Spring 2001

Workers Compensation Section Newsletter

State Bar of Michigan Workers Compensation Section

Copy Charges for Medical Records

The Workers' Compensation Health Care Service Rule 418.2324 no longer exists. The new rule is 418.10118. The new charges are 25 cents per page and any mailing charges incurred. Please change your subpoena letter if you cite this rule in it. If you would like a copy of the rule, check www.cis.state.mi.us/wrkcomp/

Spring Seminar

June 14 and 15

Boyne Highlands

See page 5 for more information!

In this Issue:

Two Bills Address Mental Disabilities, Refusal to Work

House Bill 5914, Sponsor: Rep. Kuipers and House Bill 5916, Sponsor: Rep. Shulman

HOUSE BILL 5914 would amend the Workers' Disability Compensation Act of 1960 to specify what "actual events of employment" would not include with regard to compensable mental disabilities, and to make unemployed disabled workers permanently ineligible for wage loss benefits "after the passage of a reasonable period of time" if they refused bona fide offers of "reasonable employment." The bill also would specify that any employee who voluntarily quits employment for any reason or who is terminated for just cause would not be entitled to further wage loss benefits from the employer where the injury occurred.

Currently, mental disabilities and conditions of the aging process (including but not limited to heart and cardiovascular conditions) are compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities are compensable when arising out of actual events of employment, and not out of "unfounded perceptions" thereof. The bill would specify that "actual events of employment" would not include reasonable job performance evaluations, regular supervisory acts directly related to employment, or disciplinary, suspension, or termination proceedings from employment.

Finally, the bill amends 301 (5) (e) which currently provides a disabled worker compensation based upon his or her wage at the original date of injury if, for whatever reason, he or she loses his or her job after having been employed under this subsection of the act [in favored work] for less than 100 weeks. The bill would replace the phrase "for whatever reason" with the phrase "through no fault of the employee."

HOUSE BILL 5916 would make identical changes to 301(5)(e), would provide under 301(5)(a), that bona fide offers of favored work must remain open for a reasonable period of time.

A complete nonpartisan analysis of each bill and a review of the entire bills can be found at *http://www.michiganlegislature.org*

New Court Reporting Firms

Effective February 1, 2001

Please be advised that effective Thursday, February 1, 2001, the bureau has contracted with several court reporting firms to provide services to the bureau. Hearings held on or after this date will be transcribed by the new firms.

Network Court Reporting will handle live body court reporting: in the Upper Peninsula and Gaylord. New Century Court Reporting will handle live body court reporting in St. Joseph, Muskegon, Battle Creek, Ann Arbor, and Saginaw. Transcripts for these locations where a Iive body court reporter was present should be ordered from these firms.

All transcript orders for video court reporting hearings held on or after February 1, 2001 should be ordered from Regency Court Reporting. Hearings held prior to this date should be ordered from Dolman Technologies Group, Inc.

Provided below please find the relevant information for each court reporting firm for easy reference.

Network Reporting 2604 Sunnyside Drive Cadillac, MI 49601 Voice: 800/632-2720 Fax #: 800/ 968-8653

New Century231 W. Lafayette Bldg. 660 Woodward Ave.1131 First National Bldg. Detroit, **MI** 48226Voice: *313i963-5410* Fax#: *313 \963-4660*

Regency Reporting, 2547 Union Lake Rd . Commerce, Mi 48382 Voice: 2481 360-2145 FaX#: 248/ 360-6608

New Location For St. Joe

If you haven't been to the Benton Harbor/St. Joe Bureau in a while, please note the current location is: Clarion Hotel, 100 Main St., St. Joseph, MI 49085.

We All Lost A Giant: William G. Reamon, Sr.

As reported in your last newsletter, William G. Reamon Sr. passed away last January. We were unable to include a fitting tribute then but promised one in the next volume. As one who greatly admired Mr. Reamon, writing a tribute to his memory is a daunting task. I will begin by simply quoting from information given to me by his son, William G. Reamon, Jr.:

"William G. Reamon, was larger than life to those: who knew him, who loved him, who worked with and against him. He was a man of conviction and principle who elicited strong, and varied, emotions in the people he knew and met. Whatever else, he always elicited respect. He was a scholar an Epicurean, a world traveler, *an* accomplished lawyer. Most importantly, he was a beloved husband, father, grandfather and friend. And on January 10, 2001, at the age of 73, William G. Reamon, Sr. passed from this life to the next. He will be greatly missed.

Mr. Reamon was a lifelong resident of Grand Rapids, a 1945 graduate of Central High School and graduate of the University of Michigan Law School. His education was interrupted briefly for a stint in the U. S. Navy in World War II where he served in the Pacific. He was a proud Veteran.

He came home to Grand Rapids to practice law, and quickly became one of the preeminent trial attorneys of the area. For 46 years, Mr. Reamon championed and represented the injured and disabled in state and federal courts. He also appeared several times before the Michigan Supreme Court. His peers e1ected him President of the: State Bar of Michigan, a post he held from 1976- 77.

Mr. Reamon's many interests included traveling, scuba diving, fencing, reading, fishing, cooking, attending University of Michigan football games and watching games on television with his friend, Bob Jamo. For 21 years his love of scuba diving and travel led him and his wife, Phyllis, to the island of Providenciales. He also loved treks to Europe, especially France. And his intense interest in and study of the Holocaust prompted a journey to Auschwitz and other sites integral to Holocaust history.

His interests extended to politics and he was an active figure on that front in West Michigan. In the 1960's, Mr. Reamon ran unsuccessfully against former President Gerald R. Ford three times *for* the 5th District U.S. Congressional Seat.

Survivors include his beloved wife, Phyllis J. Reamon, his children, William (Bonnie), Martha (Glenn W. House, Jr.), Daniel, Matthew, and Rebecca; grandchildren, Sarah, Billy, Justin, Molly, Zachary and Mackenzie; stepchildren: Charles Long (Tammy), David Long (Dolly) and Rebecca Long; step-grandchildren, Christopher, Emily and Charles; and nieces and nephews."

Bill Junior, as he is known to many, was quoted in the Grand Rapids Press shortly after his father's death, and commented upon his dad's famous gaze. I believe he could have stared down anybody on the planet. One of my first experiences of Mr. Reamon's ability to intimidate was a deposition of a board certified psychiatrist. This experienced witness asked me who was in his waiting room to cross-examine him. When I told him it was Bill Reamon he immediately began to proclaim that he wasn't intimidated. The more he proclaimed it, the more I knew I was in trouble. Sure enough, on cross exam, Bill started asking him about the DSM IV, and asking if the patient didn't have all of the elements of this diagnosis code or that. The doctor indicated that he would have to look up the elements in the book. Mr. Reamon proceeded to cite the elements of the relevant sections for the doctor, from memory. The doctor had to admit after the deposition was over that he was, in fact, quite intimidated.

Bill Reamon had what I would call "stage presence." When he walked into a room, everyone took notice. It wasn't just intimidation, either. He simply knew how to obtain and keep the full attention of his audience without saying a word. Then, when he did speak, no word would fall on a distracted ear. I once represented one of several co-defendants in a wrongful death case Mr. Reamon brought in Kent Circuit. Among the co-defendants were many seasoned veterans from some of the biggest firms in West Michigan. I was staff counsel for an insurance company with primarily workers' compensation experience. I'd been through a number of mediation hearings in circuit court, but I've not seen one like this before or since. Bill cast a spell over the three mediators, and had the entire room in tears or nearly in tears before he was through. What a performance, and straight from the heart. As we were leaving the courthouse, he did something I'll never forget. He came up to me and told me that of all the mediation summaries presented by the myriad of defense counsel, mine was the only one that made sense and then he congratulated me on it. This more than made my day, but to the point, it revealed a side of Bill Reamon that opponents rarely had a chance to see.

On January 17, 2001, his memorial service packed the church with common folk and dignitaries alike, a testament to the scope of influence he held. Memorial contributions may be made to the Richard J. Lacks Cancer Center of St. Mary's Mercy Center or Heart Research at the Blodgett/Butterworth Health Care Foundation in Grand Rapids.

Timothy M. McAree, editor

New Magistrate Assignments

Courtesy of Chief Magistrate Crary Grattan

The following docket changes are effective January 29, 2001 for Magistrate Wierzbicki and Rabaut, February 6, 2001 for Magistrate Frankland, and February 12, 2001 for Magistrate Harris.

Magistrate	*Former Docket*	*New Docket*
John Wierzbicki	Mt. Clemens	Pontiac (4 weeks)-Haith's former docket
John Rabaut	Detroit	Mt.Clemens (4 weeks)-Wierzbicki's former docket
Kenneth Frankland	None	Okemos (2 weeks)-Battle Creek (2 weeks) Fuller's former docket
Michael Harris	None	Detroit (4 weeks) - Rabaut's former docket

Magistrate Smith will handle the Fuller Okemos docket for the week of January 29. Magistrate Oldstrom will handle Magistrate Rabaut's old Detroit docket through February 9, 2001. Lastly, Magistrate Ayyash submitted his resignation effective February 16, 2001, and shortly thereafter, Governor Engler appointed Michael J. Barney to fill the unexpired term of Magistrate Ayyash. He was assigned to the Detroit office and assumed the Ayyash docket. Barney commenced his employment with the board in mid-March, 2001. Barney has been a workers' compensation defense attorney with the law firm of Gerald R. Skupin since July of 1999, and before that was with the firm of Beresh, Prokopp and Sekerek.

Please join us in congratulating the above magistrates on their respective appointments.

Open Letter on Civility

All of us are experiencing increasing pressures in the practice of law. Many individual practitioners and law firms alike are having difficulty in obtaining enough business to maintain their practices. New legislation and regulations have created stress in the management of the practice of law. The increase in the numbers of practicing attorneys has created competition for employment. There are, to be sure, many other professional and personal stresses significantly increasing the pressure experienced by members of our Section as well as throughout the State Bar.

These pressures appear to have negatively impacted upon the civility between lawyers to lawyers and lawyers to and from the bench. While standards of civility have been deteriorating throughout the Bar, the Workers Compensation Section has been recognized throughout the state as being one of last bastions of true civility in the practice of law. Many of you might recall that Justice Kelly commented on this civility when speaking at the Section meeting of the State Bar Convention in Grand Rapids a year ago.

Recent incidents involving conflict between professional participants in hearings before the Board of Magistrates suggest that we all need to keep in mind that the standards of civility are part of the Lawyers' Code of Conduct. While we are clearly in an adversarial environment, it is important to remember that we are each representing the interest of our respective client and not our own personal interests. Personal conflict involving lawyers or Magistrates only serves to cloud the issues and reduces the effectiveness of the lawyer in representing the interests of the true party involved the litigation, the client.

We, the members of the Workers Compensation Section, have a long and proud history of voluntary cooperation between our members in the pursuit of the interests of our clients. We have been successful in maintaining civility within the adversarial system in the past, let us each, individually and collectively I strive to maintain civility into the future.

—Anonymous

2002 Winter Seminar

By Alan S. Helmore

Initial planning has begun for the WC Section, 2002 Winter Seminar. It has been proposed that the Winter Seminar might be held in Las Vegas. Some thought has been given to having the actual Seminar limited to an extended weekend 3-4 days with an individual optional extension to up to 10 days. It might also be possible to include optional side trips for a few days. (possible side trips might include a trip to a ski resort, health spa, golf Mecca, dude ranch etc.) At this point, the options are limitless.

MEMBER COMMENTS ARE SOLICITED

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Workers' Compensation Law Section

Spring Seminar Agenda

Thursday, June 14, 2001

3:30 – 5:30 p.m.	Registration
5:00 p.m.	Hotel Check-In
5:30 – 7:30 p.m.	Cocktail Reception
7:30 p.m.	Buffet Dinner

Friday, June 15, 2001

7:30 – 8:15 a.m.	Continental Breakfast
8:15 – 8:30 a.m.	Introduction by Richard Woods, Section Chair
8:30 - 9:30 a.m.	Craig R. Petersen, Dir., Bureau of Workers' Compensation Crary Grattan, Chair, Bd. Of Magistrates Jurgen Skoppek, Chair, W.C. Appellate Comm.
9:30 – 9:45 a.m.	Break
9:45 – 10:45 a.m.	Gerald M. Marcinkoski and John Braden with Point/Counterpoint
10:45 a.m.	Adjournment
11:30 a.m.	Golf Tournament
6:00 – 7:30 p.m.	Cocktail Reception

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Workers Compensation Section Newsletter

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Richard G. Wood, Chairperson

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Opinions expressed herein are those of the authors, or the editor, and do not necessarily reflect the opinions of the Section Council or the membership.

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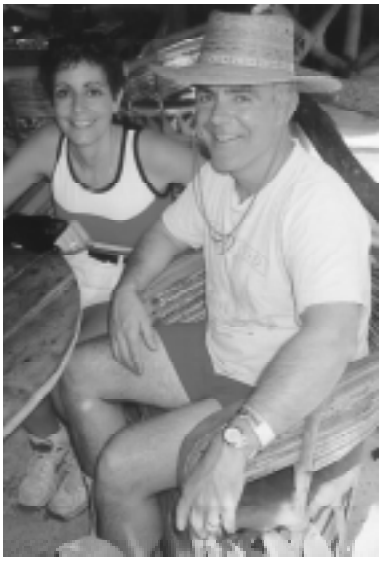
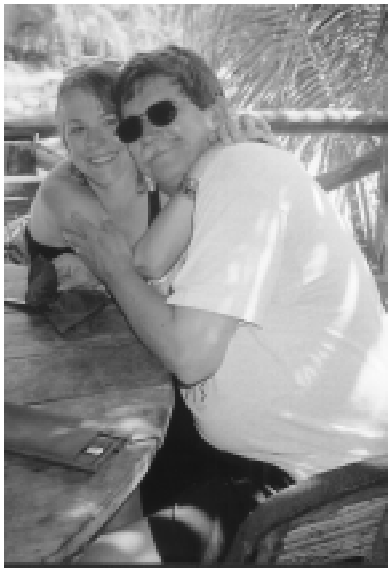
Scenes from Cancun

Photographs courtesy of Michael Brenton





RECENT COURT DECISIONS

By Jerry Marcinkoski

Since our last newsletter there have been a number of decisions from the Courts and Commission affecting workers' compensation law, including a larger than normal number of published decisions from the Court of Appeals. Here is a synopsis of the decisions.

SUPREME COURT

There have been no decisions from the Supreme Court in workers' compensation cases since our last newsletter as of the writing of this newsletter. However, the Supreme Court has recently granted leave to appeal in three workers' compensation cases and still has before it a workers' compensation case that was argued and should be released no later than July 31, 2001. The cases pending on leave granted before the Supreme Court and the issues involved are as follows:

- *Robertson v DaimlerChrysler Corp*, SC #116276 [work-relatedness of mental disabilities]
- *Cain v Waste Management, Inc*, *and Second Injury Fund (Total and Permanent Disability Provision)*, SC #116389 and #116945 [in determining loss of industrial use of the leg for total and permanent disability purposes do you use a "corrected" test which takes into account corrective devices such as a leg brace or an "uncorrected" test]; (see also the invitation to the section, noted below).
- *Lesner v Liquid Disposal Inc,* SC #116205 [calculating death dependency benefit under *Weems* in a case that also involves *Franges*]
- *Crowe v City of Detroit,* SC #115983 [election of "like benefits" under § 161]

In *Cain*, the Supreme Court's order granting leave contained the following invitation to the Section (and others):

> We invite the Worker's Compensation Section of the State Bar of Michigan to file briefs amicus curiae in support of each side of this dispute. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae.

COURT OF APPEALS

The Court of Appeals has released a large number (10) of published decisions since the last newsletter. Published decisions are of precedential value, while unpublished decisions are not. Here is a summary of the published decisions.

Powell's supervening event analysis continues under § 301(5).

In *Sington v Chrysler Corporation*, ___ Mich App ___ (2001) (C.A. #225847, released for publication May 1, 2001), the Court of Appeals decided a number of important questions relating to the "reasonable employment" [favored work] provisions of § 301(5).

Plaintiff suffered a work injury, but eventually returned to work for an undetermined amount of weeks (but less than 250) until he suffered a non-work-related stroke that rendered him completely unable to work.

The magistrate and Commission denied plaintiff benefits, but the Court of Appeals reversed and remanded. The Court agreed with plaintiff that the following portion of *Powell* is still valid: a supervening, non-work-related event that precludes continuance at a favored job is not at bar to recovery. Since this plaintiff was unable to continue at his reasonable employment due to such an event, he was not disentitled to benefits.

In the course of deciding this case, the Court also disagreed with the magistrate and Commission as to whether plaintiff was laboring at "reasonable employment", as opposed to his regular job. The facts were that plaintiff continued to work in essentially the same classification and within the same departments as he had pre-injury, but certain job duties were not assigned to him because of his work-related limitations. The Court said that such an employee is laboring at "reasonable employment" rather than at his regular job. Finally, the Court also said that since this case fell within § 301(5), the analysis developed under § 301(4) and *Haske v Transport Leasing, Inc., Indiana*, 455 Mich 628; 566 NW2d 896 (1997), did not apply. The employer had argued that there was no link between the work injury and plaintiff's present unemployment under such analysis. The Court said § 301(5)'s reasonable employment principles applied.

<u>Marital or tax-filing status does not change post-injury</u>

In C*hambers v National Redi Mix, Inc,* 244 Mich App 546 (2001), the Court of Appeals held that an employee's marital or tax-filing status does not change post-injury.

At the time of injury, plaintiff was single with no dependents. By the time of trial, plaintiff married and had a child. In setting plaintiff's weekly rate of compensation, the Commission increased plaintiff's rate due to his marriage and change in tax-filing status and for the after-acquired child.

The Court of Appeals said that there was no clear statutory authority for changing rates post-injury as a result of a change in marital or tax-filing status. Therefore, the Court reversed that ruling. The increase for a conclusively dependent child, however, was allowed.

<u>Construction of § 361(3)(g)'s phrase: "permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury"</u>

Continued on page 8

Recent Court Decisions

Continued from page 7

The total and permanent disability provision which applies to loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm contains the following limitation:

> "for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury." The question presented in *Sullens v Ford Motor Co*, ___ Mich App ___ (2001) (C.A. #227185, decided on March 23, 2001) was: what is the proper construction of this limitation?

The magistrate and Commission held that this provision requires plaintiff to file a claim before the expiration of 500 weeks less 30 days from the date of injury. Plaintiff argued that a claim can be filed later than that point in time so long as the plaintiff demonstrates that the total and permanent disability manifested itself during the 500 weeks less 30-day period.

The Court of Appeals agreed with plaintiff. The Court said that the Legislature could have promulgated a statute of limitations in this regard if it had wanted, but on its face § 361(3)(g) does not operate to limit the time for filing the claim.

Police and firefighter presumption of work-relationship for respiratory and heart problems

Section 405 provides a presumption that respiratory and heart problems are work-related for firefighters, police, and certain others. In *Price v Bloomfield Township*, 244 Mich App 410 (2001), the Court of Appeals addressed the strength of that presumption.

The Court of Appeals had been asked by the Supreme Court to decide on remand the following question: "whether *Schave* correctly interpreted the presumption of work relatedness" in § 405(2). *Schave* is a 1975 Court of Appeals' case that described a very strong presumption of work relationship in § 405(2). In *Price*, the Court of Appeals concluded that *Schave* was wrongly decided. In so doing, the Court reversed the Commission's award of benefits and reinstated the magistrate's denial of benefits.

Price says that the § 405 presumption only removes the "initial burden" of claiming work-relationship. The Court said that "once the employer comes forward with evidence by which a fact finder might conclude that the physical injury did not result from the employment, . . . the presumption has no continuing effect." At that point, the question of work relationship "is then tested using the same principles applicable to any other employee."

Calculation of Fund's liability in dual employment

In *Gilbert v Second Injury Fund*, 244 Mich App 326 (2001), the Court of Appeals decided this case for a second time, this time on remand from the Supreme Court. In this dual employment case, the employer with whom the plaintiff was injured did not report plaintiff's wages to the IRS, nor did plaintiff. Plaintiff's injury for this employer affected his wage-earning capacity at that employer, as well as at his other employer. The question presented was: how does the dual provision apply, if at all, in a situation where neither plaintiff nor the injury-employer reported wages to the IRS, but those wages are otherwise easily determinable?

In its prior opinion, the Court of Appeals had declined to apply the dual employment provision on the basis that the result would be absurd. In the instant opinion, the Court of Appeals applied the provision and, working through the mathematics involved, concluded that the Fund was obliged to reimburse the injury-employer 100% of the rate of compensation. The reimbursement rate in such cases will be 100% because, under the Court of Appeals' math, zero is the numerator to be placed in the fraction described in the dual employment provision.

Cost-containment limitations apply to no-fault carriers seeking reimbursement

In *Autowners Insurance Company v Amoco Production Co*, ___ Mich App ___ (2001) (C.A. #223572, released for publication March 27, 2001), the issue was whether the cost containment rules in the Act apply to limit a workers' compensation carrier's reimbursement of medical expenses to a no-fault automobile insurance carrier. The Court of Appeals affirmed the Commission's ruling that the cost containment rules do apply.

The Court of Appeals noted that the employee had not paid his own medical expenses and, therefore, the Health Care Administrative Rule which requires the employee to be fully reimbursed was not applicable. Instead, where a no-fault carrier pays the medical expenses instead of the employee, the cost containment rules do apply and do not require the workers' compensation carrier to reimburse in full.

The Court of Appeals also said that Act's 10% interest provision applied, rather than the 12% provision urged by the no-fault carrier.

Coordination of benefits and redemptions where there is dual employment; Cross-appeals

In *Rahman v Detroit Board of Education* and *Second Injury Fund (Dual Employment Provisions)*, ___ Mich App ___ (2001) (C.A. #215628, released for publication March 16, 2001), the Court of Appeals decided two questions of first impression under the dual provisions of § 372.

Plaintiff worked for two employers, claimed an injury against each, redeemed with one of the employers, and successfully obtained an award against the other. The employer held liable coordinated its payment of dual employment benefits to plaintiff.

The initial question of first impression was: does plaintiff's redemption with one of his employers eliminate or reduce the Fund's reimbursement obligation under the dual employment provisions? The Court said that the redemption neither precludes application of § 372, nor does it afford the Fund a credit.

With respect to the second question of first impression, the Court said that the Fund is to calculate its reimbursement obligation to the injury-employer by applying its percentage to the rate payable before coordination. The Fund's apportionment percentage is not to be applied to the post-coordination weekly rate.

Finally, the Court said that it does have jurisdiction over cross-appeals and delayed cross-appeals in workers' compensation cases. There had been some question in this regard. The Court now says that after it grants leave to appeal, then the non-appealing party can cross-appeal.

Reimbursement between carriers can be forfeited

In *Stein v Braun Engineering*, ___ Mich App ___ (2001) (C. A. #225211, released March 20, 2001), the case had been litigated primarily to determine which of two employers was liable for plaintiff's work-related disability. One employer had voluntarily paid plaintiff from the time of his injury through the time of the magistrate's decision, a decision that switched liability to the other employer. The employer found liable by the magistrate appealed to the Commission, and the employer who had voluntarily paid cross-appealed on the basis that the magistrate failed to grant it reimbursement from the liable employer.

The Commission affirmed the date of injury finding and held that the reimbursement request was waived.

On appeal, the Court of Appeals affirmed the Commission. The Court said that the reimbursement request was not waived but was "forfeited" because the voluntary-pay-employer had not asserted the request for reimbursement at the trial level.

Reimbursement of 70% benefits from the Fund

In *Charboneau v Beverly Enterprises, Inc,* 244 Mich App 33 (2000), the Court of Appeals reversed the Commission's conclusion that the employer was entitled to reimbursement of 70% benefits from the Second Injury Fund under § 862.

This case had a complex history. The magistrate held the employer liable and the employer appealed. While the award was still pending on appeal, the employer filed a petition to stop compensation benefits. The award in the original case became final prior to completion of the petition to stop proceeding. The employer paid the employee all accrued compensation owing upon completion of the original litigation. The employer then ultimately prevailed on appeal in the petition to stop proceeding. The employer then looked to the Fund for reimbursement of benefits paid during the appeals process under § 862.

The Court rejected the employer's request on the basis that § 862 does not contemplate reimbursement in an overlapping situation such as this where the original award and the petition to stop ruling are both on appeal with the employer prevailing in the latter but not the former.

Estate of deceased employee can collect benefits

In *Grier v Yellow Freight Systems, Inc*, ___ Mich App ___ (2001) (C. A. #222037, released for publication March 9, 2001), the employee had no dependents, obtained a closed award of benefits, but passed away prior to completion of the litigation. The employer argued that benefits were not payable because the deceased died without dependents.

Affirming the Commission, the Court of Appeals disagreed. The Court said that an award under such circumstances is an asset of the decedent's estate and the employer is liable to that estate. The Court said that the employer was improperly seeking to transfer the dependent requirement from the death benefits provisions of § 375 to this situation. That requirement did not apply because this was an action for lifetime benefits not death benefits.

WORKERS' COMPENSATION APPELLATE COMMISSION

The Commission has issued a number of important opinions, including *en banc* opinions. Here is a summary of some significant Commission opinions.

En banc decision describing how to determine whether work contributes "in a significant manner"

The Commission released an *en banc* opinion in *Martin v City of Pontiac School District*, 2001 ACO #118 for the purpose of providing guidance on how Magistrates should determine and how parties should attempt to prove or disprove "significant" contribution under § 301(2). This section applies to mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions. The statute provides that such conditions are compensable where work contributes "in a significant manner."

The Commission began by saying that the worker's compensation system until now had "failed to articulate a specific meaning for this significant manner requirement." The Commission noted that Legislature introduced the phrase but the legislative history was not helpful in shedding light on what is "significant." Supreme Court cases are helpful insofar as they describe a weighing process. But, otherwise there is "no additional guidance to the key question: what is significant?"

The Commission reviewed other states' similar statutes and case law, as well as legal definitions of "significant", and settled on the following definition of significant: "'of considerable amount; vital; more than nominal.'"

The Commission then offered a multi-factored test to assist Magistrates and litigants in practical application of this definition. The test is summarized as follows:

> In summary, we have adopted a definition for significant contribution that can be satisfied only when a four-factor test is met. Contribution is significant when it constitutes a vital component or when it contributes a considerable amount toward the progression of the condition. The factors to consider are 1) the number of occupational and non-occupational contributors, 2) the relative amount of contribution of each contributor, 3) the duration of each

Continued on page 10

Recent Court Decisions

Continued from page 9

contributor, and 4) the extent of permanent effect that resulted from each contributor.

In discussing the last factor, the Commission emphasized that " a pure last-event analysis will never satisfy the statutory standard."

This four-factor inquiry is not "a bright line test" and "satisfaction of each factor is not required." For example "overwhelming proofs regarding one factor can overcome the absence of proof regarding another factor."

Applying the four-factor test, the Commission reversed the Magistrate's award of mental disability benefits because the Magistrate explicitly applied a "'straw-that-broke-the-camel's back'" inquiry. Under the four-factor test, the Commission found that the non-occupational contributors greatly outnumbered, outweighed and spanned much longer periods of time than the work events.

Voluntary pay agreements not enforceable

In *Morley and Director, Bureau of Worker's Disability Compensation v General Motors Corp*, 2002 ACO #120, the Commission on remand from the Court of Appeals addressed the issue: can penalties be imposed for failure to pay pursuant to a voluntary pay agreement, taking into consideration administrative rule 408.33(2)(b)? This administrative rule says that if a case is in litigation and the defendant agrees to voluntary pay benefits but does not do so within 30 days of the date the agreement is formalized, then a penalty can be imposed.

The Commission explains that it cannot enforce the administrative rule because it conflicts with and is not recognized in the Act. The Commission said that the rule conflicts with the statute because enforcement of voluntary pay agreements would: (1) circumvent the protections afforded plaintiffs in the redemption process, and (2) offend § 831which provides that voluntary payment of compensation is not a determination of liability.

Calculation of post-injury average weekly wage

In *McDaniel v Pneumo Corp*, 2001 ACO #27, plaintiff returned to work after a work injury and some weeks his post-injury wages exceeded his average weekly wage on the date of injury and some weeks his post-injury wages fell below that mark. The Magistrate and Commission faced the question: how do you determine an "average" post-injury weekly wage for purposes of calculating a partial rate?

The Magistrate examined all pertinent provisions of the statute and concluded that no provision provides sufficient guidance. She explained that while the Act defines how to determine an "average" weekly at the time of injury, it offers no help in identifying a method for calculating a post-injury "average" weekly wage. The Magistrate therefore settled on a week-by-week comparison of wages.

The Commission reversed. The Commission said that "[w]ithout any appropriate definitive statutory time, we adopt a reasonable time standard." Under the unique facts of this case where plaintiff had completed six years of post-injury work and for certain calendar years earned "'well in excess of what his earnings were prior to his injury,'" the Commission said "at least one year should expire after the injury and commencement of reasonable employment." The Commission noted, however, that "nothing in our opinion should be construed to require an employee to wait for a year before receiving partial compensation benefits."

En banc opinion on dismissals of appeals for failure to file transcripts

In *Worthy v Micro Platers Sales Inc*, 2001 ACO #162, the Commission dismissed plaintiff's appeal for failure of the appealing party's counsel to file the transcript by the statutory deadline and for failure to timely request an extension of time to file the transcript. Rather than simply issue an order dismissing the appeal, the Commission issued an *en banc* opinion "because of our concern over possible misinterpretation" of the Court of Appeals statements in an unpublished order of the Court in a different case, *Kurtz v Faygo Beverages*, (C.A. Docket #230773, issued February 20, 2001). In *Kurtz*, the Court of Appeals said that under the present state of the law it was compelled to reverse the Commission's transcript-based dismissal given prior Supreme Court orders suggesting that the Commission abuses its discretion under similar circumstances. In so doing, however, the *Kurtz* Court did urge the Supreme Court to restore the discretion of the Commission to enforce statutory deadlines.

The Commission endorsed *Kurtz's* suggestion that the Supreme Court restore the Commission's discretion, but the Commission explained that the Supreme Court cases relied upon by *Kurtz* were distinguishable. The Supreme Court cases had been based upon the Commission's prior policy which had placed the obligation of filing transcripts on the court reporter. The Supreme Court had said that under such circumstances failure to timely file a transcript was beyond the appellant's control. The Commission explained that it has since changed its policy and, as of January 1, 1999, the obligation to file transcripts is now placed on the appellant. Given this new policy, the Commission says that the timely filing of transcripts (or a timely request to extend the time for doing so) is now within the control of the appellant.

The Commission added that its present policy also routinely allows for reconsideration of the dismissal if the dismissed party files a timely motion for reconsideration within 14 days from the dismissal order and demonstrates that the reason for the late or absent filing was beyond the party's control. The reasons offered must be supported by an affidavit or other evidence.

In resolving the case at hand, the Commission dismissed the appeal and allowed time for a timely motion for reconsideration as described above.

Work avoidance

In *Solis v Airborne Express*, 2000 ACO #638, the Commission reversed the Magistrate's resolution of the work avoidance issue under § 301(4) and *Haske*.

The Magistrate had rejected defendant's vocational expert's testimony on the basis that the expert never met with plaintiff, did not file a *bona fide* rehabilitation plan, and could not testify at the time of his deposition that the job leads he had previously furnished plaintiff were still open.

The Commission rejected the Magistrate's reasoning. The Commission said that the expert never met with plaintiff because "it was plaintiff who consistently refused to" meet with the expert. The Commission said that "the absence of a bona fide rehabilitation plan" was irrelevant because this was "not vocational rehabilitation, but avoidance of work under *Haske.*" Finally, inability to testify at the time of deposition as to whether the previously provided jobs were still open was not relevant because the job opportunities were open at the time they had been provided to plaintiff.

For these reasons, the Commission denied plaintiff benefits for avoiding available work. See also, *O'Shaughnessy v Atlas Supermarkets, Inc*, 2000 ACO #575.

Bits and pieces

Here is a quick list of other significant cases recently from the Commission:

- Interaction of § 301(4) [the definition of disability] and § 301(5)[the reasonable employment provisions] – *Wilson v Walt Industries, Inc,* 2001ACO #133 contains an extensive and in depth examination of the interplay of Section 304 and 305 where an employee has returned to reasonable employment for more than 100 weeks.
- Unreasonable refusal of surgery – In *Bowen v State of Michigan, Department of Corrections*, 2001 ACO #78, the Commission said that a claimant is barred from collecting benefit if the employer proves: (1) the proposed surgery is not considered a danger to life or health, and does not expose plaintiff to extraordinary suffering; and, (2) the surgery offers a reasonable chance of relief from the condition.
- Rate Tables – In *Vaughn v Schafer Bakeries, Inc*, 2001 ACO #633, the Commission affirmed the Magistrate's holding that in calculating partial benefits where the employee has returned to work, the parties are to apply the updated rate tables in each new year in which the subsequent earnings are received. The rate table for the year of the original injury is not to be used to determine subsequent earnings in later years.
- Section 222 – In *Goldstein v Dairy Mart*, 2001 ACO # 167, the plaintiff failed to list prior medical providers on his application for hearing. The Commission remanded for a determination of whether the omission was willful. The Magistrate held it was not willful, suggesting in a colloquy with plaintiff's counsel that plaintiff forgot or did not make the connection between prior treatment and his present condition. The Commission reversed. The Commission said that while "forgetfulness" can be a valid excuse, plaintiff offered no evidence that he forgot the names of the treating doctor or that he considered the prior problem a separate condition. Statements by counsel on the record, without evidentiary support, do not suffice.
- Section 222 – In *Meader v American Building Maintenance*, 2001 ACO #130, the Commission rejected defendant's argument that plaintiff violated § 222 by not providing a treating doctor's records. The Commission said that plaintiff did not begin treating with the doctor until *after* she filed her application for mediation or hearing. Section 222 only requires production of records possessed at the time parties file their pleadings.
- Section 222 – In *McComber v McGuire Steel Erection, Inc,* 2001 ACO #41, the employee's application for benefits did not disclose his post-injury employment. The Magistrate refused to dismiss the employee's claim under § 222, but the Commission reversed. The Commission reiterated its holding from prior cases that a "lawyer's omissions, through operation of law, become the client's." For this reason, plaintiff's testimony that he provided the information to his attorney and did not know why it was omitted on his application did not save his case.

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