Luxor Hotel (final negotiations pending). Len Hickey has just volunteered to chair this event. Further details will be posted on the Section Website at *www.michbar.org* as they become available. Our travel agent is Cheryl Cox at Funjet Vacations/ Detroit, 1-800669-0768 extension 4894.

Spring Seminar

June 13, 14, & 15, 2002 @ place TBA

Crystal Mountain let us down in a big way after we'd been working with them for months. Accordingly, our able committee of Paula Oliverez and Rob Ryan and a player to be named will be looking for a new home for this coming year's activities and we will post that information on the section website as it becomes known. Meanwhile, mark those calendars.

Don't forget to checkout our Section Webpage at *www.michbar.org*!



In Memoriam

A. Donald Kadushin, Southfield

Workers Compensation Section Newsletter

Published quarterly by the Workers Compensation Section, State Bar of Michigan

Alexander Ornstein, Chairperson

Tim McAree, 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.

Material for publication should be sent to the editor at:

Lacey & Jones
City Center Building, 5th Floor
Ann Arbor, MI 48104
tmcaree@hotmail.com
Phone: (734) 761-8358 Fax: (734) 761-3131

Workers Compensation Section
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933

Presorted
First-Class Mail
U.S. Postage Paid
Lansing, MI 48933
Permit No. 191