State Bar of Michigan

Workers' Compensation Section Newsletter

Spring 2005

WCAC Bids Farewell To Chairperson Reamon

On April 16, 2005, Workers' Compensation Appellate Commission Chairperson William G. Reamon, Jr. left the WCAC to accept an appointment to an Administrative Law Judge post with the Social Security Administration Office of Hearings and Appeals.

Reamon's brief career with the Commission commenced in March 2004 when Governor Granholm appointed him as Chair of the "New" Commission, along with fellow members Martha Glaser, James Kent, former Commissioner Richard Leslie and Rodger Will. Prior to that, he was a partner in the Grand Rapids law firm of Reamon, Fotieo, Szczytko & Fedewa. Reamon spent the majority of his 17 years of private practice with his father, William G. Reamon, Sr., and sister, Martha E. Reamon, concentrating primarily on the representation of plaintiffs in personal injury matters. From 1989-92, he served as a WC Magistrate, covering dockets ranging from Kalamazoo to Houghton.

During his stint with the Commission, Reamon's goal as Chair was to make the WCAC and its Commissioners more accessible and responsive to the Bar and other stakeholders, such as the Board of Magistrates. It was his hope that this policy would improve the lines of communication between these groups to thus foster a new era of understanding and cooperation among Bench and Bar. A secondary aim was to improve the Commission's productivity and timeliness in disposing of appeals.

In line with the first goal, the WCAC placed a high priority on participation in numerous outreach activities over the past year. Commissioners were provided multiple speaking opportunities at seminars and meetings held by various stakeholder groups, including

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Murray Feldman, Newsletter Editor

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Board of Magistrates Chairperson's Report

Magistrate Jack A. Nolish

It seems as though less than three months have elapsed since my last report to this bulletin. Fortunately, the editor's staff makes sure that the contributors keep to the deadlines no matter how we perceive the passage of the "Days of our Lives."

I want to take this opportunity to wish Bill Reamon a hearty congratulations and good luck on his new endeavor as an Administrative Law Judge for the Social Security Office of Hearings and Appeals. Their gain is certainly our loss. The good citizens of Paducah, Kentucky hardly know that "Hurricane Bill" is headed their way to dispense justice at an alarming rate. I look forward to working with Commissioner Martha Glaser as she assumes the role of interim chair of the Commission.

Since my last report, we have seen the appointment of new magistrates: Thomas Moher in the UP and Gaylord; Paul Purcell and Michael Theile in Saginaw; Alexander Ornstein in Flint; Timothy McAree in Pontiac and Traverse City; and John Rabaut and Joy Turner in Detroit. Magistrates Andrew Sloss, Jay Quist and Michael Harris have been re-appointed to serve in Mt. Clemens, Grand Rapids and Flint. Magistrate Christopher Ambrose has been transferred to a split docket in Lansing and Flint.

This year's appointment process took place in record time with minimal disruption in the docket. Special thanks should be given to the participants in the appointment process: The Qualifications Advisory Committee, chaired by Ed Welch; Deputy Director David Plawecki and, of course, Governor Granholm and her staff.

The docket reassignments have taken place and things are achieving a new normal. The next change to be made is a bit of fine-tuning. As of July 1, 2005, all the Detroit pre-trials will be on Monday and all Detroit Magistrates will share the same "writing day" of Friday. As in the past, each Magistrate will be able to schedule any type of hearing needed on a Monday or Friday but the Agency scheduled Detroit pre-trials will all be set for Monday.

Most of you are unaware of certain obligations the administration has under the Act to report to the legislature. Every other year, we are required to report the impact of inflation and other factors on the weekly benefit rates provided under the Act. This year, the twelfth such study was due in March and I participated in its preparation. I am including the text of the discussion portion of the document. The report has been delivered and it is called "Adequacy of Benefits Paid Under the Workers' Disability Compensations Act Twelfth Biennial Study."

This report is done biennially in odd-numbered years and must be submitted by March 1 of the reporting year. The report is prepared under the statutory obligation of MCLA 4189.364, which requires: "…The study shall evaluate the effects of inflation on benefits and other factors that the director considers relevant." It is time for a look at the "other factors" that impact injured workers in this state that are collecting Workers' Compensation benefits.

The impact of inflation on the specific weekly rate is easily measured by calculation. However, the higher wage earners suffer from the impact of the **maximum rate limits**. Workers in 2005 earning over $765.12 per week do not receive any additional

compensation beyond the maximum weekly workers' compensation rate of $689. That weekly wage is equal to $19 per hour and there are many skilled workers making more. Also, the higher wage earners tend to have fringe benefit plans but the value of those plans drops out of the calculation for workers eligible for more than $510 per week in workers' compensation benefits.

Recently, a study panel of the National Academy of Social Insurance (*http://nasi.org/*) reported on a comprehensive study of the "Adequacy of Earnings Replacement in Workers' Compensation Programs." The study found wage loss studies "the best yardstick to measure the adequacy of benefits." There are a number of advantages to this approach. These studies look at actual wage replacement rather than some average or estimate of statutory benefits. They take into account wages earned by the worker after the injury as well as the fact that for most workers wages increase over time. Finally, they can be tailored to examine various aspects of the system. For example, in other states they have compared the extent of wage replacement in long-term as compared to short-term disabilities. In some states they have shown that a relatively small category of cases accounted for most of the "average" inadequacy of benefits.

These studies have been done in California, Wisconsin, Washington, Oregon and New Mexico. It is recommended that Michigan sponsor such a study in order to fully evaluate the adequacy of benefits here.

The **fringe benefit** issue goes beyond the simple impact in the calculation of average weekly wage. Since the Workers' Compensation Act does not require employers to continue fringe benefits while an individual receives benefits under the Act, many families lose their **health insurance** and the weekly benefits paid under the Act do not allow injured workers to effectively use the option to continue benefits under "COBRA." If the injured worker is the principal breadwinner in the family and the employment is the source of the family health coverage, then the whole family is adversely affected. In many cases, the injured worker suffers since the medical care provided under the Act is limited to the conditions found related to the injury. For example, a worker disabled with knee problems will not have medical expenses covered for heart problems.

Although MCL 418.356 provides for an increase in benefits after "**2 years of continuous disability**," this only applies to lower wage rate cases. The increase only comes if the worker has a weekly compensation rate that is less than 50% of the state average weekly wage. The worker also must show 2 years of disability at a level similar to that required for Social Security Disability. However, if the worker is disabled to that extent, it is likely that SSD benefits are being paid and the increase from the 2 year continuous benefit will do little more than reduce the SSD benefit due to caps specified in the SSD program.

There are **age-based reductions** in benefits that need to be addressed. Under present law, when a worker is receiving benefits, there is a 5% reduction in weekly benefits at age 65 and an additional 5% reduction each year thereafter until the weekly benefit rate is cut in half. (MCLA 418.357(1)) Also, there is coordination of benefits (MCLA418.354) for age-based social security with the requirement that the worker apply for social security retirement benefits when eligible to do so. However, the Social Security Administration has revised the age for full retirement on a graduated basis. "Boomers" will have to reach 66 or more to receive full benefits and being forced to apply early would adversely affect long-term benefit amounts. The statutory age reduction in the weekly benefit rate commences before the worker is eligible for full social security retirement benefits. Also, workers are staying on the job significantly longer than age 65 and are working for more than "pocket money" to supplement social security benefits. Recent case law regarding aggravation of degenerative conditions has severely limited the ability of an injured older worker to receive benefits. (*Rakestraw*) It may be time to consider expanding the coverage of the Vocational Handicap certification to include diseases of the aging process (MCL 418.901)

Lastly, it is time to review the **vocational rehabilitation** benefits available under the Act. The limitation of 104 weeks of training is not realistic in light of the level of training an unskilled worker must undergo to become part of the modern high-tech work force. It is a long road from illiteracy to computer literacy.

At this writing, it does not appear that there will be any legislative action on these issues anytime soon. If there is, I will certainly make the Bar aware of any proposed changes. It is time, however, to look at the adequacy of benefits under our system. There has not been a significant revision in this area since 1982 and the employment world today is a far different place then it was back then.

WCAC Farewell
Continued from page 1

the WC Section of the State Bar, the Michigan Self Insurers Association, the Qualifications Advisory Committee, the Michigan Trial Lawyers Association, etc. Also, the Commission held a number of off-site Oral Arguments on pending appeals, including what is thought to be the first Oral Argument on a WCAC case held in the Upper Peninsula. It was Reamon's hope that this procedure would be an increasingly utilized mechanism to highlight issues and develop cases in greater detail, and as an effective means to establish "eye to eye" relationships with practitioners in hopes of enhancing the collegiality and familiarity between Bench and Bar.

In terms of the Commission's productivity over the past year, Reamon is especially pleased about the fact that a reduction of over 50% was made in the number of older appeals (cases ready for review for longer than 6 months). Also of note was the fact that the 5 Commissioners published approximately 485 opinions, the most put out by the Commission since 2000.

Though he found the work of the Commission very interesting, it was the people he encountered in the course of that job that made the most indelible impression. In the "farewell" gathering memorialized by the photo on page 1, Reamon stated "Though I've only been here a year, I feel like the staff and commissioners and I have become friends. I can truthfully say that it's the people I've worked with that have made this job a pleasure I won't forget." Reamon also cited the unique degree of support and guidance provide by Deputy Director David Plawecki and Communications Specialist Marcia Valentine as noteworthy elements to the Commission's first year experience.

We here at the Commission have known Bill for only one year, but it seems as if we have known him our entire careers. He is a kind and caring person, with a down to earth manner and style. (Some might say folksy.) His delightful sense of humor and ability to tell a story is always enhanced by his genuine humility. The invaluable experience he brought to the Commission will be put to use here, long after he has left us for the corncob pipes and straw hats of Paducah, KY. He will be remembered for several accomplishments. Perhaps foremost was the stabilizing leadership he displayed in guiding the New Appellate Commission through the uncertainties of its first year of existence. His hard work and amiable personality were key factors in engendering an atmosphere of openness, collegiality, and co-operation, which led to high productivity, quality work, and a new found willingness to reach out to the Commission's clientele. 🛠

Trade Readjustment (TRA)
(Help for Those Affected by Foreign Competition)
and Health Coverage Tax Credit
(Help with Health Insurance for the TRA-Eligible)

If you have a client, with or without an injury, who is laid off from work due to foreign competition, they may be entitled to receive not just TRA benefits extending their state unemployment compensation, they may also be entitled to a federal income tax credit for 65% of their private health insurance premiums. This is not just a deduction. It is a dollar-for-dollar credit. The same is true for people receiving benefits from the Pension Benefit Guarantee Corporation (PBGC) who are at least 55 years old. – Magistrate Murray Gorchow

Workers who lose their jobs or whose hours of work and wages are reduced because of foreign competition may be eligible for federal assistance through the Trade Adjustment Assistance program. Weekly TRA benefits may be payable once state unemployment benefits and any extensions are exhausted. Usually TRA will be paid only if the individual is enrolled in an approved training program, but there are exceptions. An application may be filed for TRA with any *Michigan Works!* Agency Service Center. For detailed information regarding this program, eligibility requirements and benefits go to the following website: *http://www.michigan.gov/uia/0,1607,7-11826899--,00.html*. Then scroll down and click on "Trade Readjustment Allowance(s) TRA Fact Sheet 102." Also see Fact Sheet 108 re the HCTC tax credit.

The United States Department of Labor decides whether foreign competition has adversely affected employees with a given employer, and issues a "certification." For a list of employers that have already been certified, are

Announcement

Workers' Compensation Agency
Qualifications Advisory Committee

Applications for a position on the Workers' Compensation Appellate Commission are being accepted by the Qualifications Advisory Committee, Michigan Department of Labor & Economic Growth. (Two positions will be up for reappointment on October 1, 2005.) An applicant must be a member in good standing of the State Bar of Michigan and have five years of experience as an attorney in the field of workers' compensation or pass a written examination. If there is any question as to whether the five years of experience has been met, applicants are encouraged to take the exam so as not to be deemed unqualified.

The deadline for filing an application is June 10, 2005.

An exam will be given on June 20, 2005 in Lansing, Michigan. Applicants will be tested in the areas of: knowledge of the Workers' Disability Compensation Act; skills in fact finding; knowledge of human anatomy and physiology; and Michigan rules of evidence. Applicants who have already successfully passed the Board of Magistrates exam do not need to take this exam.

Persons who meet the five years of experience requirement or successfully complete the written examination must also be available for an interview by the Qualifications Advisory Committee to determine their suitability for the position, especially with regard to their objectivity.

If individuals on the appellate commission list that was sent to the governor on March 9, 2005 wish to remain on the list, they must reapply but they do not need to be re-interviewed. If they reapply, their names will be sent to the governor with the same recommendation they received on the March 9 list, without the need for a further interview. If any of these individuals wish to be re-interviewed, the QAC will interview them again and make a new recommendation based on the second interview.

Applications from those wishing to apply must be received by June 10, 2005. Application forms are available on the agency's web site at *www.michigan.gov/wca* or by calling 517-322-1106. The mailing address is: Qualifications Advisory Committee (Attn: Sue Bickel), Workers' Compensation Agency, P.O. Box 30016, Lansing, MI 48909.

April 26, 2005

The Department of Labor and Economic Growth will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, marital status, disability, or political beliefs. If you need assistance with reading, writing, hearing, or any other disability, please contact the agency and we will seek to accommodate your need.

pending certification, or have been denied certification, go to the following website: *www.doleta.gov/tradeact/determinations.cfm*. Then click on the link to "TAA Petition Determinations." Scroll down to the menu of states and click on "Michigan." The Fact Sheet applies to petitions filed on or after 11/4/02.

NEW to the TRA program is the *Health Coverage Tax Credit* (HCTC), which ***helps*** *certain unemployed workers* ***pay for private health insurance***. The new HCTC covers 65% of the premium paid by "eligible" individuals for "qualified" health insurance coverage. An individual may qualify for this tax credit (not just a deduction), if they are receiving any of the following:

(1) **TRA benefits** or TRA eligible pending exhaustion of state unemployment benefits; or

(2) **Benefits from the Pension Benefit Guarantee Corporation** (PBGC) and are at least 55 years old; or

(3) **Alternate Trade Adjustment Assistance (ATAA) benefits**, which are paid to individuals who are at least 50 years old and are receiving a percentage of the wage difference between the wages of their previous, adversely-affected employment and their new full-time employment.

For more information regarding this tax credit and qualified health insurance plans, go to the HCTC website: *http://www.irs.gov/individuals/article/0,,id=109915,00html* or call the HCTC Customer Contact Center toll free at 1-866-628-HCTC (4282). There is also a Fact Sheet 108 on the michigan.gov/uia website mentioned above.

Announcement

Workers' Compensation Agency
Qualifications Advisory Committee

The Qualifications Advisory Committee (QAC) has the responsibility of making recommendations to the governor concerning vacancies on the Workers' Compensation Board of Magistrates. We expect that there will be vacancies on the board effective January 26, 2006. An applicant must be a member in good standing of the State Bar of Michigan and have five years of legal experience in the field of workers' compensation or pass an examination.

To meet the requirement of five years of experience, an applicant must document to the QAC a period of time totaling five years during which the applicant met one of the following criteria:

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

If there is any question as to whether the five years of experience has been met, applicants are encouraged to take the exam so as not to be deemed unqualified.

The exam will be given in September of 2005 in Lansing, Michigan. Applicants will be tested in the areas of: knowledge of the Workers' Disability Compensation Act; skills in fact finding; knowledge of human anatomy and physiology; and Michigan rules of evidence. Applicants who have already successfully passed the exam do not need to retake it.

Persons who meet the five years of experience requirement or who successfully complete the written exam will be personally interviewed by the QAC to determine their suitability for the position, especially with regard to his or her objectivity.

Please see the agency's web site at *www.michigan.gov/wca* for additional information. No later than August 1, 2005, application forms will be available on the web site or by calling 517-322-1106. The mailing address is: Qualifications Advisory Committee (Attn: Sue Bickel), Workers' Compensation Agency, P.O. Box 30016, Lansing, MI 48909. Interested parties may contact the QAC now. They will then be sent an application form when they are available.

April 26, 2005

Misplaced last quarter's newsletter?

Don't be upset.

You can find back issues of the newsletter at *www.michbar.org/workerscomp/*

Revisiting *Sington*

By Edward M. Welch

I want to suggest here that perhaps we have all been mistaken in our basic understanding of the interpretation of the definition of disability by the Michigan Supreme Court in *Sington v Chrysler Corp*, 467 Mich 144, 648 NW2d 624, 15 MIWCLR2045 (2002). I will outline here some problems with the current interpretation and suggest a slightly different approach. The space available here does not permit a thorough analysis of all the issues involved. I will present here an outline of an idea that I offer for consideration. A more detailed discussion is available in Chapter 8 of the 2005 Supplement to *Workers' Compensation in Michigan: Law and Practice*, available from the Institute for Continuing Legal Education.

We seem generally to have come to believe that *Sington* means a worker is disabled if he or she is unable to perform all the work at his or her maximum wage earning capacity. In other words, we must determine which jobs are within the worker's qualifications and training, then focus on those jobs that pay at the maximum rate, and then ask if the worker is disabled from all of them. One problem with this approach is that it ignores considerable language in the *Sington* opinion dealing with a variety of factors, including the worker's ability to compete in the labor market. I will return to this issue again later in this article.

The Partial Benefit Rate

What I find most troubling about the current interpretation of *Sington* is a suggestion in some Appellate Commission decisions that for a partially disabled worker, the benefit should not be measured by his or her actual wage loss but rather on some theoretical loss of wage earning capacity. See *Wegienka v Monsanto Chemical Co.*, 2004 ACO No. 324 (2004). This is based on an interpretation of the language in Section 361(1) that provides that weekly benefits should be based upon the "average weekly wage which the injured employee is *able to earn* after the personal injury." (Emphasis added). Does "able to earn" mean wages actually earned or wages the worker has the capacity to earn? The Commission seems to be taking the latter approach. This is a radical departure from previous interpretations, which have held that the amount the worker was able to earn was measured by his or her actual earnings. See for example *Kurz v Michigan Wheel Corp,* 236 Mich App 508, 601 NW2d 130 (1999).

There are a number of reasons why this approach seems legally wrong and terribly unjust.

1. There is no language in *Sington* that supports this position. The Commission's decisions have made reference to a footnote, but it does not really say this.
2. Section 301(5)(b) deals with a situation in which the worker is employed at a lower wage. It also uses the phrase "able to earn." This seems clearly to be a reference to actual earnings.
3. Sections 301(5)(d) and (e) deal with compensation payable when a worker returns to work and then leaves. These all base compensation on the worker's wage earning capacity. If benefits in the first place are based on the employee's wage earning capacity, then these sections are meaningless. In fact, even Section 301(5)(a), dealing with an offer of reasonable employment is meaningless because benefits would already have been reduced by the worker's capacity to perform any job that might be offered.
4. The most serious problem with this approach is that it takes away any incentive for the employer to offer work to an injured employee. If there is work that the individual has the capacity to perform, the employer can reduce benefits by simply showing that work exists, without ever having to offer the job to the worker.

Whatever the problems, proponents of this approach argue that it is necessary to prevent inequities. They point to the situation in which a worker is unable to perform work at his or her maximum wage earning capacity but able to perform a variety of jobs that exist in the economy that are readily available to the worker. If he could easily have these jobs but will not put forth the effort to get them, employers argue that it is not fair to pay him full benefits.

Advocates for workers reply that while this might lead to seemingly unfair results in a few cases, the alternative of taking away the incentive to offer a job creates a much more serious inequity.

Overreaction?

Some have suggested that I am overreacting to Commission decisions like *Wegienka*. They suggest that the Commission does not want to reduce benefits merely because jobs exist that the worker has the capacity to perform. Instead the Commission would only reduce benefits if the jobs were readily available and the worker was in some sense avoiding them. This would

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Revisiting . . .
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certainly be a more moderate approach. It might even be a good idea but I do not see any basis for it in the statute. Not even the Supreme Court, much less the Commission, is free to redesign the system in a way that it thinks fair and equitable if there is no statutory basis for the approach.

An Alternative

Perhaps the solution to this situation lies not in how we calculate partial benefits but in re-examining our interpretation of the basic definition of disability. As I mentioned above, the *Sington* opinion includes a discussion of many factors in addition to the ability to perform work at the maximum wage-earning capacity. In several places it makes reference to the ability to compete in the labor market and also makes several references to the various factors spelled out in *Rea v Regency Olds/ Mazda/Volvo,* 450 Mich. 1201, 536 NW2d 542 (1995).

Perhaps we were mistaken in assuming that inability to perform jobs at a maximum wage earning capacity was intended to be the *only* consideration in determining whether the worker is disabled. Perhaps the court intended us to consider that and other factors, such as the ability to compete in the labor market. Currently the Commission does consider some of these factors in examining jobs at the maximum wage-earning capacity. I am suggesting that these factors should be considered independently of jobs at the maximum wage-earning capacity. In some circumstances, a worker could be found disabled or not disabled based on his or her ability to compete in the labor market, regardless of the ability to perform all jobs at the maximum wage-earning capacity.

If all of these factors are combined in an appropriate way, it might lead to more equitable results in a great many cases. It would allow a magistrate or the Commission to find that a worker who, though unable to perform all the jobs at her maximum wage-earning capacity, suffered no practical limitation in her ability to compete in the labor market, was not disabled. It would also allow a finding that a worker who does not have a limitation in all the jobs at his or her maximum wage-earning capacity but who is likely to have a great deal of difficulty competing in the labor market was disabled.

This approach should also lessen the perceived need for the use of wage-earning capacity in calculating partial benefits. In those cases in which an individual seems to be "avoiding work," we would look to see if the injury had limited his ability to compete in the labor market. If it had not, he would not be considered disabled. This approach would allow us to reach an equitable result in the majority of cases without the need to radically change the way we calculate disability benefits. 🛠

Ed Welch is the Director of the Workers' Compensation Center at Michigan State University (www.lir.msu.edu/wcc). He can be reached at welche@msu.edu.

Find the Magistrates

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Turner
Wierzbicki
Wolock
Zettel

Recent Decisions

By Jerry Marcinkoski, Lacey & Jones

There has been virtually no action from the courts in workers' compensation cases since our last newsletter. Below is a summary of what is pending before the Supreme Court, one unpublished decision from the Court of Appeals, and some of the significant decisions from the Workers' Compensation Appellate Commission subsequent to our last newsletter.

Supreme Court

Two workers' compensation cases have been orally argued and are ripe for decision at the Supreme Court.

One case is *Cain v Waste Management, Inc./Transportation Insurance Co. and Second Injury Fund* (SC Nos. 125111 and 125180). The issues in this case relate to plaintiff's claim for specific loss benefits for a non-amputated leg, as well as his claim for total and permanent disability benefits. Among the issues the Supreme Court is considering is whether it should overrule *Pipe v Leese Tool & Die Co.*, 410 Mich 510; 302 NW2d 526 (1981). *Pipe* allows for application of a "loss of industrial use" standard in specific loss cases where there has been no amputation.

The second case pending before the Supreme Court is *Bailey v Oakwood Hospital and Medical Center/Second Injury Fund/Director of Bureau of Workers' & Unemployment Compensation* (SC Nos. 125110 and 125171). The issues in this case relate to Chapter 9's vocationally disabled (f/k/a vocationally handicapped) provision, particularly the requirement that the carrier notify the Fund within a certain window of time. MCL 418.925(1).

Finally, scheduled for oral argument in May 2005 is the case: *Reed v Yackell/Hadley/Herskovitz/Mr. Food, Inc*. (SC No. 126534). This is a case emanating from the circuit court but touches on a workers' compensation question. For that reason, the Supreme Court invited an *amicus curiae* brief from the Section. The issue touching on workers' compensation is whether plaintiff was an "employee" within the meaning of §161(1) (l) and (n) of the Workers' Disability Compensation Act. Resolution of that question speaks to whether plaintiff's exclusive remedy is within the workers' compensation system.

The Section Counsel accepted the Supreme Court's invitation to file an *amicus curiae* brief. The Section's brief is limited to arguing that the Workers' Compensation Agency has exclusive jurisdiction over resolving the "employee" question in §161.

Court of Appeals

For the second newsletter in a row, there have been no published Court of Appeals opinions to report. As mentioned in the preceding newsletter, it is not our practice to report on unpublished Court of Appeals opinions because they do not constitute precedent. However, in the continuing absence of published Court of Appeals opinions, we will report the one unpublished Court of Appeals' decision in a workers' compensation case since the last newsletter.

Res Judicata Defense Waived

In *Celletti v Fiat Auto USA, Inc.*, CA No. 251918, unpublished decision released February 17, 2005, plaintiff had been receiving an open award of benefits pursuant to an earlier adjudication of his claim. Plaintiff filed a new petition seeking medical benefits for a lower back surgery. In the prior adjudication, the Magistrate had not explicitly said whether plaintiff's lower back was part of his compensable claim. The defendant resisted plaintiff's lower back claim on appeal by arguing *res judicata* barred the claim. The Workers' Compensation Appellate Commission agreed and held *res judicata* barred the claim.

On further appeal, the Court of Appeals disagreed with the Appellate Commission and remanded the case for resolution of the substantive merits of plaintiff's claim. The Court of Appeals said the *res judicata* defense was raised for the first time when the case was on appeal before the Appellate Commission. The Court said, "There is simply no authority holding that the defense of *res judicata* may be raised for the first time on appeal."

The Court of Appeals added that, even if defendant could have raised the argument for the first time on appeal, defendant's comments at the trial level must be construed to be a waiver of *res judicata* . The Court explained that the Magistrate had inquired whether the "'only issue'" was the work-relatedness of plaintiff's lower back problem. Plaintiff's counsel responded affirmatively and the defense counsel did not reply at all. The Court also noted that, in colloquies between the Magistrate and counsel during trial, there was no indication a *res judicata* defense was being pressed.

Workers' Compensation Appellate Commission

Redemption Reviews

In *Oskin v McCoy Maintenance, Inc.*, 2005 ACO #72, the Commission addressed an appeal of a redemption review order with the parties urging different appellate review standards for determining the propriety of the redemption. In seeking to set aside the

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redemption, plaintiff argued that the Commission should exercise *de novo* review of the redemption orders. In seeking affirmance of the redemption, defendant argued the Commission should apply an abuse of discretion standard.

The Commission rejected both suggestions. The Commission held, in accord with prior Commission case law, that the Commission's proper review standard in redemption review cases is to determine whether there was competent, material, and substantial evidence to support the factual findings and to determine whether there is any legal error. In this particular case, the Commission found no legal error. Therefore, the case reduced to whether there was sufficient evidence to support the fact finding below that the redemption should stand.

The Commission found from plaintiff's testimony at the redemption hearing that there was sufficient evidence that plaintiff was fully apprised of the consequences of his decision to redeem.

In *West v Bentley Environmental Services*, 2005 ACO #56, the Commission reviewed another redemption review order. In this case, the deputy director had granted plaintiff's appeal and set aside the redemption. The reason offered by plaintiff for setting aside the redemption was that, subsequent to the redemption hearing, plaintiff's wife unexpectedly filed for a divorce and had obtained an *ex parte* order that would seize any redemption proceeds.

Applying the competent, material, and substantial evidence standard in reviewing the case, the Commission found sufficient evidence to affirm setting the redemption aside. The Commission agreed that the settlement was not in plaintiff's best interest and was not just and proper under the circumstances.

Voluntary Payments

In *Gray v General Motors Corp*, 2005 ACO #36, the Court of Appeals had vacated the prior decisions in the case and remanded the case for reconsideration in light of *Rakestraw v General Dynamics Land Systems, Inc.*, 469 Mich 220 (2003). The remand went to the Commission which, in turn, remanded to the Magistrate with the Commission retaining jurisdiction. On remand before the Magistrate, instead of proceeding with a supplemental hearing, the parties chose to enter into a voluntary pay agreement. Under the voluntary pay agreement, plaintiff's Application for Mediation or Hearing was withdrawn in exchange for defendant agreeing to pay a lump sum in full and final settlement of the case. The Magistrate signed a green sheet indicating the matter was dismissed pursuant to the voluntary pay agreement.

Since the Workers' Compensation Appellate Commission had retained jurisdiction, the case still returned to the Commission after the voluntary pay agreement on remand. The Commission in its post-remand opinion wrote to express the Commission's agreement with this mode of settlement and this means of ending matters on remand where the Commission retains jurisdiction. The Commission acknowledged that, while it is "apparently not settled amongst the practicing bar, we believe the issue of enforceability of voluntary pay agreements to have been disposed of by the Michigan Court of Appeals in *Morley v General Motors Corporation*, 252 Mich App 287 (2002)."

Commencing Trial in the Absence Of Counsel

In *Saldana v Deckerville Wire, Inc.*, 2005 ACO #14, neither plaintiff nor plaintiff's counsel appeared on the day set for trial. Defense counsel did appear. Rather than simply dismissing the case, the Magistrate decided to take testimony and issue a decision. The Magistrate said this was an "unusual procedure" but noted that plaintiff's application had been filed and withdrawn three times over the preceding five years and parties had been warned to prepare the case for trial on this date.

Defendant submitted its depositions and a video tape at the hearing. No evidence was submitted on plaintiff's behalf and proofs were closed. The Magistrate issued a decision denying benefits.

On appeal, plaintiff argued that the Magistrate erred by commencing trial and denying benefits in the absence of plaintiff or her counsel. Plaintiff charged the Magistrate exceeded his authority in doing so.

The Commission disagreed and affirmed the Magistrate. The Commission said that management of a trial docket is within the Magistrate's discretion. The Commission found no abuse of discretion here, noting the "seemingly endless pattern of plaintiff's filing of application for hearing and either withdrawing them or having them dismissed for lack of progress."

Ordering Transcripts For Appeal

The question presented in *Daldos v Grand Rapids Gravel Co*, *Inc.*, 2005 ACO #65, was which party was responsible for paying for transcripts of a remand hearing where the Magistrate switched liability for the open award between carriers.

In the Magistrate's original opinion, the Magistrate held one of the employer's carrier's liable for an open award. That party appealed. The case was then remanded with the Commission retaining jurisdiction. On remand, the Magistrate took additional evidence and held the other carrier liable. The case automatically returned to the Commission and it was necessary that transcripts of the remand proceedings be filed with the Commission. The carrier originally held liable resisted responsibility for paying for the transcripts given the remand decision.

The Commission held that the carrier originally found liable was responsible for the transcripts because it is the only party to have filed a claim for review and the original appeal had not been conclusively resolved yet. In so doing, the Commission distinguished its ruling in *Doublestein v Tenneco Packaging*, 2004 ACO #375.

Probate Court Expenses as Nursing Care Expenses

In *Whitehead v State of Michigan*, 2005 ACO #49, the conservator of an injured employee's estate petitioned for payment of probate court fees under §315(1) of the Act. This provision requires that employers pay for "reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed." Plaintiff-conservator argued that a provision in the No-Fault Act similar to §315(1) has been interpreted by the Court of Appeals to require such payments. See, *Heinz v Auto Club Insurance Association*, 214 Mich App 195 (1995).

In a 2–1 decision, the Commission rejected plaintiff's argument. The majority of the Commission held that such payments were not within the intendment of §315(1). The dissent said the case was one of first impression for workers' compensation purposes and agreed with plaintiff. The dissent would remand for further findings of fact as to the reasonableness of the fees claimed.

Recent *Sington* Cases

Four cases illustrate the Commission's recent treatment of *Sington's* interpretation of the definition of disability.

In *Stewart v Great Lakes Beverage Co.*, 2005 ACO #48, the Commission affirmed an open award. In so doing, the Commission said the Magistrate was free to reject the defendant's vocational testimony that there was truck driving work available to plaintiff within his restrictions, particularly given that plaintiff "had looked for work as a truck driver through MESC and on his own with no success. He had specifically sought work from J.B. Hunt and was not hired," despite defendant's indication that truck driving jobs were available at J.B. Hunt.

In *Lee v General Motors Corp.*, the Commission affirmed a denial of disability benefits likening the case to the facts presented in *Sington* itself. The Commission said:

> Here, plaintiff has an established work injury that requires some accommodation. Mr. Sington also had non-occupational impairments which further limited his abilities, as did this plaintiff. As with Mr. Sington, Ms. Lee was placed in other regular jobs and worked for two years until a non-occupational impairment took her out of the workplace.

Sington remands from the Commission still occur. In *Nowak v City of East Lansing*, 2005 ACO #83, defendant challenged the Magistrate's application of *Sington* in granting plaintiff an open award. The Commission remanded the case for a *Sington* analysis, explaining:

> We have on several occasions made clear the requisite steps in making a disability determination under the *Sington* provisos. It appears no such findings or analysis was made here. It is essential, under the economic focus mandated by *Sington* that the magistrate determines whether the position as head of the parking enforcement unit was within plaintiff's qualifications, and was in fact a regular job for which there was a substantial job market, such as contemplated in *Sington*. If so, the magistrate should determine whether that job paid the maximum. If that is the case, plaintiff does not meet the definition of disability.
>
> If necessary, the magistrate should also consider the other jobs reasonably available to plaintiff given her qualifications and training which she could still perform. For guidance, in addition to the *Sington* remand opinion, the magistrate should consider the oft quoted opinions in *Riley v Bay Logistics*, 2004 ACO #27 and *Wegienka v Monsanto Chemical Co.*, 2004 ACO #324.

See also, *Holt v Barrien Mental Health Authority*, 2005 ACO #17.

The Commission has also recently emphasized that the plaintiff or other lay witnesses with personal knowledge of plaintiff's qualifications and training , *e.g.*, "co-employee, supervisor, personnel representative, etc.," must describe the scope of plaintiff's qualifications and training. In *Carnoskes v Aetna Industries, Inc*, 2004 ACO #376, the Commission remanded the case for a *Sington* analysis involving vocational testimony. In so doing, the Commission explained that plaintiff's and defendant's vocational expert tes-

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Recent Decisions
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timony must derive from trial testimony describing plaintiff's qualifications and training. The Commission said:

> Such [vocational] testimony can provide, in the appropriate case, relevant information regarding the transferability of skills as well as an assessment of the dimensions of the injured worker's qualifications and training insofar as their candidacy for actual, reasonably available jobs in the current marketplace. We wish to re-emphasize, however, that such testimony must definitively and specifically establish the existence of actual jobs, not poorly defined areas of hazy employment opportunities with nameless employers and nebulous physical/mental demand job descriptions.
>
> There is another fundamental problem posed by the absence of lay testimony concerning key elements of the *Sington* analysis. As of September 1, 2003, MRE 703 was amended to now require that the facts or data, upon which an expert bases an opinion, must be admissible, and admitted into evidence. The problem is obvious. If the plaintiff has not testified to such questions as the maximum wage, qualifications and training, the nature of his post or post-injury employment, etc., the vocational expert will have no foundation upon which to base an opinion, rendering that opinion incompetent and inadmissible.
>
> These problems can be reliably solved by placing such evidence into the record through the sworn testimony of the plaintiff and/or others with personal knowledge of his past work. Absent such evidence, there is no valid method available to review the necessary fact issues elemental to a proper and complete *Sington* analysis. From our vantage point, it is imperative on pending remands involving *Sington* issues that remand hearings include as the *sine qua non* the relevant lay testimony of plaintiff and, if desired by either party, that of others with personal knowledge of plaintiff's qualifications and training, wage levels, work duties, subsequent employment, etc. This evidence is indispensable in providing the building blocks which form the infrastructure to a properly executed *Sington* analysis.

Recent *Rakestraw* Cases

Two recent cases illustrate the Commission's application of the *Rakestraw* rule for determining whether a "personal injury" has occurred.

In *Laforest v USF Holland, Inc.*, 2005 ACO #10, defendant challenged the Magistrate's award on the basis that plaintiff's slip-and-fall injury did not produce a medically distinguishable injury as required by *Rakestraw*. The Commission disagreed. After quoting prior Commission decisions in *Hale v Borgess Medical Center*, 2004 ACO #266 and *Reed v City of Detroit*, 2004 ACO #279, the Commission affirmed the award, saying:

> Here, as in *Hale* and *Reed*, the plaintiff has established that he suffered an injury, producing continuing pain subjectively dissimilar from his pre-injury condition, and causing impaired performance of pre-injury activities, which constitutes an "independent contribution" to the "final condition", resulting in a "medically distinguishable" condition. Plaintiff testified that as a result of his injury on May 14, 2001 where he fell backwards, striking his head and neck, he has headaches on a daily basis. . . plaintiff did not experience these symptoms prior to his work-related injury.

In *Davis v General Motors Corp*, 2004 ACO #410, the Commission discussed other post-*Rakestraw* Commission cases and affirmed the Magistrate's open award. *Davis* explains:

> As we noted in *Lapham*, the key to balancing *Connaway/Hale* and *Rakestraw* is that the evidence in *Connaway* was that the symptoms (pain) were NOT equally attributable to the progression of a pre-existing injury and a work related injury. Indeed, the Court in *Connaway* emphasized the second injury permanently elevated the symptom (pain) and was the significant factor from there on in time causing it. (Emphasis in original). 🛠

Late Breaking News

As we were going to press, the Supreme Court has released its decision in *Cain v Waster Management/Second Injury Fund*. This is the case addressing specific losses and T&P. With respect to the specific loss question, the Court held plaintiffs can recover specific loss benefits where the limb in question has not been amputated. (This has been the law for decades). A specific loss recovery will follow if the limb has "no practical usefulness." (This represents a slight "clarification" of the PIPE standard). The determination of usefulness is to be made under an "uncorrected" test, i.e., without reference to corrective devices such as braces. With respect to the T&P question, the Court held that Mr. Cain was correctly awarded T&P benefits for loss of both legs because one leg had been amputated and the other leg meets the specific loss test. A more complete report on the case will be contained in the next newsletter.

Ode to Molly Cooke

(Sung to the tune of Gilbert & Sullivan's "Major-General Song" in *The Pirates of Penzance*)

You've always been the model of a legal intellectual,
Not one of us has ever thought that you are ineffectual.
Of matters that are statutory and, as well, decisional,
You write so well that all have said your rulings are precisional.

Yes, there's no doubt that in the world of workers' comp today
Regret there is aplenty 'cause you've said, "It's time to go away."

There once appeared before you a young lawyer many years ago
Who sought to bar a class of claims on grounds he thought quite clear, although
You pointed out the logjam that his logic would have brought about
And counseled him, "I don't believe that this you've clearly thought about."

Yes, there's no doubt that in the world of workers' comp today
Regret there is aplenty 'cause you've said, "It's time to go away."

The years went on and through it all you called 'em as they seemed to you,
Both on the facts and on the law as many cases streamed to you.
Your words so elegant and clear the Court in *Clark* said, "We've attached
A different view so ably put that it we'll never hope to match."

Yes, there's no doubt that in the world of workers' comp today
Regret there is aplenty 'cause you've said, "It's time to go away."

Among the bar on either side, we all agreed you were the best
To hear our cases; rest assured we'd certainly prefer the best.
Yes, some we'd win and others lose, but everyone agreed that you
Would ably look at facts and law and only then decree your rule.

Yes, there's no doubt that in the world of workers' comp today
Regret there is aplenty 'cause you've said, "It's time to go away."

Everyone in workers' comp sincerely hopes that now you will
Enjoy retirement and even let us know: "And how I will!"
So here's to you as you conclude a lifetime's work with us today
And bid "adieu" to the whole bar—yes, sad to say, 'tis thus today.

Yes, there's no doubt that in the world of workers' comp today
Regret there is aplenty 'cause you've said, "It's time to go away."

So now I'll close with just one wish I know is surely shared by all,
And now's the time in which this wish shall loudly be declared by all:
Enjoy retirement and do the many things you long to do,
For now it's clear—this special time assuredly belongs to you!

In short, there's just no doubt that in the world of workers' comp today
Regret you'll find aplenty 'cause you've said, "It's time to go away."

With my deepest admiration

Morrison Zack

Poetry

By Magistrate Mike Barney

A Survey of Forms —Part I: The Sestina

Much of the poetry with which the casual poetry consumer has latterly become familiar, written (at least in English) in the Modern/Postmodern period (roughly the last 100 years) has been written in so-called "open form"—free verse; the "chopped and lineated prose" so infuriating to traditionalists. Yet new poems in "closed" or "received" forms continue to be created, and I thought that it would be edifying, or amusing, or both, to take the next few columns to explore in a little bit of depth some of the more interesting of these forms.

The subject of this piece is the Sestina, derived from the Latin "sextus", or six. Invented in 11th century France by Arnaut Daniel, first of the great French troubadors (literally, the proverbial wandering minstrels) and developed throughout the 12th and 13th centuries, it is a delightfully complex form of 39 lines, having six stanzas of six unrhymed lines each, in which the words at the ends of the first stanza's lines are repeated in a pre-determined, rolling pattern (called "lexical rotation") at the ends of all the other lines. The poem then ends with a three-line envoi in which the six repeated words also must appear, two to a line.

Because of the baroqueness of the form, it lends itself to use for courtly, semi-mocking romanticism, which produces a lot of really bad "unrequited love" poetry. However, because of the repetition, it also lends itself to conversationality: we humans tend to repeat certain words, for emphasis, or merely as place-markers, throughout casual conversation. Used this way, the repetition inherent in the form can become at turns poignant, comforting or unsettling.

However, no mere description of the mechanics of the form can truly approximate any effect an actual sestina can create; I'll just have to let you see for yourselves with a couple of examples. Try reading them out loud.

The Shrinking Lonesome Sestina, by Miller Williams

Somewhere in everyone's head something points toward home,
a dashboard's floating compass, turning all the time
to keep from turning. It doesn't matter how we come
to be whatever we are, someplace where nothing goes
the way it went once, where nothing holds fast
to where it belongs, or what you've risen or fallen to.

What the bubble always points to,
whether we notice it or not, is home.
It may be true that if you move fast
everything fades away, that given time
and noise enough, every memory goes
into the blackness, and if new ones come—

small, mole-like memories that come
to live in the furry dark—they, too,
curl up and die. But Carol goes
to high school now. John works at home
what days he can to spend some time
with Sue and the kids. He drives too fast.

Ellen won't eat her breakfast.
Your sister was going to come
but didn't have the time.
Some mornings at one or two
or three I want you home
a lot, but then it goes.

It all goes.
Hold on fast
to thoughts of home
when they come.
They're going to
less with time.

Time
goes
too
fast.
Come
home.

Forgive me that. One time it wasn't fast.
A myth goes that when the quick years come
then you will too. Me, I'll still be home.

Sestina, by Elizabeth Bishop

September rain falls on the house.
In the failing light, the old grandmother
sits in the kitchen with the child
beside the Little Marvel Stove,
reading the jokes from the almanac,
laughing and talking to hide her tears.

She thinks that her equinoctial tears
and the rain that beats on the roof of the house
were both foretold by the almanac,
but only known to a grandmother.
The iron kettle sings on the stove.
She cuts some bread and says to the child,

It's time for tea now; but the child
is watching the teakettle's small hard tears
dance like mad on the hot black stove,
the way the rain must dance on the house.
Tidying up, the old grandmother
hangs up the clever almanac

on its string. Bird-like, the almanac
hovers half open above the child,
hovers above the old grandmother
and her teacup full of dark brown tears.
She shivers and says she thinks the house
feels chilly, and puts more wood on the stove.

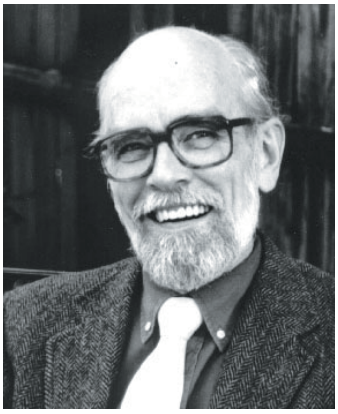
It was to be, says the Marvel Stove.
I know what I know, says the almanac.
With crayons the child draws a rigid house
and a winding pathway. Then the child
puts in a man with buttons like tears
and shows it proudly to the grandmother.

But secretly, while the grandmother
busies herself around the stove,
the little moons fall down like tears
from between the pages of the almanac
into the flower bed the child
has carefully placed in front of the house.

Time to plant tears, says the almanac.
The grandmother sings to the marvelous stove
and the child draws another inscrutable house.

Other poets of note who have utilized this form include Auden, Spenser, Swinburne, Kipling, Dante Rossetti, Pound, and Dorianne Laux (hers concerning the experience that is Las Vegas.) Weldon Kees, of whom I wrote last time, has one called After The Trial that is particularly trenchant.

Next time, the Sonnet. 🛠



Miller Williams

Elizabeth Bishop

Find the Magistrates - Answer Key

B	**T**	**U**	**A**	**B**	**A**	**R**	Z	V	Z	K	Y	W	R	N	Y	**S**	D
T	M	H	**N**	D	L	**W**	L	V	**S**	**M**	**I**	**T**	**H**	K	**S**	M	K
X	L	X	Q	**I**	**O**	**L**	N	**S**	**I**	**R**	**R**	**A**	**H**	**O**	T	R	F
X	C	V	L	**L**	**E**	T	**I**	Z	T	Y	**N**	**O**	**L**	**I**	**S**	**H**	R
N	R	F	**O**	M	**G**	**T**	W	**R**	**G**	G	K	**S**	B	**Y**	F	C	Z
Q	X	**C**	K	K	**R**	M	**S**	**U**	**A**	**L**	**E**	**T**	**T**	**E**	**Z**	Q	**T**
X	**K**	V	W	N	**I**	Y	**Y**	**N**	M	**B**	L	M	W	**N**	V	R	**U**
C	**S**	Q	M	**R**	**T**	**T**	N	P	**R**	H	M	W	H	**R**	G	**W**	**R**
N	K	**I**	**E**	B	**O**	T	N	D	P	**O**	Y	B	D	**A**	**T**	**I**	**N**
L	M	**H**	**V**	**N**	R	M	**E**	**S**	**O**	**R**	**B**	**M**	**A**	**B**	**D**	**E**	**E**
T	**O**	L	M	**R**	**Q**	**G**	**N**	F	H	C	G	B	G	**P**	**R**	**R**	**R**
M	**H**	B	J	**U**	**A**	**A**	**R**	T	Y	Y	J	K	J	**U**	**A**	**Z**	G
K	N	**E**	**I**	T	**N**	**J**	**E**	**A**	**P**	L	X	K	T	**R**	**H**	**B**	T
R	E	**S**	**I**	**N**	Q	L	**E**	K	**T**	A	R	L	B	**C**	**N**	**I**	L
J	**T**	K	**E**	**L**	X	F	**R**	H	G	**T**	**I**	Y	K	**E**	**I**	**C**	J
Q	N	**R**	C	T	**E**	R	**A**	N	W	J	**A**	**G**	F	**L**	**E**	**K**	M
W	**B**	V	Q	P	K	J	**C**	L	B	N	G	**N**	**E**	**L**	**R**	**I**	V
V	R	M	M	T	H	B	**M**	M	B	N	**G**	**O**	**R**	**C**	**H**	**O**	**W**

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