September 1998

Workers Compensation Section Newsletter

Volume 38, No.1

State Bar of Michigan Workers Compensation Section

In this Issue:

Annual Meeting of the Section

The Workers Compensation Section of the State Bar of Michigan will hold its traditional

Cocktail Party
Tuesday, September 15, 1998
5:00 to 9:30 p.m.

University Club, East Lansing

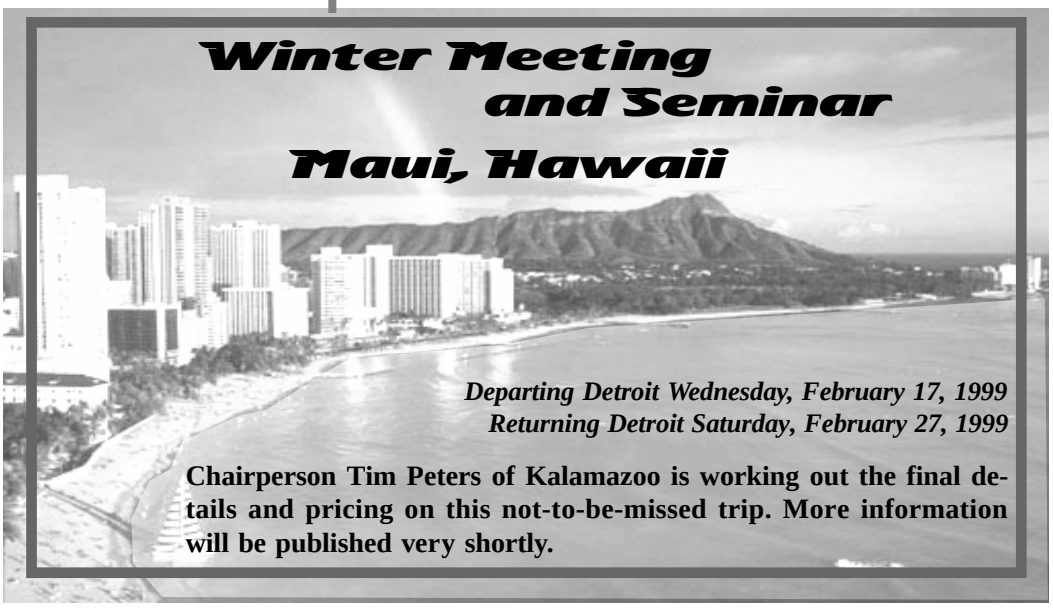
All section members are invited to the festivities for food and drink and conversation.

Section Annual Business Meeting and Election of Officers

Wednesday, September 16, 1998
8:45 a.m.

This will be followed at 9:30 by our program, featuring James E. Logan who will present "Creative Settlement Strategies for Workers' Compensation Claims."

The co-chairs for this year's arrangements and programs are past chairpersons of the Section Council Steve Pollok and Michael Brenton, both of Lansing. They have our thanks and sincere appreciation.



NOTICE OF MAGISTRATE APPLICATIONS

Applications for positions on the Workers' Compensation Board of Magistrates are being accepted by the Qualifications Advisory Committee, Michigan Department of Consumer & Industry Services. An applicant must be a member in good standing of the State Bar of Michigan and must either successfully complete a written examination or have five years' experience as an attorney in the field of workers' compensation.

The qualifying examination for positions on the Workers' Compensation Board of Magistrates will be given on **September 25, 1998** in Lansing, Michigan. Applicants will be tested in the areas of:

- Knowledge of the Workers' Disability Compensation Act.
- Skills in fact finding.
- Michigan Rules of Evidence.
- Knowledge of human anatomy and physiology.

Applicants who have already successfully passed the examination do not need to retake the exam.

To meet the requirement of five years of legal experience as an attorney in the field of workers' compensation, an applicant must document to the Qualifications Advisory Committee a period of time totaling five years during which the applicant met one of the following criteria:

A significant portion of personal practice has been in active workers' compensation trial practice representing claimants or employers.

- A significant portion of personal practice has been in active workers' compensation appellate practice representing claimants or employers.
- Service as a member of the former Workers' Compensation Appeal Board or the Workers'Compensation Appellate Commission.
- Persons who successfully complete the written examination or meet the five years' experience requirement will be personally interviewed by the Qualifications Advisory Committee to determine their suitability for the position, especially with regard to his or her objectivity.

If you are interested in being considered for a position on the Board of Magistrates, send your resume to the address below by **September 14, 1998.** Please include a cover letter clearly stating whether you are applying to take the examination or you meet the five years' experience requirement.

Qualifications Advisory Committee
Attention: Susan Bickel
Michigan Department of Consumer & Industry Services
P.O. Box 30016
Lansing, MI 48909

Welcome to Our Home!

www.michbar.org

Be sure to visit our Internet site for the latest section news and project updates

RECENT COURT DECISIONS

By Jerry Marcinkoski

The Supreme Court has issued a number of decisions directly involving workers' compensation and others touching on workers' compensation. The Supreme Court has also granted leave to resolve other workers' compensation issues in the Court's 1998-1999 term.

The Court of Appeals has issued seven published workers' compensation decisions since our last newsletter.

The Workers' Compensation Appellate Commission has released a number of important decisions, particularly those addressing favored work and *Haske* issues.

SUPREME COURT DECISIONS

Date of Injury for Payment of Ongoing Benefits

In *Arnold v General Motors Corp,* ___ Mich ___ (1998), the Supreme Court addressed the question of how employers pay ongoing weekly workers' compensation benefits under the following factual pattern.

Plaintiff worked for General Motors at a high average weekly wage. She sustained a partially disabling work-related back injury. She returned to favored work for General Motors, but was ultimately laid off. She then obtained a vocationally handicapped certificate and became employed by SMART as a part-time bus driver. Her work there aggravated her earlier GM back injury leading to her cessation of work. Plaintiff had worked for SMART for less than 100 weeks. Her average weekly wage at SMART was less than her average weekly wage at General Motors.

The Court of Appeals and the Workers' Compensation Appellate Commission had held that SMART was liable from the date of aggravation at SMART and thereafter. Plaintiff's ongoing rate was based on her average weekly wage at SMART. The Court of Appeals and Commission had reached this result by applying the general rule that a second date of injury leaves the second employer entirely liable from that point forward, as expressed in such cases as *Dressler v Grand Rapids Die Casting Corp,* 402 Mich 243 (1978).

The Supreme Court in a unanimous opinion disagreed and reversed. The Supreme Court said that under the Court of Appeals' and Commission's approach, a claimant who returns to work at lower wages risks a reduction in workers' compensation benefits if a subsequent injury occurs. The Supreme Court did not read prior case law and the statute to dictate a reduction. The Supreme Court remanded the case "for entry of an order directing General Motors to pay the difference between benefits computed using wages at the time of the original injury and the benefits paid by SMART . . .."

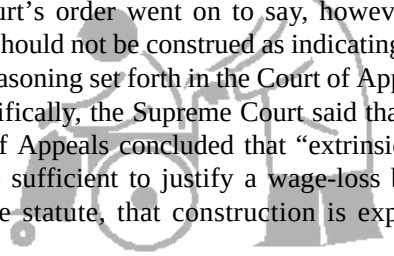
The case concludes with an interesting footnote. The Court said that since the subsequent employer had not argued that under favored work principles General Motors is responsible for the full amount of benefits after plaintiff left SMART, the Court would express no opinion on whether SMART might have obtained reimbursement from General Motors of the benefits SMART had paid plaintiff. The footnote implies that General Motors might have been liable for the full amount of benefits after plaintiff left SMART.

Two Years of Continuous Disability

In *Matney v Southfield Bowl and Second Injury Fund,* ___Mich ___ (1998), the Supreme Court addressed an issue relating to §356's increase in benefits after two years of continuous disability. The Supreme Court also addressed a retroactivity issue relating to nursing care benefits.

Section 356 addresses claimants' right to an increase in their weekly rate of compensation after two years of continuous disability if, at the time of the work injury, the claimant is entitled to a rate of compensation that is less than fifty percent of the state average weekly wage for the year of injury.

After oral argument, the Court affirmed the Court of Appeals and Commission's increase in Ms. Matney's weekly rate of compensation under this provision in an order simply saying there was competent evidence in the record to justify the increase. The Court's order went on to say, however, that the Court's ruling "should not be construed as indicating our agreement with the reasoning set forth in the Court of Appeals' opinion." More specifically, the Supreme Court said that to the extent the Court of Appeals concluded that "extrinsic economic forces are alone sufficient to justify a wage-loss benefits increase under the statute, that construction is expressly disavowed."



On the issue of the retroactivity of the one-year-back rule that applies to nursing care benefits under §381(3), the Supreme Court reversed the Court of Appeals. The Supreme Court said that the one-year-back rule on nursing care benefits, which went into effect on July 30, 1985, applied from its effective date forward.

Review by Appellate Commission

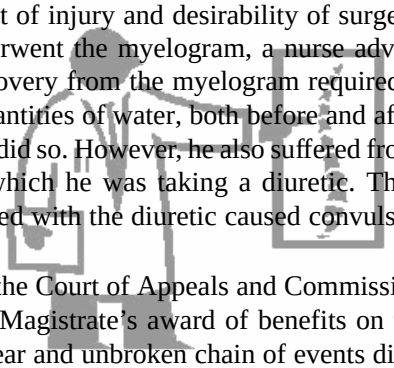
In *Layman v Newkirk Electric Associates, Inc,* ___ Mich ___ (1998), the Magistrate granted plaintiff an open award of benefits for aggravation of an arthritic condition. The Magistrate's decision was unclear whether or not he found the arthritis to be a "condition of the aging process," which would require plaintiff to prove that work aggravated his arthritis "in a significant manner," under §301(2). The Workers' Compensation Appellate Commission concluded that plaintiff's arthritis was a "condition of the aging process" and reversed the award for failure to meet the more stringent work-relationship standard.

The Supreme Court, in a 4-1-2 decision, reversed the Commission and ordered that the case be remanded to the Magistrate for a determination of whether the arthritis was or was not a "condition of the aging process." The Court said that where factual findings need to be made but have not been rendered by the Magistrate, the Commission should remand the case to the Magistrate. The Court said that "the magistrate must be given the task of providing comprehensive findings of fact while applying the proper legal standard."

Proximate Cause Standard in Death Cases

In *Hagerman v Gencorp Automotive,* ___ Mich ___ (1998), the Supreme Court, in a 4-3 decision, held that "the proximate cause" requirement for determining compensability of a death under §375(2) is met where the circumstances of the death were "within the range of compensable consequences." The Court further explained that "death is within the range of compensable consequences if the [work] injury was a substantial factor in the death."

The facts of the case were that the decedent suffered a work-related back injury. As part of the medical treatment for the injury, the decedent's doctor ordered a myelogram to diagnose the extent of injury and desirability of surgery. When the decedent underwent the myelogram, a nurse advised him that successful recovery from the myelogram required that he consume large quantities of water, both before and after the procedure. Plaintiff did so. However, he also suffered from high blood pressure for which he was taking a diuretic. The high water intake combined with the diuretic caused convulsions and ultimately death.



Reversing the Court of Appeals and Commission, the Court reinstated the Magistrate's award of benefits on the basis that there was a clear and unbroken chain of events directly linking the work injury to the death. The Court said that these facts satisfied "the proximate cause" standard in nonimmediate death cases recited in §375(2).

The case made for a lively discussion between the majority and dissent on questions of statutory construction, public policy, and judicial restraint. The dissent says that the statute requires that the work-related injury be the sole proximate cause of a nonimmediate death.

Exclusive Remedy Provision and Premises Liability

Bitar v Wakim, 456 Mich 428 (1998) was an action originating in circuit court that presented the issue of whether the defendant enjoyed the protection of the exclusive remedy provision of the Workers' Disability Compensation Act, §131. The facts were as follows.

Plaintiff worked for Beirut Bakery, a corporation whose stock was solely owned by the defendant. The defendant also personally owned the property where the bakery was located and leased the property to the bakery. Plaintiff was injured while taking trash out of the bakery to a dumpster at the rear of the property. The Court of Appeals and trial court ruled that the defendant enjoyed exclusive remedy protection from the circuit court action, but the Supreme Court reversed.

The Supreme Court said that the defendant and the Beirut Bakery were separate legal entities at the time of the injury. The Court said that, while the bakery could not be sued due to the exclusive remedy provision, the defendant could not use the exclusive remedy provision to protect himself from suit as the premises owner.

The lead opinion of the Court and particularly the concurring opinion emphasized that the outcome of this case may have been different had defendant raised a §827(1) defense to the effect that plaintiff is barred from proceeding because the defendant is a "natural person in the same employ" as plaintiff.

Carrier Responsibility for Medical Treatment

In *Blackwell v Citizens Insurance Company of America,* ___ Mich ___ (1998), the Court faced the issue of whether a workers' compensation carrier has a duty to an injured claimant to conform the claimant's treatment to the recommendations of a physician to whom the carrier referred the claimant.

The facts of the case were that plaintiff, a press operator, injured her hand and arm at work. The employer's insurance carrier sent plaintiff to the Detroit Industrial Clinic. After plaintiff was examined there, the clinic referred plaintiff to a doctor who prescribed minimal medical treatment. When plaintiff's symptoms continued, the carrier sent plaintiff to another doctor who diagnosed reflex sympathetic dystrophy.

Plaintiff sued the carrier in circuit court. Plaintiff argued that the negligence of the carrier resulted in her not being properly treated for RSD until it was too late for effective treatment.

A unanimous court, affirming the Court of Appeals, held that the carrier was entitled to summary disposition on the basis that the carrier does not as a matter of law owe the plaintiff the duty she alleged. The Court also held that plaintiff failed to state a claim that the carrier voluntarily undertook such a duty under the facts of this case.

Cases Pending on Leave Granted Before the Supreme Court

For its 1998-1999 term, the Court is slated, as of this writing, to also hear arguments in: *Hoste v Shanty Creek Management, Inc*, (S.C. No. 108599) [whether a ski patroller is an employee under the facts presented in the case]; *Tyler v City of Livonia*, (S.C. No. 109196) [whether public retirement pension plans are subject to the renewal and exemption requirements of §354(14)]; and, *Camburn v Northwest School District*, (S.C. No. 108080) [whether a schoolteacher injured while driving to a work-related seminar suffers an injury arising out of and in the course of employment].

COURT OF APPEALS DECISIONS

Authorization to Obtain Social Security Benefit Information

In *Vernon v Controlled Temperature, Inc*, ___ Mich App ___ (March 24, 1998), the employer requested authorization from the plaintiff to obtain information as to whether or not plaintiff was receiving early old-age Social Security benefits that the employer might coordinate. Plaintiff was 62 years of age at the time of the request. Plaintiff resisted the request, arguing that he could not be compelled to provide such a release until he reached age 65.

The Court of Appeals held that plaintiff was obliged to provide the employer with the release. The Court said that the statute contemplates release of information whenever an employee is possibly eligible for old-age Social Security benefits. The Court also said that the employer is not obliged to accept an employee's representation with respect to those benefits, but can verify the information for itself.

Michigan Air National Guardsman is Covered by Act

In *Oxley v Department of Military Affairs*, 227 Mich App 528 (1998), the employer argued that the claimant, a member of the Michigan Air National Guard, was not covered by the workers' compensation Act. Relying on *Tulppo v Ontonagon Company*, 207 Mich App 277 (1994), defendant argued that the claimant's remedy for injuries in the National Guard is under the Federal Employees' Compensation Act [FECA].

The Court of Appeals disagreed. The Court rejected the employer's reliance on *Tulppo*, by saying that the employer was relying on dicta in that decision. The Court said that since the claimant was voluntarily in the service of the state and subject to its direction and control, the claimant was employed by the State of Michigan pursuant to the economic realities test.

Purchase of New Van is Employer's Responsibility

In *Wilmers v Gateway Transportation Co*, ___ Mich App ___ (1998), the issue was whether a vehicle constituted an "appliance" under §315(1) so as to require the defendant to furnish the claimant with a new van. More specifically, the controversy centered on whether the defendant was obliged to provide the paraplegic claimant an entirely new vehicle or merely pay for special modifications to a vehicle to accommodate the claimant's physical condition.

The Court of Appeals, in a 2-1 decision, held that it was the defendant's obligation to furnish the entire specially equipped van under the circumstances of this case. The Court noted that the modifications to a vehicle to accommodate plaintiff's work-related disability (and 6'7" height) would be substantial. The Court said that it might not require the full cost of a modified vehicle in cases where less substantial modifications are involved.

Offsets for Subsequently Earned Wages in §356 Cases

In *Dibenedetto v Westshore Hospital*, ___ Mich App ___ (1998), the plaintiff was receiving weekly benefits for a work-related injury that had been increased pursuant to §356(1), the two year continuous provision, described earlier in *Matney*.

Plaintiff returned to work and earned more than the average weekly wage she had been earning at the time of her work injury but less than the augmented rate of compensation she received with the §356(1) increase.

The Second Injury Fund argued that it need not continue to pay benefits, per §301(5)(c), because her post-injury average weekly wage exceeded her actual average weekly wage at the time of her work injury.

The Court rejected the Fund's argument. The Court held that when an employee successfully obtains an adjustment in his or her weekly compensation rate under §356(1) by demonstrating that he or she would have earned a greater wage but-for the work injury, the imputed higher wage should be substituted for the preinjury wage when considering subsequently earned wages under §301(5). The Court also affirmed the finding that plaintiff remained "totally" disabled on the basis that at the time of plaintiff's injury in 1986 the Act made a distinction between skilled and unskilled employment and plaintiff was unable to do post-injury, the skilled work she had been doing at the time of injury.

Administrative Rules

In *VanDeusen v Tri-County Distributing, Inc*, (On Remand), ___ Mich App ___ (1998), plaintiff challenged the Commission's reversal of the Magistrate's award on two bases.

First, the defendants had moved to quash one of plaintiff's expert's depositions on the grounds that plaintiff did not com-

ply with administrative rule 10f. This rule requires that depositions be taken not less than twenty days prior to trial. The Magistrate denied defendant's motion, but the Commission reversed saying the Magistrate should have granted it.

On appeal, plaintiff argued that he was not obliged to comply with administrative rule 10f because no administrative rules currently govern practice before the Board of Magistrates. Plaintiff argued that the emergency rules promulgated by the Department of Labor in 1987 expired in 1988, leaving no administrative rules applicable to proceedings before the magistrates.

The Court of Appeals disagreed with plaintiff's contention. The Court said that the emergency rules related to the waiver of public notice, hearing, and review requirements for administrative rules in order to allow the Board of Magistrates to properly hear and decide petitions. However, those emergency rules did not repeal or render ineffective the earlier administrative rules that had taken effect on January 3, 1979.

The Court did agree with plaintiff, however, that the measuring point for the twenty-day rule is the date upon which trial actually begins, not an earlier scheduled trial date. Measured in that manner, the Commission said that plaintiff's deposition should have been considered.

The Court then added that the Commission's error on this point did not necessitate reversal because the Commission had explained that, even considering the deposition, there was no competent, material, and substantial evidence to support the Magistrate's decision.

Plaintiff's second issue was that the Commission exceeded its scope of administrative appellate review in reversing the Magistrate's decision. The Court disagreed. After reviewing the evidence, a majority of the Court concluded that the Commission reviewed the whole record and appropriately focused on the discrepancies in plaintiff's account of the cause of his injury. The Court also noted that a doctor testifying on plaintiff's behalf admittedly altered his records.

Third-Party Settlements

In *Jones v McCullough and Auto-Owners Insurance Co,* ___ Mich App ___ (1998), plaintiff challenged the circuit court's order that the entire settlement amount recovered in a third-party action was subject to the intervening workers' compensation carrier's lien under §827.

More specifically, the plaintiffs—husband and wife—claimed that the workers' compensation carrier was entitled to reimbursement only from the employee's share of the third-party settlement, not from the employee's spouse's share.

The Court of Appeals agreed saying that the workers' compensation carrier is only entitled to reimbursement for that portion of the settlement proceeds allocated to the employee's injuries. The Court remanded the case for the trial court to apportion the proceeds between the two plaintiffs. In so doing, the Court distinguished *Piper v Pettibone Corp,* 450 Mich 565 (1995). In *Piper*, the Supreme Court indicated that the entire third-party judgment, less expenses, must reimburse the employer for compensation benefits even if such an allocation "deprives the employee and his spouse of all proceeds from the third-party recovery." The Court of Appeals said that the *Piper* Court was not called upon to determine the specific question posed here and the *Piper* Court's reference to both the husband and wife being deprived of the proceeds of the third-party recovery should not be construed as overruling Court of Appeals case law. That case law excluded the spouse's derivative claim in lifetime cases from an §827 lien.

Appellate Standard Of Review

In *York v Wayne County Sheriff's Dept,* 219 Mich App 370 (1998), the Court resolved two issues: the scope of the Court's review of Commission decisions and compensability of mental disabilities upon application of *Gardner v Van Buren Public Schools,* 445 Mich 23 (1994).

With respect to the first issue, the Court rejected plaintiff's argument that the Commission acted outside of its statutory review power when it reversed the Magistrate. The Court said that its review of Commission decisions does not include an independent review of the Magistrate's decision. Instead, the Court will only review the standard of review applied by the Commission. In this particular case, the Court found that the Commission did not simply substitute its judgment for that of the Magistrate. The Court said that the Commission concluded that the Magistrate's findings of fact were not supported by the requisite evidence and the Commission articulated adequate reasons grounded in the record for its determination.

This portion of *York* has the distinction of having been cited favorably by both the majority and in dissent of the Supreme Court in *Goff*.

With respect to the mental disability issue, the Court rejected plaintiff's argument that the Commission contravened *Gardner*. The Court said that *Gardner* requires an objective assessment of the relative significance of both occupational and non-occupational factors affecting disability. The Court explained that *Gardner* specifically prohibits reliance upon the claimant's subjective perception in making the "in a significant manner" determination.

WORKERS' COMPENSATION APPELLATE COMMISSION OPINIONS

No-Fault Benefits and Third-Party Offsets

In *Smithingell and Auto-Owners Insurance Co v Amoco Production Co,* 1998 ACO #250, the no-fault automobile insurance carrier argued on appeal that the Magistrate erred by limiting Auto-Owners' reimbursement of medical expenses from the employer to the amounts owing under workers' compensation cost containment rules. Auto-Owners also argued that the Mag-

istrate erred by denying its request for reimbursement of no-fault wage-loss benefits.

The Commission said that the workers' compensation carrier was to reimburse Auto-Owners but such reimbursement is limited by the Act's cost containment rules. The Commission also affirmed the Magistrate's denial of reimbursement of wage-loss benefits on the basis that Auto-Owners did not sustain its burden of proving that the employee, in fact, incurred any loss of wages. Plaintiff received sick leave during his absence from work.

In *Laprairie v Mechanical Insulation Contractors*, 1998 ACO #334, the Commission resolved a medical reimbursement question urged by plaintiff's union health and welfare fund in a similar fashion. The health and welfare fund paid medical benefits. The Fund argued that its right to reimbursement from the employer is not subject to cost containment rules. The Commission disagreed, saying that the welfare fund must be charged with awareness that the medical liability of a workers' compensation carrier is limited by cost containment.

On another third-party offset issue, in *Pool v Polar Logging, Inc,* 1998 ACO #60 the Silicosis and Dust Disease Fund had reimbursed the employer for those amounts of benefits that the employer paid which surpassed the statutory threshold under §531(1). Later, the employer received reimbursement for some of its workers' compensation benefits from a third-party action. The Fund sought recoupment from the employer for the money the Fund had paid the employer on the basis that, given the employer's reimbursement from the third-party case, the employer no longer surpassed the threshold. The Magistrate and Commission agreed with the Fund. They said that the employer must pay out-of-pocket the statutory threshold amount whether the third-party settlement takes place before or after the Fund's reimbursement to the employer.

"Reasonable Employment"/Favored Work Cases

In a case litigated for many years through many remands, *Sell v Mitchell Corporation of Owosso,* 1998 ACO #371, plaintiff was originally denied benefits for refusing favored work. Plaintiff appealed that decision to the now defunct Workers' Compensation Appeal Board with the Appeal Board affirming. Two days after the Appeal Board's decision, which was six years after the initial refusal, plaintiff contacted the employer expressing a desire to accept the job previously offered, all to no avail.

The Magistrate denied plaintiff's claim for reinstatement of benefits. The Commission affirmed. The Commission's review required discussion of recent favored work cases, including *Pulver v Dundee Cement Co,* 445 Mich 68 (1994) and *Derr v Murphy Motors Freight,* 452 Mich 375 (1966). After reviewing such decisions, the Commission said that—as a matter of law—a claimant's offer to return to favored work must be as bona fide as the offer of work in the first place. The Commission agreed with the Magistrate that plaintiff's offer to return to work was not credible. The Commission also said, particularly given the passage of time, the forfeiture of benefits continued.

The Commission has addressed other favored work issues with heavy reliance upon its *en banc* opinion in *Perez v Keeler Brass Co,* 1997 ACO #687 [summarized in the preceding newsletter].

In *Bunt v Total Petroleum, Inc,* 1988 ACO #3, the Commission says that an employee is not entitled to reinstatement of benefits unless a favored job is no longer available and the employee by his or her own action ended the prior refusal to perform the job. Applying this teaching from *Perez,* the Commission said that, even though the offer of favored work was withdrawn, plaintiff never again made himself available for work and had in fact quit. The Commission found that plaintiff was not entitled to a resumption of benefits, under such circumstances. See also, *Asher v Grandvue Medical Care Facility,* 1998 ACO #190 ["In situations involving termination of employment for just cause, no issue is presented regarding the length of time the offer is held open."]; *Corrales v Tele-Communications, Inc,* 1998 ACO #73 ["upon plaintiff's termination for just cause, the employer was no longer obligated to hold the offer of favored work open"].

Other favored work cases bear brief mention:

Where plaintiff was still working at reasonable employment at the time of trial, the question of whether she established a new wage-earning capacity was improperly put to the Magistrate because a prerequisite to a determination of whether a new wage-earning capacity has been established is that the job first be lost, pursuant to §301(5)(d)(i). *Redding v William Nevers,* DDS, 1998 ACO #377.

When plaintiff failed a drug and alcohol test and was terminated, the termination was not for good cause because the employee had not been informed of the company's policy until the day after the drug screen culminating in his termination. *Brown v Contech,* 1998 ACO #356. Contrast, *Williams v Steelcase, Inc,* 1998 ACO #54 [where the plaintiff knowingly violated a company policy against using illegal drugs].

In determining whether a new wage-earning capacity has been established, the proper test is the historical inquiry into whether the employment was recognized regular employment, with ordinary conditions of permanency. *Sherlock v State of Michigan,* 1998 ACO #65.

Where a plaintiff establishes a new wage-earning capacity after 250 weeks of post-injury reasonable employment, and that reasonable employment has paid less than the plaintiff earned at the time of injury, the Commission addressed what level of weekly benefits, if any, plaintiff receives. The Commission said that when the claimant loses the post-injury job they are not entitled to full benefits, but neither is the employer relieved of all liability. Instead, partial benefits continue. If the Magistrate finds that the plaintiff rebuts the presumption of a new wage-earning

capacity, then full benefits are to be paid. *Fredricks v Pepsi-Cola Metropolitan Bottling Co,* 1998 ACO #188.

A refusal of an offer of reasonable employment was not based upon good and reasonable cause when it rests upon personal and ordinary facts, such as an allegation that there would be no one home to care for the children. *Wasson v Meisel/Sysco Food Service Co,* 1998 ACO #101. The Commission distinguished *Holmes v L. Perrigo Co,* 1996 ACO #195 on the basis that there the plaintiff demonstrated that they could not locate a babysitter and no daycare program was available, whereas in the case before it no such evidence was offered.

Procedure Before the Board of Magistrates

A number of Commission opinions address procedural questions in trying cases before the Magistrates.

In *O'Brien v Federal Screw Works,* 1998 ACO #53, the Commission issued an *en banc* opinion addressing the question of whether the Magistrate has the authority to allow plaintiff's expert witness, an industrial hygienist/toxicologist, to view and tour defendant's plant to determine the air quality there and its possible relationship to the employee's death. The Commission ruled 5 - 2 that the Magistrate does have such authority. The majority concluded that, while there is no explicit statutory authority permitting a Magistrate to do so, such power is implied as part of the Act's desire for easy and extensive exchanges of information relevant to the adjudication of a case.

In *Norman v Henry Ford Health System,* 1998 ACO #350, the plaintiff challenged the Magistrate's decision to proceed with taking the testimony of a defense witness in the absence of plaintiff's counsel and plaintiff. The Commission noted that the issue was not an issue relating to whether plaintiff or her attorney were aware of the date of the continued hearing, but rather their nonappearance. Plaintiff's counsel was apparently trying a different case at the time this case was called. The Commission said that the decision to proceed in the absence of a party or an attorney who has notice is a discretionary one for the Magistrate. The Commission said it would not reverse absent an abuse of discretion. The Commission found no abuse of discretion.

In *Holland v Detroit Board of Education,* 1998 ACO #164, plaintiff challenged the Magistrate's adoption almost verbatim of defendant's trial brief in the Magistrate's decision. The Commission agreed with plaintiff and remanded the case. The Commission distinguished the case from *Rogers v K-Mart Corp,* 1995 ACO #282 on the basis that in *Rogers* the Magistrate adopted a brief that exemplified a more neutral, objective application of the law to the facts. Here, the Magistrate adopted, as his own, a more slanted brief and one that failed to discuss a physical claim that had been made in addition to the psychiatric claim.

The Commission has emphasized that magistrates are not strictly held to the Michigan rules of evidence, but instead enjoy considerable latitude regarding the admissibility of evidence. *Runyan v Chemical Leaman Corp,* 1998 ACO #244; *Durfy v USF Holland, Inc,* 1998 ACO #108. In *Runyan*, the Commission said that where a party on appeal challenges a magistrate's decision as to the admissibility or inadmissibility of evidence, that party has the burden of showing that the magistrate did not act in an equitable, reasonable or correct manner under the circumstances.

Finally, in *Lisowicz v ARA Mark Services, Inc,* 1998 ACO #347, plaintiff challenged a magistrate's denial of benefits on the basis that the magistrate did not disqualify himself. Plaintiff's argument for disqualification was based on a statistical compilation of the Magistrate's decisions which plaintiff's counsel argued indicated bias. The Commission rejected the argument, saying that the compilation was unsubstantiated, and covered a limited time frame chosen by plaintiff's counsel, all of which the Commission found fell short of overcoming a presumption of judicial impartiality.

Filing of Transcripts on Appeal

In *Nace v Fabricon Products,* 1998 ACO #287, the Commission had a case returned to it by the Court of Appeals for consideration of the merits. The Commission had dismissed the case for late filing of the transcript of trial proceedings. Within the decision, the Commission explained its policy concerning late transcript filings.

The Commission said that, while it recognizes that attorneys do not have control over the production of the transcript other than to timely request it and pay the appropriate funds, attorneys must monitor the progress of the preparation of the transcript and timely request extensions.

The Commission explained that "nearly without exception" whenever a timely transcript extension request is received by fax, mail, or hand delivery, it is automatically granted. Such request is granted by administrative letter on three occasions before any individual Commissioner's attention is even required. The request must be timely, however.

The Commission also said that there have been a number of occasions when timely requests beyond the third have been granted. The Commission said that all that is needed for such further extensions is timely proof that responsibility for the delay rests with the court reporter. See also, *Kropp v General Motors Corp,* 1998 ACO #381.

Seventy-Percent Benefits Payable During the Appeal Period

In *Johnson v Boon & Dar, Inc,* 1998 ACO #198, the Commission had earlier reversed the decision of the Magistrate on the basis that the Magistrate's opinion was inadequate for review and remanded the case for a new determination. As part of the remand, the Commission had said that the 70% benefits required by §862 should continue to be paid plaintiff in the interim between the completion of the remanded decision and the

return of the case to the Commission after the remand.

The carrier filed a motion with the Commission to be relieved of the 70% obligation on the basis that the reversal of the Magistrate's decision left no order upon which continuing payment of 70% benefits could be based.

A majority of the Commission rejected the carrier's argument. The Commission said that in this case the Commission had not previously found that the Magistrate's decision awarding benefits was wrong or unjustified. Instead, the Commission explained that it had reversed the decision because it was so poorly written and inadequate in explaining the basis and direction of liability that it could not be properly reviewed.

In another case, the Commission explained the conditions for suspending 70% benefits during the appeal period. In *Curry v Cilla Scott*, 1998 ACO #338, the Commission explained:

"As a general rule, the Commission will not consider arguments which go to the merits of a magistrate's award as part of a motion to suspend 70% benefits. Such benefits are designed by Section 862 to provide a claimant with benefits until the underlying merits are resolved on appeal. Challenges to the underlying award should be raised in the appeal brief. If defendants wish to stop the payment of benefits due to events which occur subsequent to the issuance of the magistrate's decision (such as plaintiff's recovery from work-related disability, a dispute about whether plaintiff has found a new job, a plaintiff's unwillingness to undergo medical examination or cooperate with medical treatment, *etc*.), the most expeditious approach is usually to file a Petition to Stop or a Petition for Determination of Rights with the Bureau. If such issues are raised at the Commission under its jurisdiction of the case and there is a dispute about the facts which would give rise to the suspension of 70% benefits, the Commission will in virtually every case remand that factual dispute to the Board of Magistrates for resolution."

Applications of Haske

The question of whether the employee suffers from a compensable disability, as that term is defined in *Haske v Transport Leasing, Inc, Indiana,* 455 Mich 628; 566 NW2d 896 (1997), has arisen in a great many cases decided by the Commission.

In the first opinion released this year, the Commission had occasion to decide a case on remand from the Court that presented the whole panorama of law on disability from *Sobotka v Chrysler Corporation* through *Rea v Regency Olds/Mazda/Volvo* through *Haske*. The Commission's summarized the present state of the law on disability as follows:

On appeal by plaintiff, the Court of Appeals held in an order issued April 3, 1994, that the Commission had incorrectly applied the definition of disability in light of that Court's just-issued decision in *Rea v Regency Olds/Mazda/Volvo,* 204 Mich App 516 (1994), but that the error was harmless "in light of the WCAC's conclusion, which is supported by the record, that plaintiff's residual wage-earning capacity was equal to or greater than her weekly wages before she was injured." Then came the Supreme Court decision in *Sobotka, supra*, and on March 28, 1994, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. The Court of Appeals in turn remanded the case to us.

In order to apply *Sobotka, supra*, it is of course now essential to examine the extended reference made to that decision by the Supreme Court in the definitive majority opinion in *Haske v Transport Leasing, Inc*, Indiana, 455 Mich 628 (1997). *Haske* reaffirms the viability of the lead opinion in *Sobotka*, but limits and refines the purpose and meaning of the analysis provided in the latter opinion.[1] As a practical matter, *Haske* and *Sobotka* establish a unified whole, where the inquiry focuses on the relationship between a claimant's unemployment and the claimant's work-related injury.

Section 301(4) of the Act has now been carefully analyzed by the Michigan Supreme Court in *Haske, supra*. According to the Supreme Court, a claimant is entitled to benefits when he demonstrates that his actual loss of wages is attributable to a work-related injury. A claimant proves wage loss when he "demonstrates that, as a consequence of work-related injury or disease, he has suffered a reduction in his earning capacity." *Haske* summarized the rule for compensability as follows:

We hold that an employee proves a disability where he proves he can no longer perform a job suitable to his qualifications and training as a result of his injury. An employee's disability is compensable only where he proves wage loss by showing a reduction in earning capacity. An employee establishes a reduction in earning capacity where he establishes to the fact finder's satisfaction that a reduction or elimination of his wages, subsequent to the work-related injury, is causally linked to the work-related injury. [Emphasis added]

Put simply, an employee must show 1) a workplace injury, 2) a disability, and 3) wage loss due to the injury, in order for there to be entitlement to weekly benefits. If an employee proves a workplace injury, disability and subsequent wage loss, the employer has the opportunity to present proofs that the wage loss is not related to the injury, but is instead due to other, non-work-related factors.[2] Such factors might include avoidance of work, malingering, termination from employment for reasons unrelated to the injury, the employee'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 employee only receives weekly benefits if the trier of fact concludes that the relationship between work-injury and subsequent wage loss has been proven.

How does *Sobotka, supra* and Section 361(1) fit into this scheme? Justice Boyle in *Haske, supra* explains that benefits can be denied to an injured/unemployed plaintiff "where the defendant carries the burden of showing the plaintiff's 'employability.'" Although a partially disabled employee's benefits are not to be reduced on the basis of a residual wage-earning capacity (a hypothetical ability to earn after injury), and a plain-

tiff does not have the burden of proving that the absence of wages is due to the absence of a residual wage-earning capacity, Justice Boyle rejects "the plaintiff's claim that the mere fact that a claimant remained unemployed after injury automatically established an absence of wage-earning capacity under Section 361." Justice Boyle explains that "absence of wages not truly related to the work injury [does] not justify an award of compensation" and that a magistrate can "infer that a plaintiff is avoiding work."

What is the test for avoidance of work? Justice Boyle in *Haske, supra* points to her *Sobotka, supra* test: The "real inquiry for determining loss of wages relates to the monetary worth of the injured workman's services in the open labor market under normal employment conditions."[3] " *Wells v Bay-Arenac Community Living,* 1998 ACO #1.

[1] Both the majority opinion in *Haske* and the two-justice lead opinion in *Sobotka* were authored by Justice Patricia Boyle.

[2] The Supreme Court explicitly rejected the notion "that wage loss from any source and a personal injury automatically mandate maximum benefits." The Court declared that [u]nemployment or reduced wages must be causally linked to work-related injury, and a plaintiff may not reject actual wages reasonably offered or avoid or refuse actual wages." The Court held 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 unemployment 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."

[3] Justice Boyle quotes *Sobotka* in turn approvingly quoting *Jones v Cutler Oil Co,* 356 Mich 487 (1959).
See also, *Lussier v General Motors Corp,* 1998 ACO #333; *Montalvo v Wohlert Corp,* 1998 ACO #14; *Stroia v O.C. Birdair, Inc,* 1998 ACO #178.

In applying this teaching, the Commission has said that magistrates have wide discretion. In *Ahmed v Talent Tree, Inc,* 1998 ACO #36, the Commission affirmed the Magistrate's finding of a compensable disability. Rejecting the defendant's argument that the same Magistrate had accepted similar evidence in other cases and ruled for the defendant, the Commission emphasized the Magistrate's discretion, saying:

"Appellant is concerned that the magistrate may have imposed the requirement that Talent Tree had to actually offer a job to plaintiff in order to escape liability. We do not read the magistrate's opinion as imposing any such improper requirement on appellant. On the contrary, the magistrate found that under the facts of this particular case, Talent Tree's failure to reveal the availability of performable jobs to plaintiff was important in his assessment of whether plaintiff was avoiding work. Such an analysis in this case was not unreasonable and demonstrates no error of law. As appellant notes in its brief, the same magistrate utilized evidence of performable work existing in the marketplace in another case in order to deny benefits. Here, similar evidence was found unpersuasive of the avoidance of work. Such disparity in result only goes to show how great the discretion of the magistrate is in determining whether the proofs in any given case show the requisite linkage between injury and wage loss, or instead show the avoidance of work. An employer's failure to communicate with an injured claimant in order to make the latter aware that real jobs in the real world are actually available may well, under appropriate factual circumstances, result in the failure to prove that the claimant's wage loss is no longer the consequence of the injury. In every case, a magistrate must balance the unique facts presented by the particular parties and determine whether they show a compensable disability or a non-compensable one."

By contrast, the Commission has also affirmed a Magistrate's denial of benefits where the employee, although suffering from a work-related disability, did not sufficiently prove that the disability was compensable under *Haske*. The Commission said: "'An employee's disability is compensable only where he proves a wage loss by showing a reduction in earning capacity. An employee establishes a reduction in earning capacity where he establishes to the fact finder's satisfaction that a reduction or elimination of his wages, subsequent to the work-related injury, is causally linked to the work-related injury.' *Haske,* at 664." (Emphasis is the Commission's).

Lussier, supra, presented the Commission with a close case under its *Haske* analysis which the Commission resolved as follows:

"The findings made by Magistrate Mowry present this Commission with a particularly difficult task in applying *Haske*. This is not a clear-cut case where the evidence shows the actual rejection of clearly identified actual jobs in the marketplace. Instead, we face a case where plaintiff's dishonest representations and disreputable behavior repeatedly impeded efforts to put plaintiff back to work. For all intents and purposes, the magistrate indicates that plaintiff is a dishonest individual with unbelievable excuses for not working. Whether one calls this behavior "avoiding work" or "malingering", the implication of the magistrate's fact finding is clear. The idea that Michigan's workers' compensation law might be interpreted to reward plaintiff for his dishonesty by entitling him to an open award of benefits defies logic, and it defies the interpretation of Section 301(4) provided by Justice Boyle in *Haske*."

Plaintiffs have prevailed in *Haske* cases where defense attempts to prove work avoidance fall short of persuading the Magistrate. Where the defense presented findings and conclusions of a vocational expert on the second day of trial, the Magistrate and Commission rejected a job avoidance defense noting that "the information is only sprung upon plaintiff in the middle of trial." *Novakoski v Horizon Healthcare Corp,* 1998 ACO #271. Likewise, in *Stroia, supra,* the Commission affirmed the Magistrate's award saying that even though plaintiff indicated

that "he would be willing to perform such [work] activity in the future," he prevailed because "there has been no showing that such work is regularly available. Defendants have not shown that the connection between wage loss and injury was broken by plaintiff's performance of a 'onetime only' consulting job."

By contrast, in *Camp v Sears, Roebuck Co,* 1998 ACO #99, the case returned to the Commission for reconsideration in light of *Haske* after the Court of Appeals' opinion had applied *Sobotka* and denied benefits. The Commission denied benefits on remand where available jobs had been posted and the employee refused to bid on them. The Commission said that, under *Haske,* plaintiff was avoiding available work, just as the Court of Appeals had held under *Sobotka*.

In affirming two awards for compensable disability, the Commission mentioned that the plaintiffs demonstrated that they have been actively seeking employment. *Derlon v Garb-Ko, Inc,* 1998 ACO #322; *Wood v Newell Mfg Co,* 1998 ACO #337. On the other hand, in *Gilmer v Detroit Board of Education,* 1998 ACO #172, the Commission remanded the case to the Magistrate under *Haske* to determine whether plaintiff satisfied the third step of *Haske*—the step requiring a causal link between injury and reduction in wage-earning capacity—where the plaintiff indicated that she had not looked for work and had no intention of doing so.

Finally, in *Thibodeau v Uniroyal, Inc,* 1998 ACO #114, the Commission indicated that insofar as *Haske* "sought to explain *Sobotka*" a *Haske* analysis applies regardless of the injury date. The Commission in *Thibodeau* applied a *Haske* analysis to a 1979 injury. The Commission said that "although *Haske* involved 1987 injury dates and thus a different definition of disability than was applicable in the instant case, that decision also sought to explain *Sobotka* which, like the instant case was a pre-1982 definition case. . . The Supreme Court by so ruling set forth a rule of law which is applicable to the instant matter despite the age of the case."

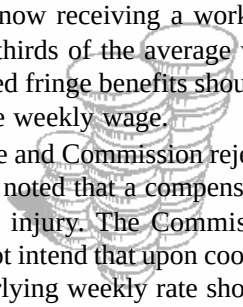
Fear of Termination and Mental Disability Benefits

In *McKim v Hurley Medical Center,* 1998 ACO #11, plaintiff argued that her fear of termination from employment due to the absenteeism policy of the employer led to a mental disability. The Magistrate awarded benefits, but the Commission reversed.

Analogizing the case to *Robinson v Chrysler Corp,* 139 Mich App 449 (1984), the Commission held that fear of termination is not an actual event of employment, as required by §301(2) and *Gardner v Van Buren Public Schools,* 445 Mich 23 (1994). The Commission contrasted this case with *Calovecchi v Michigan,* 223 Mich App 349 (1997) on the basis that in *Calovecchi* the compensable claim was grounded in the employee's reaction to actual events at the workplace, whereas in this case it was simply the fear of termination that was alleged to be the employment event.

Fringe Benefits

In *Blood v Motor Wheel Corp,* 1998 ACO #390, plaintiff was receiving a weekly workers' compensation rate that exceeded two-thirds of the state average weekly wage. Therefore, plaintiff's fringe benefits were not included for purposes of determining plaintiff's average weekly wage, per §371(2). However, plaintiff sometime later began receiving pension benefits subject to coordination under §354. The question presented was whether the lowering of plaintiff's weekly rate of compensation after coordination necessitated inclusion at that point of the value of the discontinued fringe benefits. Plaintiff argued that since she is now receiving a workers' compensation rate of less than two-thirds of the average weekly wage, the value of her discontinued fringe benefits should be included in calculating her average weekly wage.



The Magistrate and Commission rejected plaintiff's request. The Commission noted that a compensation rate is established as of the date of injury. The Commission also said that the Legislature did not intend that upon coordination of benefits the employee's underlying weekly rate should be increased by addition of discontinued fringe benefits.

The Dual Employment Provisions and Lawrence

The case of *Timmers v Meijer, Inc,* 1998 ACO #240, presented some of the ramifications of application of the dual employment provisions in light of *Lawrence v Toys R Us,* 453 Mich 112 (1966).

Plaintiff worked for two different employers earning approximately the same amount of money per week from both. On the date of injury, however, plaintiff was still employed by the second employer, the employer with whom he did not sustain his injury.

The Magistrate said that the Act and *Lawrence* require that plaintiff's average weekly wage be determined by taking into account earnings at both employments, even though plaintiff continued to work for the second employer. The Commission agreed, but modified the Magistrate's opinion to further indicate that the Second Injury Fund does not have liability to reimburse the employer under the dual employment provision under such circumstances, per *Lawrence*. The Court said that the liable employer is, however, entitled to offset its liability by plaintiff's post-injury ability to earn at the second job. See also, *Blanshine v Fruitport Community Schools,* 1998 ACO #157.

Intoxication as Intentional and Willful Misconduct

In *Wyskiel v CSI Industrial Systems Corp,* 1998 ACO #395, the Commission affirmed a denial of benefits on the basis that plaintiff's injury was caused by his own intentional willful misconduct (drinking alcohol) under §305.

The facts were that plaintiff fell from a ladder shortly after a

lunch break. He admitted to having had two cans of beer during the lunch break, but denied that he was intoxicated at the time of the fall. Evidence at trial indicated that plaintiff's blood alcohol content at the time of a hospital admission right after the fall was .168, and that plaintiff had a history of alcoholism.

In affirming the denial, the Commission addressed an evidentiary issue relating to the blood alcohol test. The Commission rejected plaintiff's arguments that the admissibility of a blood test did not meet strict, foundational requirements derived from nonworkers' compensation cases. The Commission noted that the evidentiary admission of a blood alcohol content in workers' compensation is not subject to the same rules, and there was no challenge to the reliability or authenticity of the test itself.

Conditions of the Aging Process

In *Vickerson v General Motors Corp*, 1998 ACO # 156, defendant argued that the Magistrate erred by not applying the more stringent work relationship standard for a condition of the aging process found in §301(2) where the claim was one of spondylolisthesis aggravated by work. The Commission said that, except for heart and cardiovascular conditions, other cases that arguably present conditions of the aging process must contain concrete expert testimony that the condition at issue is in fact a condition of the aging process. Here, the Commission said that spondylolisthesis is a developmental condition pertaining to the process of growth, whereas the "aging process" contemplates gradual changes in the structure of any organism that occur with the passage of time. The Commission therefore affirmed the award under the less stringent standard.

Other Cases

Other Commission cases warrant a brief mention.

In Gantz v Lopatin, Miller, Freedman, Bluestone, 1998 ACO #344, the defendant argued that the Magistrate erroneously awarded death benefits to this former workers' compensation attorney. Defendants argued that the last two days of the decedent's work did not contribute "in a significant manner" toward his death, given the decedent's risk factors. Decedent's wife cross-appealed arguing for a finding of a greater percentage of partial dependency than that found by the Magistrate.

The Commission, although noting a great number of risk factors in plaintiff's background, affirmed the Magistrate's finding that when the decedent learned he had lost a workers' compensation case where he represented a personal friend, the decedent's volatile outburst at that time and its carryover the next day was a significant contributing factor justifying an award.

With respect to the percentage of dependency of the wife, the Commission noted (as did the Magistrate) the calculation problem presented by the Supreme Court's decision in *Weems v Chrysler Corp*, 448 Mich 679 (1995). Specifically, the Weems Court sets forth in one part of the opinion a particular formula to be used in making the appropriate calculation, only to later apply a slightly different formula when actually engaging in the calculations. The Commission found the formula as applied (using gross annual incomes for both decedent and survivor) the more appropriate. In applying that formula, the Commission increased the spouse's weekly rate of death benefits.

In *Lolich v Detroit Baseball Club*, 1998 ACO #343, plaintiff, the famous ex-Tiger pitcher, sued the Detroit Baseball Club and Mickey Lolich's Doughnut Shop, his subsequent employer. Plaintiff claimed a work-related knee disability.

The Magistrate found that plaintiff was entitled to an open award of benefits on the basis of an injury at Mickey Lolich's Doughnut Shop, but exonerated the Tigers. Mickey and the doughnut shop appealed.

On appeal, plaintiff also sought benefits from the Tigers to the time of his doughnut shop injury. The Commission affirmed the Magistrate's denial of such benefits, noting that plaintiff continued to pitch post-injury for the New *York* Mets and San Diego Padres earning more money there.

The Commission also affirmed the Magistrate's rejection of the doughnut shop's argument that plaintiff should not be entitled to an open award of benefits against it. The Commission noted that, although plaintiff retained abilities to work, under *Haske and Mayse v Wirt Transport Co*, 1997 ACO #528, plaintiff established an injury, loss of wages, and causal link between the two. At that point, "the focus shifts to whether defendant has shown that plaintiff is avoiding work he can perform." There was no such showing here.

In eleven consolidated cases presenting a common issue, the lead case being Moore and Dr. Kim K. *Lie v Cusolar Industries, Inc*, 1998 ACO #294, the Commission affirmed the Magistrate's opinion which held that Dr. Lie was not entitled to reimbursement for services he provided in his outpatient hand clinic. The employers or carriers denied Dr. Lie's request for certain payments on the basis that his clinic was not a licensed freestanding surgical, outpatient facility as required by the health care service rules.

Finally, *De Vries v Grand Rapids Public Schools*, 1998 ACO #170 is a valuable opinion for learning the history of the total and permanent disability provisions of the Act.

Appellate Commission Has Moved

The Workers Compensation Appellate Commission has moved all of its offices to a new location in Lansing. The Commission is now located at:

1375 South Washington Avenue,
Lansing, MI 48909-7968
(517) 334-9719

DEALING WITH BLUE CROSS AND BLUE SHIELD OF MICHIGAN

By Michael F. Skinner
Assistant General Counsel
Blue Cross and Blue Shield of Michigan

Introduction

For many years, Blue Cross and Blue Shield of Michigan ["BCBSM"] and its subsidiary HMO Blue Care Network ["BCN"] (collectively known as "the Blues") have sought reimbursement of medical expenses in contested eases pending in the Bureau. In most cases, counsel for the claimants and respondents recognize the Blues' right to seek reimbursement in these cases and conduct themselves accordingly. However, some attorneys and their clients resist the Blues' efforts at controlling healthcare costs in this fashion, usually based on some misconceptions about rights of reimbursement and standing to pursue those rights. This article will attempt to purge those misconceptions.

Subrogation and Exclusion

The Blues seek reimbursement in worker's compensation cases based upon two theories of recovery. Both of these theories can be found in the certificates of coverage which, like a policy of insurance, describe the duties and responsibilities of not only the Blues but also the covered claimants. Consideration is paid in the form of a premium in exchange for the healthcare coverage, and thus, the certificates memorialize a contract between the Blues and their covered members.

The Blues' certificates all contain a clause which excludes coverage for work-related injuries. Thus, for an injury which occurs in the course of employment, there is no Blues coverage. Unfortunately, when a worker is injured at work and is treated for his or her injuries, the worker often finds it easier to use his or her Blues' coverage to pay for the treatment rather than try to get the expenses paid by the *employer's* worker's compensation carrier. Also, healthcare providers tend to prefer the certainty of the Blues' coverage over the uncertainty of receiving payment from the employer or worker's compensation carrier. Providers know that, because the employer or carrier often dispute the worker's claim that the injury arose in the course of employment, they are often unwilling to pay any expenses prior to litigation. BCBSM is obligated to pay these medical expenses when the employer or worker's compensation carrier refuses to do so. MCL 418.230(2)(d). Therefore, when one of its members alleges a work-related injury by initiating a contested case in the Bureau, the work-related injury exclusion is triggered and the Blues seek reimbursement.

The Blues certificates also contain a subrogation clause. This clause allows the Blues to "stand in the shoes" of its member for the purpose of seeking reimbursement of medical expenses where a third party is alleged to be responsible for those expenses. The subrogation clause also imposes certain duties on its members. When a member engages an attorney for the purpose of pursuing a claim in the Bureau, he or she is required to notify the Blues of this event and advise the attorney of the Blues' rights under the certificate. The subrogation clause also requires the worker to "do whatever is necessary" to assist the Blues in enforcing its rights of recovery. Some certificates prohibit the worker from settling his or her case without the written permission of the Blues. The Blues consider the failure to do these things a breach of the healthcare contract. Remedies for breach of contract include suspension of performance by the non-breaching party (suspension or termination of coverage) as well as commencement of an action for breach of contract.

Pursuing Reimbursement

The Blues are not required to formally intervene into a contested case. *Ptak v Pennwalt Corp,* 112 Mich App 490; 316 NW2d 251 (1982). They often do so because some magistrates refuse to recognize a Blues' claim for reimbursement if they do not file a Form 104. Filing a Form 104 also entitles the Blues to receive notices of hearings which not only helps it track cases, but tends to remind the magistrates and parties of the lien. The Blues prefer, however, to ask the claimants to honor their contractual duty to the Blues to assist them in securing a reimbursement. Therefore, in nearly every case, the Blues ask their members, through their attorneys, to pursue reimbursement of the medical expenses paid by the Blues at trial and in settlement negotiations. Attorneys representing these claimants often interpret this request as a request that he or she represent the Blues in exchange for a contingent fee. While this is permitted, some attorneys (and magistrates) perceive this to be a conflict of interest. It is not a conflict, but even so they should understand that the Blues are directing their request for assistance to the member and that refusal could constitute a breach of the healthcare contract. It is this author's perception that attorneys representing these members sometimes ignore this request and fail to discuss it fully with their clients. This can often result in a rather rude awakening for the members who have settled their cases without reimbursement to the Blues and later find themselves named as defendants in breach of contract suits. The attorneys who represented these persons in the worker's compensation action usually find themselves having to defend these former clients for free and/or face the possibility of a grievance action. All of this can be avoided if counsel for Blues

members would simply discuss the request of the Blues for assistance with their clients and urge them to cooperate with the Blues.

In cases where a member, for whatever reason, does not wish to cooperate with the Blues or perhaps wishes to contest its right to reimbursement, then counsel for the Blues will appear and present its claim. Counsel for the Blues will participate in all settlement discussions and are willing to compromise their claims more or less to the same degree as the other litigants. On occasion, however, counsel for the member is tempted to settle a case without any reimbursement to the Blues. When this occurs, the Blues will typically elect not to pursue its claim in the Workers' Compensation Bureau, instead pursuing breach of contract remedies. When a breach of contract suit is filed the proper forum is, of course, the Circuit or District Court. In such a case, the Blues are not required to prove that the claimant's injury was work related or that the medical expenses paid by the Blues arose from the work-related injury and were reasonable and necessary. Instead, the Blues need only prove that in cases which are settled, it typically recovers a percentage of that settlement. As an alternative, the Blues might simply suspend performance by denying future claims. Both of these breach of contract remedies are somewhat easier than pursuing a claim in the Workers' Compensation Bureau. Of course, the member can avoid all of this by simply honoring his or her contractual obligations to the Blues.

Conclusion

Oftentimes, especially with newer attorneys, a letter from the Blues asserting a claim for reimbursement is looked upon with the same enthusiasm as one shows toward a letter from the Internal Revenue Service. Attorneys who generally represent claimants fear that a claim from the Blues will reduce the amount of settlement money available to their clients. Conversely, defense attorneys generally believe that such reimbursement claims increase the cost of settlements to their clients. The truth probably falls somewhere in between these extremes. In any event, with the increasing pressure from customers who demand more containment of healthcare costs, the Blues will not be reducing their efforts to seek reimbursement. If anything, those efforts will be increased. Therefore, attorneys representing clients in worker's compensation contested cases are encouraged to deal with the Blues up-front and openly so as to avoid the problems which will inevitably result from a failure to do so.

Michael F. Skinner is Assistant General Counsel of Blue Cross and Blue Shield of Michigan. His practice focuses on subrogation and reimbursement for BCBSM and for BCN. He is a graduate of Thomas M. Cooley Law School and serves on the State Bar of Michigan Insurance Law Committee and is a member of the Workers' Compensation Section. He is the author of several articles on other party liability issues.

Report of the W.C. Section

Applications for Mediation or Hearing—Forms A, B & C

It was agreed that only one (1) original Application for Mediation or Hearing—Form A, B or C needs to be mailed to the bureau and contained within the file. There is no need to copy the form to the hearing site or magistrate. The bureau rules will be amended to comply with this policy (1 instead of 3 original forms). Forms may be processed by using software packages supplied by the various companies. However, the forms must be the same color as the bureau forms: 104A—Yellow; 104B—Orange; and 104C—Blue. The word processed forms must mirror the contents of the bureau forms and be approved by the bureau before it can be used. A cover letter just addressing the fact that the application is attached is not necessary as it will be recycled by bureau staff.

Carrier's Response Form

This form is required to be submitted by the insurance carrier or self-insured employer. Only the original form needs to be sent to the bureau in Lansing with no other copies mailed to the magistrate or hearing site. Attorney appearances may be made on this form by including the attorney "P number."

Answer, Affirmative Defenses, Demand for Medical and Proof of Service

Normally, this information is attached to the Carrier's Response form and submitted together to the bureau after notice of the pretrial or mediation hearing. This information must be submitted and retained within the contested case file. However, only one Answer, Affirmative Defenses, and Demand for Medical needs to be submitted. This information should be mailed to the Lansing bureau with no copies being sent to the hearing site or magistrate. A cover letter just addressing the fact that the above information is attached is not necessary as it will be recycled by bureau staff. The smaller the font size, the fewer number of pages will be needed to be sent to the bureau.

Attorney Appearances (with Proof of Service)

If the attorney does not file the carrier's response form, an appearance must be filed identifying the party he or she is representing. The appearance must contain the following:

1. Caption of the claim including the employee's social security number,
2. A statement advising the bureau of which party the attorney is representing,
3. The attorney's name followed by the P#.

The appearance should be sent to the bureau in Lansing so it can be entered on the automated system for future mailings.

Council Subcommittee on Contested File Contents

Bureau staff will then forward the appearance to the contested case file. A one page appearance form is preferred. No copies of the appearance need to be sent to the magistrate or hearing site. A cover letter just addressing the fact that the appearance is attached is not necessary as it will be recycled by bureau staff.

Substitution of Attorneys for a Party (with Proof of Service)

A substitution of attorney for a party must be retained within the contested case file. Only one form needs to be submitted to the bureau in Lansing with no copies being sent to the magistrate or hearing site. The substitution should contain the information provided in the Attorney Appearance section.

Notice of Deposition (with Proof of Service)

The notice of deposition shall not be sent to the bureau, magistrate or hearing site. A copy should be retained by the attorney issuing the notice in case the contents of the notice are subject to dispute. The bureau staff may recycle these forms along with any cover letter.

Notice or Letter of I.M.E. (with Proof of Service)

The notice or letter of an independent medical examination (I.M.E.) being scheduled shall not be sent to the bureau, magistrate or hearing site. However, a copy should be retained by the attorney issuing the notice or letter in case the contents of the document are subject to dispute. The bureau staff may recycle these forms along with any cover letter.

Letter or Notice of Intent to Introduce Records—Rule 5 (with Proof of Service)

A letter or notice of intent to introduce records under magistrate rule 5 must be contained in the contested case file. The letter or notice should be addressed to the magistrate of record and sent to the bureau in Lansing with no copy being sent to the hearing site.

Records mentioned in the notice or letter should not be attached to the letter or notice sent to the magistrate. However, the records should be specifically identified within the letter or notice. A proof of service should be contained within the notice or letter advising the litigants of who received it.

Letter or Objection(s) to Notice of Intent to Introduce Records—Rule 5 (with Proof of Service)

A letter or objection to the notice of intent to introduce records under magistrate rule 5 must be contained within the contested case file. The letter of objection(s) should be addressed to the magistrate of record and sent to the bureau in Lansing with no copy being sent to the hearing site.

Specific objection(s) should be provided within the letter or objections form. A proof of service should be contained within the letter or objection form advising the litigants of who received it.

Letters or Notices of Lien by Friend of the Court or Medical Provider

Letters or notices of lien filed by the friend of the court or medical provider should be contained within the contested case file. A Form 104C filed by the lien holder is the preferred method. However, the notice does *not necessarily* establish the rights of the *party* bringing the lien. The amount and rationale for the lien must be established by the party asserting the lien.

Expert Witness Depositions

Testimony of an expert witness taken by deposition should not be placed in the contested case file until the matter is called for trial or redemption. The party responsible for the deposition should retain the magistrate's copy of the deposition until requested by the magistrate.

Transcript Orders/Dolman

When appealing a magistrate opinion, please attach a copy of the opinion to your transcript order placed with Dolman. Dolman's address is P.O. Box 26125, Lansing, Michigan 48909. Dolman's telephone number is (517) 393-1668.

Mailing Address for Bureau

P.O. Box 30016
Lansing, Michigan 48909

Claims for Review (Form 262)

Send to the Bureau address

Mailing Address for Appellate Commission (other than Claims for Review)

P.O. Box 30468
Lansing, Ml 48909-7968

Briefs—Appellate Commission

Only one (1) copy of any correspondence needs to be submitted to the Appellate Commission.

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

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