State Bar of Michigan

Workers' Compensation Section Newsletter

Fall 2007

Fall Seminar Set for December 14, 2007

Contents

This year's Workers' Comp Section Fall Seminar is set for December 14, 2007. As usual, it will be held at the Detroit Bureau hearing location in a room to be designated on the main floor. A complementary continental breakfast will be served from 8:30 a.m. to 9:00 a.m. with presentations following. Presenters will include Agency Director Jack Nolish, WCAC Chairperson Martha Glaser, and Chief Magistrate Murray Gorchow. Our "State of the Law" presentation will be made by Daryl Royal.

Our guest speaker will be Doug Holmes, who will address a variety of Medicare-related issues.

You are encouraged to attend this most important annual event.

Murray R. Feldman, Seminar Chairperson

Committee members:

Charles Palmer
Danielle Susser
Robert Kluczynski
Joel Alpert (in charge of continental breakfast)

This newsletter is published by the Workers' Compensation Section, State Bar of Michigan

Tom Ruth, Newsletter Editor

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

Material for publication should be sent to the editor at:

4301 Fashion Square Blvd.
Saginaw, MI 48603
tomrut@bkf-law.com

From the Chair

Dear Colleagues,

It is hard to believe it is already fall. Time moves so swiftly (for everyone but legislators, it seems).

The Michigan budget crisis was "resolved" without imposing a tax on legal services and without closing Workers' Compensation Bureaus. For this, we can be thankful.

As for the federal government, there is no movement on the CMS legislation. I sometimes feel that Michigan is fighting this battle alone. Therefore, I am seeking the approval of the council to contact other states' workers' compensation sections. It is my hope to learn if other states are lobbying for passage of this legislation and/or what they are doing about the CMS situation.

If there is enough response from other states, I am proposing that Michigan host a conference to bring this issue to Washington, D.C.

It seems self evident that the set aside money isn't enough to pay for the burgeoning bureaucracy created with the set aside processing. We just need to sell this idea to Congress in the middle of an election year. Am I an optimist, or what?

On a lighter note, my Minister of Misrule seems to be missing. If anyone sees Klu, tell him I'm looking for him. Thanks.

— *Paula*

2007 Economics of Law Practice Survey Preliminary Results are Now Available

Preliminary results for the 2007 Economics of Law Practice Survey are available online at *http://www.lawpracticeeconomics.com/*.

To access results click on the above link. Enter your P number and the password created when you completed the survey and you will be on your way to the interactive results tables and charts.

If you have not yet completed the survey, it's not too late! Click on the above link and follow the prompts to register and complete the survey. You will then have full and immediate access to the results.

The 2007 Economics of Law Practice Survey is a powerful new research tool that will help attorneys monitor changes in the profession. This online format replaces the paper version of the survey that was previously conducted every three years. Now it will be possible to access the most up-to-date results through the searchable database that will updated several times each year. 🛠

Letter from the New Editor

By Thomas J. Ruth

I believe it was Mark Twain who said, "being an editor of a newspaper is like dating a new girl every day." While our section newsletter is not a "paper" in the normal sense, when putting this first issue together, I certainly understood Mr. Twain's sentiment. I look forward to being the editor, and I anticipate not only learning a lot, but having a lot of fun.

First of all, the next time you see Murray Feldman, you should shake his hand and thank him for the great job that he has done these past years in putting the newsletter together. Sometimes it is easy to take for granted the notion that someone will always be there to make sure our section is properly represented. Murray did a great job and continues to represent you in our section. I am still going to rely on him heavily for advice!

One of the goals that I have is to have more out-state attorneys participate in this newsletter. I have reviewed old newsletters, and I find the same contributors. That's not to say that I want those people to stop participating, but this is a newsletter for all of us who practice in workers' compensation. We only get better as a section if we hear from **everyone.** I invite all of you to consider advice and ideas that you believe are important and could help all of us—defense or plaintiff's bar. Remember, the newsletter is not a "soapbox," but a useful tool that assists us in our practice and, perhaps more importantly, binds us together as people and workers' compensation attorneys. Indeed, one of the true advantages of our practice is that, for the most part, we like each other and get along. Most other sections cannot say the same.

Please take the time to ask yourselves if you can contribute to your section. If the answer is "yes," consider making a contribution by way of an article that would convey your thoughts and ideas to all of us. Frankly, I am going to take the aggressive step of calling some of you and putting you on the spot—please do not be offended—we need to make this a section that continues to grow stronger and closer as a group, but willing to accept new ideas and new participants. In recent years, the section has taken significant steps in attempting to broaden and increase section membership. Please also take the time to calendar and attend our upcoming meeting.

Since the first of the year, we have already experienced changes in the way our courts deal with workers' compensation issues. Additionally, the CMS issue continues to weigh heavily on all of us, and I can tell you that your section is grappling with many ideas to help all of us in this regard.

While this was a "short first date," you can be sure there will be a second (Twain also liked short articles). I leave you with a quote from our sixteenth president,

> "with educated people, I suppose, punctuation is a matter of rule; with me it's a matter of feeling. But, I must say I have a great respect for the semicolon; it's a useful little chap." 🛠

Harold Dean WC Open

By Murray Feldman

Although not an officially sponsored section event, many thanks to all who attended this year's Harold Dean WC Open Golf Tournament on June 29, 2007. As usual, the day was filled with fun, frivolity, and a chance to see some old friends and share some memories. Due to the generosity of all who purchased raffle tickets, a sizable donation was again made to Harold's designated charity. Kudos to David Knoll for the raffle and donation and to Ray Bohnenstiehl and his staff for their continued excellence in ensuring the continuation of this event, which honors Harold's memory and gives us a chance to celebrate our friendship, fellowship, and practices. 🛠

Notes from the Director

By Jack A. Nolish, Director, Workers' Compensation Agency

Here I sit, facing the challenge of a blank page, or more accurately, a blank screen. What ground-shaking news can I convey? What tide-turning policy pronouncements can I make? Well, simply stated, as of right now, none. I do want to thank you for the compliments about my diet program. Yes, I have lost a bunch of weight, a little over 100 pounds done over the course of a year at Weight Watchers. Yes, I feel great and appreciate all the support I have received. Somebody in my hearing room the other day suggested I looked a little like Al Pacino. That has never happened to me before, but I must point out that the person was accompanying a lady seeking a 15-day appeal period waiver that I granted just before he made the compliment.

I do have some news to report: Our long-time secretary, Sharon Burkes, has retired. Formerly Sharon Smith, she was my secretary when I was first appointed to the Board of Magistrates. Before her marriage, Sharon Burkes (Smith) was Magistrate Sharon Smith's secretary. I certainly wish her well in the next chapter of her life journey.

I am pleased to report that the moving process in the Lansing area is now completed. The WCA, Appellate Commission, and Lansing Hearings Office are now all located at the State Secondary Complex, General Office Building (GOB), 7150 Harris Drive, Dimondale, Michigan. The mailing address remains Lansing, but for those who might use computerized mapping, it is necessary to indicate Dimondale or you will be directed to the other Harris Drive on the opposite side of Lansing. The Secondary Complex is located just off I-96 at exit 98A. We are across the street from the state police training facilities and laboratories. Because of the frequency of encountering state police cruisers in the area, I do recommend that you pay particular attention to your driving.

The newly consolidated GOB operation has come together nicely. Of course, there are some details to work out, but I am confident that the free, street-level parking and much easier handicap access will more than offset any other little details. I must warn, however, that the area has great numbers of Canada Geese who seem to enjoy using the parking lot as their personal toilet facilities. Do exercise care in walking, particularly if there has been a long period without rain. On the plus side, I am told that, unlike pigeons, the geese do not make deposits while flying.

There are new phone numbers for the Lansing Hearings Office and the WC Appellate Commission:

- Hearings: Main (517) 636-4717; FAX 517-636-3726
- WCAC: Main (517) 636-4692; FAX 517-636-4699

On October 10, I made a presentation to the annual Accident Fund attorneys' meeting. In that address, I told the group of several dozen lawyers about the move to GOB. I pointed out that it would be simpler now for Lansing cases to have 15-day appeal period waivers since someone would be in the same location that could handle the task without the necessity of fax/teleconference. The very next day, I received reports saying that I had announced the end of 15-day appeal period waivers. I cannot understand how that rumor started. I announced only the end of inconvenience, not the end of the process. We are still waiving 15-day appeal periods on redemptions under appropriate circumstances, just as before. When doing them in Lansing, you will now have the opportunity to see me or one of designees face to face instead of through the speaker phone. Isn't that worth the drive all by itself?

See you at the December seminar.

Looking for a past issue?

You can find back issues at
http://www.michbar.org/workerscomp/newsletter.cfm

Workers' Compensation Appellate Commission

By Martha M. Glaser, Chairperson

Several significant things have happened at the WCAC in the last 60 days.

First, the court of appeals issued its decision in *Stokes v DaimlerChrysler* last October, and on October 4, 2007, the Supreme Court heard oral arguments in what is referred to as a Mini Oral Argument, or MOA. I was there and listened to those arguments. A majority of the justices seemed to be grappling with the question of what is the best way to get the necessary evidence about "qualifications and training" into the record. A question that was raised several times was, "Practically, how do you accomplish that?"

One of the justices suggested that employers would be in a better position to secure and offer vocational testimony than claimants would be. Another suggested that claimants would be more forthcoming if they hired the vocational expert.

Once again we will wait for word on whether there is any change in how we do business in the comp world.

On a less controversial note, Donna Grit was reappointed for another four-year term. No one else is up for reappointment until 2009. At that time, Granner Ries's and Greg Przyblyo's terms will be up.

The Commission has filed its most recent set of rules amendments. These can be found at our website. The good news for those of you who practice before us, is that you can file briefs literally at the eleventh hour. A brief faxed to our office by 11:59 p.m. on the due date will be accepted as timely.

The bad news for those of you who practice before us is that we are now going to send only one copy of any correspondence for each party. A copy will be sent to the attorney who signs the Claim for Review for the appellant and the attorney listed as the trial attorney for the appellee. If a stipulation to name another representative recipient or a substitution of attorney is received, then only the substituted person will receive any correspondence, including orders.

In 2003, Governor Granholm executed an executive order that reorganized, among other things, the WCAC. The Commission, which formerly consisted of seven commissioners and had a staff of, at times, up to twenty, was reduced to five commissioners. The staff was also reduced to six, but not by the order itself. I recall this being a very controversial decision.

I am pleased to report that the foresight of that decision has come to fruition.

The five-member commission has essentially wiped out any backlog. We are reviewing files that were perfected within the last two months. By perfected I mean all of the transcripts and briefs have been filed. In fact, a couple of the commissioners have actually run out of files to review. So… while they waited for more, we put them to work designing a new index for the agency's publication of the Act.

As a result of the backlog being wiped out, we have also given notice that effective March 1, 2008, we will no longer grant automatic extension for filing briefs. We will continue to consider motions showing good cause for extensions. This means that if you want to take advantage of the automatic extension, you had better get the request filed before March 1, 2008. The March 1 date applies to the request, not the claim for review. In other words, there's no grandfather clause.

The Commission moved its physical location to the State Secondary Complex on September 27. Our mailing address continues to be PO Box 30468, Lansing, MI 48909-7968.

We are now physically located at:

7150 Harris Drive, Lansing, MI 48909-9768

Phone: 517-636-4692

Fax: 517-636-4699

e-mail: wcacinfo@michigan.gov

website: www.michigan.gov/wca

(click on appellate commission)

I am looking forward to seeing all of you at the December 14 seminar in Detroit.

The Workers' Compensation Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the website, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

Odds and Ends

By Murray Gorchow, Chair of the Board of Magistrates

Unlike 2005-2006, and other than the appointment of magistrates early this year, there has not been much new to report or write about from the Board of Magistrates. Maybe that's a good thing. Maybe not. I would certainly like to be able to report that I have seen a major improvement by the Centers for Medicare & Medicaid Services in its handling of our cases, but I haven't, so I can't, and I won't.

Generally, I have the following observations to make, and things to report:

- Congratulations go to Magistrate Jennifer Barnes (formerly Crawford) on her recent marriage. There will also be a partial change in her hearing office assignment. She is based in Grand Rapids, but has been hearing cases one week (1st week) each month in Traverse City, and one week (3rd week) each month in Kalamazoo. Effective the first week of November, she will no longer be handling the Traverse City docket. Magistrate Tim McAree will once again be handling the Traverse City docket the first week of each month, and Magistrate Barnes will take over the existing first week of the month McAree docket in Grand Rapids. Further, Magistrate Barnes will now have a consistent fixed one week (3rd week) per month docket in Kalamazoo, instead of only going to Kalamazoo for previously arranged trials. These changes should bring more predictability on a day-to-day basis for attorneys concerning magistrate assignments in these three hearings offices.
- From time to time, attorneys may have security concerns about clients, witnesses, or family members and friends of the parties to a case, who will be coming to a hearing office. If you ever have such a concern, please err on the side of caution, and bring such concerns to the attention of the magistrate assigned to your case in advance of the hearing. The Agency and the Board of Magistrates will arrange for the presence of the appropriate level of security for the circumstances.
- I am pleased to observe an increasing frequency of the parties using two-step or bifurcated redemptions to deal with cases involving Medicare. I urge counsel not to wait/waste a year before finally deciding to bifurcate the redemption. Remember, the magic words to insert on the papers in the first redemption are: "leaving medical open." There cannot be even a partial resolution of medical in the first step of the redemption. If you ever are unsure of how to word the papers, I urge you to check with the Magistrate *before* the hearing date, so that the papers can be properly prepared and presented without having to correct the papers by hand. I am always available by phone for questions.
- I am pleased to be able to say that we are no longer seeing old outdated Redemption Orders. Thank you! However, we are seeing self-prepared or vendor prepared Voluntary Payment Form Agreements and Workers Settlement Statements that look like, but are not identical to, the state-provided forms. In some instances, the forms have been altered in substance as well as form by some attorneys and law firms. This is especially true for the Voluntary Payment Form, and is not acceptable. When such changes are found by the Magistrate, you should be prepared for the altered form to be returned to you. I urge you to use the state-provided forms or the forms found on the Workers' Compensation Agency website at *www.michigan.gov/wca*.
- I want to thank the attorneys who have adopted and are using the words "facilitate" and "facilitation" in place of "mediate" and "mediation" to describe what magistrates do when they are helping the parties resolve a case for another magistrate short of trial. It is an important distinction. More importantly, I want to thank not only the members of the Board of magistrates for the time and effort that they devote to facilitating the settlement of cases, but also to the attorneys at hearing offices out-state that regularly facilitate settlement for other attorneys when there is no other magistrate available to facilitate, and no mediator available to mediate. The high rate of success is remarkable, creating "win-win" outcomes for the parties, rather than the "win-lose" outcomes that inevitably result from a trial with all of its uncertainties. I do appreciate that there are circumstances in which a trial is necessary, but I strongly urge that we all first find out if that is really the case.
- The transition to use of the new subpoena form has happened rather seamlessly, without any appreciable difficulty as far as I can tell. Everyone also seems to have gotten the message that subpoenas are *not* to be filed in the Agency file, and that medical records are *not* to be filed with your Notices of Intent. Thank you.
- Like everyone else, I am awaiting the next chapter in the *Sington/Stokes* saga. Stay tuned.

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

There have been no opinions from the Supreme Court and no published opinions from the court of appeals with respect to workers' compensation since our last newsletter. There are cases, however, to keep an eye on, and there are interesting unpublished decisions from the court of appeals and decisions from the workers' compensation appellate commission.

Supreme Court

The Supreme Court has not released any opinions since our spring/summer 2007 newsletter, as of the date of this writing. However, there are two pending cases before the Supreme Court that warrant attention as well as an important substantive order from the Court.

On October 4, 2007, the Supreme Court heard oral argument in *Stokes v Chrysler LLC* (f/k/a DaimlerChrysler Corporation). The Supreme Court, in response to Chrysler's appeal of the court of appeals' *Stokes* decision, granted what is known as a "mini oral argument." These mini oral arguments are short oral arguments generated by the application for leave to appeal. The Supreme Court ordered an oral argument on the following point:

> We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the burden-shifting analysis described in the Court of Appeals opinion in this case relieved the plaintiff of the burden of proving that he was disabled from all jobs within his qualifications and training, as required by *Sington v Chrysler Corp*, 467 Mich 144 (2002). *Stokes*, 477 Mich 1097; 729 NW2d 511 (2007) (order entered April 13, 2007).

Stokes is the *en banc* case from the workers' compensation appellate commission that addressed implementation of the definition of disability as had been described in *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). *Stokes* also addressed questions relating to discovery, interrogatories, and pre-trial vocational interviews. The court of appeals issued a published decision in *Stokes* found at 272 Mich App 571; 727 NW2d 637 (2006). The *Stokes* court of appeals opinion reversed or vacated the controlling opinion of the workers' compensation appellate commission on various points, but affirmed the result under a harmless error-type analysis. The Supreme Court order quoted above was issued in response to Chrysler's appeal of that court of appeals decision.

There is no predicting when the Supreme Court will issue a ruling of some sort in *Stokes*, but since oral argument has already occurred, the Court may now act at any time.

The Supreme Court will also conduct a mini argument during the first week of November in *Simpson v Borbolla Construction & Concrete Supply, Inc*. This case presents an issue relating to application of *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003).

Recall that in *Rakestraw,* the Supreme Court had addressed the requirements in MCL 418.301(1) relating to proving a personal injury arising out of and in the course of employment. Mr. Rakestraw brought to the workplace a pre-existing, non-work-related problem. The *Rakestraw* Court held that Mr. Rakestraw needed to demonstrate a condition "medically distinguishable" from his pre-existing condition to satisfy § 301(1)'s requirements. In *Simpson*, the court of appeals held that in situations where the pre-existing condition is a work-related condition, rather than a non-work-related condition as in *Rakestraw*, the claimant does not have the obligation to meet *Rakestraw*'s "medically distinguishable" requirement. The court of appeals' *Simpson* decision is found at 274 Mich App 40; 731 NW2d 447 (2007).

In response to the employer's appeal of the court of appeals' *Simpson* decision, the Supreme Court ordered a mini oral argument, saying:

> We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the Court of Appeals erred in holding that *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003), does not apply where the preexisting condition is work-related. *Simpson*, 478 Mich 875; 731 NW2d 756 (2007) (order entered June 1, 2007).

Finally, the Supreme Court did issue an order relating to the meaning of *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003) in *Fahr v General Motors Corp*, 478 Mich 922; 733 NW2d 22 (2007) (order entered June 22, 2007). In *Fahr*, the Court said the workers' compensation appellate commission misinterpreted *Rakestraw* when the commission said *Rakestraw* did not require "a 'pathological change in a pre-existing condition' in order for a plaintiff to establish that a work-related personal

Continued on next page

Recent Cases
Continued from page 7

injury has occurred." The Supreme Court's *Fahr* order says in pertinent part:

> We note that the Workers' Compensation Appellate Commission majority misinterpreted this Court's decision in *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003), when it asserted that *Rakestraw* does not require a "pathological change in a pre-existing condition" in order for a plaintiff to establish that a work-related personal injury has occurred. *Rakestraw* clearly requires a plaintiff who is suffering from a pre-existing condition to show that his work has caused an injury that is medically distinguishable from the progression of an underlying pre-existing condition. This cannot be done merely by showing a worsening of symptoms. Rather, to demonstrate a medically distinguishable change in an underlying condition, a claimant must show that the pathology of that condition has changed. Although a medical expert need not use the phrase "change in pathology," there must be record evidence from which a legitimate inference may be drawn that the plaintiff's underlying condition has pathologically changed as a result of a work event or work activity in order to meet the legal test for a personal injury under MCL 418.301(1) and *Rakestraw*. In this case, the record contains evidence that the plaintiff's preexisting medical condition was pathologically aggravated by his working conditions. Accordingly, leave to appeal is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Court of Appeals

Since there have been no published decisions from the court of appeals since our last newsletter (at the time of this writing), summarized below are the three unpublished decisions from the court of appeals released since the last newsletter.

Mental Disabilities

Robertson v DaimlerChrysler Corp, 465 Mich 732; 641 NW2d 567 (2002) is the case, in whichthe Supreme Court overruled in part *Gardner v Van Buren Public Schools*, 445 Mich 23; 517 NW2d 1 (1994) and explained the meaning and operation of the mental disabilities provision in MCL 418.301(2). After so doing, the Supreme Court remanded *Robertson* to the magistrate "for analysis under the proper statutory framework." *Robertson*, 465 Mich at 763. After the remand, the magistrate and workers' compensation appellate commission issued multiple decisions after a number of remands between the appellate commission and magistrate. Those remands culminated in the commission's granting plaintiff an open award of benefits for a mental disability.

The facts of *Robertson* were that Mr. Robertson worked in the paint department of Chrysler. He became so proficient that his supervisor asked him and a co-employee to paint his (the supervisor's) boat on company time. Plaintiff refused. The following year, the supervisor advised plaintiff that he was being transferred from the paint department to the assembly line. Plaintiff "lost it" upon learning he was being reassigned, threatened the supervisor, and never returned to work, claiming a mental breakdown. Plaintiff perceived the reassignment as retaliation for not painting the supervisor's boat.

The most contentious question litigated on remand related to plaintiff's perception of the reason for the transfer. The Supreme Court in *Robertson* held that a claimant's perception of work events must be grounded in fact or reality and must be judged under an objective standard. *Robertson* added, "The factfinder must assess the factual circumstances in terms of how a reasonable person would have viewed them." *Robertson*, 465 Mich at 755. Therefore, the perception question on remand became: Was plaintiff's perception a "founded" perception, especially in light of contrary evidence that many transfers were occurring at the time at Chrysler for business and economic reasons? The court of appeals affirmed the finding that plaintiff's perception was objectively reasonable. The court did so reciting the following facts surrounding plaintiff's transfer:

> … The facts surrounding plaintiff's transfer are as follows. Asher [the supervisor] asked plaintiff to do some painting on his boat and insisted that the work be done on company time; plaintiff refused to do the work on company time. Sipes [plaintiff's co-employee], however, agreed to complete some personal painting for Asher and admitted that he did at least some of the work on company time. Plaintiff and Sipes were both transferred from their artist positions … back to the assembly line. The transfer occurred days after the chief steward of the paint shop [Mr. Black] observed Sipes doing personal paint work for Asher, took the work to labor relations and inquired why Sipes was performing such work on company time. Despite the timing of plaintiff and Sipes' transfer back to the assembly line, Slaughter, the plant manager, testified that plaintiff and Sipes were transferred purely for business and economic reasons.
>
> … Viewing all the facts objectively, there is factual support for the WCAC's conclusion that plaintiff's belief that his transfer was related to his refusal to paint Asher's boat on company time was founded. Given the fact that

Asher asked both plaintiff and Sipes to do personal work for him and given the short time period that elapsed between the time Black discovered that Sipes was doing personal work for Asher and reported this fact to labor relations and plaintiff's and Sipes' transfer back to the assembly line, plaintiff's perception that his transfer was related to Asher's request for him to do personal work for him was not unfounded. *Robertson*, CA Docket No. 263067, unpublished decision of the Court of Appeals, entered July 26, 2007, slip op at p 4.

Seasonal Employment

In *Raybon v DP Fox Football Holdings LLC*, CA Docket No. 268634, unpublished decision of the court of appeals, entered July 17, 2007, the court of appeals reversed the workers' compensation appellate commission's decision granting a seasonal employee benefits during the off season.

Plaintiff was a professional football player for the arena football team, the Grand Rapids Rampage. He suffered injuries to his foot and knee. He was granted closed periods of benefits, with those closed periods extending into arena football's off season. The employer appealed on a number of issues, with the Workers' Compensation Appellate Commission affirming the award's extension into the off season on the strength of *Gasparick v H C Price Construction Co*, 398 Mich 483; 247 NW2d 824 (1976). On the employer's further appeal to the court of appeals, the court reversed.

The court noted that the second sentence of the definition of disability says, "The establishment of disability does not create a presumption of wage loss." The court noted that case law from the Supreme Court subsequent to *Gasparick*, most notably *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), explained that this second sentence of MCL 418.301(4) has the following meaning:

> [T]he second sentence [of §301(4)] reflects an understanding that there may be circumstances in which an employee, despite suffering a work-related injury that reduces wage earning capacity, does not suffer wage loss. For example, an employee might suffer a serious work-related injury on the last day before the employee was scheduled to retire with a firm intention to never work again. In such a circumstance, the employee would have suffered a disability, i.e., a reduction in wage earning capacity, but no wage loss because, even if the injury had not occurred, the employee would not have earned any further wages. *Raybon*, CA Docket No. 268634, unpublished decision of the Court of Appeals, entered July 17, 2007, slip op at p 3, quoting *Sington*, 467 Mich at 160-161.

The *Raybon* Court concluded, therefore, that plaintiff "cannot receive wage loss benefits for time in the off season when he would not otherwise be earning wages." *Raybon*, CA Docket No. 268634, unpublished decision of the Court of Appeals, entered July 17, 2007, slip op at p 3.

No Equitable Relief

In *Olsen v Toyota Technical Center USA, Inc. and Second Injury Fund (Vocationally Handicapped Provision)*, CA Docket No. 269208, unpublished decision of the Court of Appeals, entered September 13, 2007, the Court held the Second Injury Fund could not obtain indemnity from the plaintiff's employer, Toyota, on the following facts.

Plaintiff obtained a vocationally handicapped worker's certificate in accord with Chapter 9 of the Act, MCL 418.901 *et seq*., before working for Toyota. While working for Toyota, plaintiff re-injured his back, leaving him completely disabled. Toyota paid plaintiff workers' compensation benefits for one year, after which the Second Injury Fund became liable, pursuant to MCL 418.921.

Plaintiff then filed an action against Toyota in circuit court under the Persons With Disabilities Civil Rights Act. Plaintiff there alleged that Toyota failed to accommodate his disability, which led to his work injury at Toyota. A jury found for plaintiff, awarding him a sizable verdict of millions of dollars.

Given the outcome of that suit, the Second Injury Fund filed a petition at the workers' compensation agency against Toyota seeking indemnification for the workers' compensation payments the Second Injury Fund had been making to Olsen. The magistrate and workers' compensation appellate commission rejected the Second Injury Fund's request. The court of appeals has now affirmed.

The court said the Second Injury Fund was urging the court to adopt an equitable remedy because indemnity amounts to "equitable relief." The court said that, while magistrates and the commission have the power to "use equitable principles such as waiver and estoppel," they do not have the power to grant "equitable *relief*," and indemnification is a form of equitable relief.

Workers' Compensation Appellate Commission

Limitations on Magistrates

In a trio of cases, the appellate commission addressed magistrates either venturing beyond the record to make fact-findings or not complying with remands.

In *Duck v Michigan Carton & Paperboard*, 2007 ACO #195, plaintiff claimed work-related cellulitis in his right lower extremities. The magistrate conducted an Internet search to discover information pertaining to cellulitis and awarded plaintiff benefits. The commission held that the

Continued on next page

Recent Cases
Continued from page 9

magistrate committed reversible error when he searched outside the record to find information concerning cellulitis. The commission remanded with instructions for redetermination limited to the evidence in the record.

In *Khalil v Oil Exchange C, Inc*, 2007 ACO #200, the magistrate considered whether plaintiff had signed a form excluding himself from his company's workers' compensation coverage. The magistrate concluded plaintiff had not excluded himself. On review, the appellate commission said the magistrate "offer[ed] a lengthy examination of particular signatures [on various forms]. This examination resembles the analysis of a handwriting expert." Noting the magistrate "does not possess such expertise," the commission held her analysis cannot support her finding that plaintiff had not excluded himself from workers' compensation coverage. The commission remanded the case for re-determination.

In *Stivers v DaimlerChrysler Corp*, 2007 ACO #214, the commission remanded a case a second time to the magistrate because the magistrate on the original remand had "treat[ed] the vocational testimony as lay testimony," rather than as expert testimony. Saying the magistrate abused his discretion, the commission remanded a second time saying, "When this commission remands a claim to a magistrate, we really mean what we have said."

Accuracy of *Amerisure Insurance Companies v Time Auto Transportation, Inc.* Questioned

In *Moore v Nolff's Construction*, 2007 ACO #211, two commissioners questioned the accuracy of the court of appeals decision in *Amerisure Insurance Companies v Time Auto Transportation, Inc*, 196 Mich App 569; 493 NW2d 482 (1992). In *Amerisure*, the court of appeals held that if a claimant met any one of the criteria listed in MCL 418.161(1)(n), then the claimant is not an "employee" for purposes of workers' compensation coverage. The three criteria listed in § 161(1)(n) are whether the claimant in relation to the service provided maintains a separate business, holds himself or herself out to and renders service to the public, or is an employer subject to the Worker's Disability Compensation Act.

A majority of the commission in *Moore* reversed the magistrate and found plaintiff was an "employee," not an independent contractor. While the commission found that plaintiff met none of the three criteria in § 161(1)(n), the commission took the opportunity to say that, although "at least three times" *Amerisure*'s holding has "made its way into subsequent opinions of the court of appeals," *Amerisure* misinterpreted § 161(1)(n). The commission majority said *Amerisure* is incompatible with the commission majority's reading of the Supreme Court's decision in *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005).

Similarly, one commissioner in a concurring opinion in *Leon v A-3, Inc*, 2007 ACO #147, concluded, "I am simply unable to discern any logic or legal reasoning or common sense in the approach the Court of Appeals took in *Amerisure*, nor do I understand why such an unsupported reading of the statute has continued to remain unaddressed."

Drug Tests and Constructive Refusal to Work

In *Reed v City of Detroit*, 2007 ACO #138, the employee suffered a work-related injury and was subsequently offered a "reasonable employment"/favored work position with the employer. As part of the return to work procedure, plaintiff underwent a drug screen. The drug screen was positive for a controlled substance. As a result, plaintiff appeared before the employer's board of review for a hearing and was ultimately terminated. He had worked less than 100 weeks post-injury at "reasonable employment." See, MCL 418.301(5)(e).

The question presented was whether plaintiff's failure of the drug test was a constructive refusal of "reasonable employment" and, if so, whether plaintiff later ended his period of refusal. The magistrate denied plaintiff benefits on the basis that plaintiff had constructively refused the offer of reasonable employment because he knew a positive drug test would result in termination. A majority of the commission disagreed, saying:

> We do not believe that the plaintiff's failure of the drug test, within the facts of this case is an unreasonable refusal to perform reasonable employment. Here the employee has taken the consistent position that he is willing to work within his physical capabilities. Further, we are not told by expert testimony that the test results would indicate that the claimant would be a danger to himself or others or for that matter incompetent or inappropriate in carrying out his work duties….

The commission said it "reject[ed] the concept of 'constructive refusal' because it is inconsistent with the Act." The majority added that, even if the Act could be understood to support the concept of "constructive refusal," plaintiff's benefits would need to be reinstated at the point the employer stopped offering reasonable employment.

The dissent, relying on the commission's discussion of constructive refusal in *Frost v Brooks Beverage Management*, 2001 ACO #26, would have affirmed the magistrate's finding that plaintiff constructively refused employment on the basis plaintiff knew a positive drug test would result in termination. The dissent would, however, remand for further findings as to whether plaintiff later ended his period of constructive refusal.

Illegitimate Children in Death Cases

In *Gaeth (Dec'd) v Gemini Group, Inc*, 2007 ACO #174, two illegitimate children claimed to be the dependents of the decedent at the time of his fatal work-related injury. The decedent was the biological father of both children. Neither child lived with the decedent on the day of injury, and the decedent was not married to the mother of either of the children.

A majority of the commission affirmed the magistrate's finding that neither child could be considered a conclusively presumed dependent. The commission majority also agreed with the magistrate that one of the children proved he was a dependent-in-fact, while the other child did not prove dependency-in-fact. The majority expressed the hope the legislature would address the fact that the present statute affords inadequate relief to the illegitimate children. One dissenter would hold that illegitimate children are entitled to a conclusive presumption of whole dependency and said to rule otherwise is a violation of the Equal Protection Clause of the Constitution.

Remand on Attorney Fee Question

In *Willis v Pepsi Bottling Group*, 2007 ACO #168, the employee had received employer-funded short- and long-term disability benefits before entering into a voluntary pay agreement with the employer. The sole question presented to the magistrate was whether plaintiff's counsel was entitled to a fee on the short- and long-term disability repayment or reimbursement. Relying on *Gilroy v General Motors Corp (After Remand)*, 438 Mich 330; 475 NW2d 271 (1991), the magistrate held there was no assignment so as to bring the case within MCL 418.821(2) and, therefore, there was no attorney fee payable on the amount in controversy.

A majority of the commission remanded the case to the magistrate "because a necessary party or parties, the ERISA plan or plans, were not present in the proceedings before the magistrate and, since it is the interest of the plan or plans that we are being asked to adjudicate, they must be provided with the opportunity to be heard and must be joined." In so ruling, the commission majority distinguished *Gilroy*. The dissent would affirm the magistrate and her application of *Gilroy*. The dissent said there was no evidence of an enforcement of an assignment, as required by *Gilroy*, so as to trigger payment of an attorney fee.

Vocational Expert Testimony/Hearsay

In *Burch v Harrington House, Inc*, 2007 ACO #209, the magistrate rejected the vocational testimony offered by the employer on the disability question, saying it was not admissible as expert testimony under MRE 702. This provision says expert opinion testimony may be offered if a witness possesses "'recognized scientific, technical, or other specialized knowledge (that) will assist the trier of fact to understand the evidence of determine a fact in issue….'" A majority of the commission disagreed with the magistrate. The commission said the vocational expert:

> … conducted part of her job search efforts as would any lay person. She accessed public sources of information, including the telephone book and Internet for information on potential employers. She contacted employers to find out if they were hiring and if so, the wages they were offering. However, she ran the information the employers gave her regarding the description of the job duties through her knowledge of the dictionary of occupational titles. We believe knowledge of the DOT does rest "more to experts than the common man."

The commission majority also rejected the magistrate's reasoning that the expert's use of "the Internet and job manuals to identify employers and contacting employers to discuss the availability of jobs did not constitute a reliable way to find available work."

A separate issue in the case was whether the expert could rely on hearsay evidence in light of MRE 703. This rule of evidence says "facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence," although the court can "receive expert opinion testimony subject to the condition that the factual basis of the opinion be admitted in evidence thereafter." The commission majority said the workers' compensation system "do[es] not strictly apply the rules of evidence" and expressed uncertainty whether MRE 703 should apply. The commission noted that, if MRE 703 is to be applied to workers' compensation trials, "it should be applied to all expert witnesses" including medical experts. The commission noted that the dissent would hold some (but not all) of the vocational expert's testimony to be inadmissible hearsay, but the dissent would apply a different evidentiary standard to the plaintiff's doctor's testimony. The commission said:

> We cannot agree with the selective application of MRE 703 to some, but not all types of expert witnesses. It also seems unlikely, based on the case law cited above, that the Michigan Supreme Court or Court of Appeals would agree with selective application of the rule.

Finally, the majority noted that if the Supreme Court rules in *Stokes* that vocational testimony "is needed by plaintiffs in order to make a prima facie case, then adopting MRE 703 will make it much more difficult for a plaintiff to prove a disability claim." Despite these differences, all of the commissioners agreed on the outcome in this particular case, an affirmance of an award of benefits. 🛠

Tips and Tools for a Successful Practice

The State Bar of Michigan is presenting a daylong seminar for lawyers looking to strengthen and streamline their legal practices. The "Tips and Tools for a Successful Practice" workshop will take place on Wednesday, November 7 from 8:30 a.m to 4 p.m. at the Oakland County Bar Association offices in Bloomfield Hills.

Event highlights include presentations on maintaining mutually beneficial client relationships, drafting fee agreements, managing trust and business accounts, and law office management. Speakers scheduled to appear are experienced leaders in their fields of practice and include attorneys in private practice, law office management consultants, and lawyers from a variety of agencies.

The cost to attend the seminar is $75, and registration and payment must be received by Wednesday, October 31. A registration form in PDF format can be downloaded from the State Bar of Michigan website at http://www.michbar.org/pmrc/pdfs/seminars.pdf. Those interested in reserving a spot can sign up online at http://e.michbar.org, fax the completed registration form to the State Bar at (517) 346-6365, or mail the form with a check or credit card payment to:

ATTN: Tips and Tools for a Successful Practice Workshop
State Bar of Michigan
306 Townsend Street
Lansing, MI 48933-2012

For more information on the workshop, contact Karen Spohn in the State Bar of Michigan Professional Standards Division at (517) 346-6309 or *kspohn@mail.michbar.org*.

SBM
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

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