March 1998

Workers Compensation Section Newsletter

Volume 38, No.1

State Bar of Michigan Workers Compensation Section

In this Issue:

Chairperson's Letter,

By Rodger Will

First of all, I would like to take this opportunity to thank our outgoing Chairperson, Larry Beidelman, for the outstanding job he did as Chairperson during the term which spanned September, 1996 to September, 1997. I also want to express our appreciation to Joyce Oppenheim for the fine work that she has done during the years that she was on the Council. Ms. Oppenheim's term ended in September, 1997. Replacing Mr. Beldelman on the Council and representing employer-interest is Allen Helmore, Southfield. Sandra Ganos of Farmington Hills, representing employee interests, replaces Ms. Oppenheim on the Council. Knowing both Ms. Ganos and Mr. Helmore, I can predict that they will truly be assets to the Council.

Our September section meeting in Detroit was privileged

(Continued p. 2)

Chairpersons Letter, Continued

Sandra Ganos

to have John Reed, Professor of Law at Wayne State University speak on some evidence issues of special interest to workers' compensation practitioners. This September meeting was better attended than our Grand Rapids meeting the previous year, but nevertheless, it was not difficult to find a vacant seat for late arrivers.

The annual business meeting preceded Professor Reed's speech, and during this meeting, James Ryan of Kalamazoo was elected Vice-Chair, and Martin Glista of Kalamazoo became our Secretary. Our new Treasurer is Richard Wood of Detroit. Rounding out the Council together with Ms. Ganos and Mr. Helmore are Tanya A. Fedewa, Grand Rapids, Michael J. Flynn, Muskegon, James R. Geroux, Mt. Clemens, Charles A. Gilfeather, Saginaw, Leonard M. Hickey, Grand Rapids, Alexander T. Ornstein,, Southfield, and Magistrate Craig R. Petersen, Lansing. Past Chairperson Beidelman becomes an Ex-Officio member for 1997-1998, and Paul M. Purcell is our Commissioner Liaison.

Alan Helmore

Needless to say, your Chairperson considers himself extremely privileged to serve with such excellent council members and officers. We look forward to a year of activity and hard work to serve our Section.

We are happy to report that the November seminar in Detroit was well attended. We are most grateful to all of our speakers whose presentations were excellent and well received by all in attendance. We are extremely grateful to Justice Boyle of the Michigan Supreme Court who took time from her busy schedule to give an outstanding review of the work of our Supreme Court.

James D. Ryan

Plans for our winter seminar in St. Kitts beginning March 1, 1998 were amply and admirably made by Leonard Hickey, the Chairperson for this event. Incidentally, as of December, 1997, upwards of 50 rooms had been reserved by those who are attending this week long seminar. We are looking forward to a rewarding and enjoyable week in St. Kitts,

Under the leadership of Co-Chairs, Lisa Klaeren, Kalamazoo, Timothy M. MeAcree, Grand Rapids, and Deborah Strain, Southfield, plans for our June 11th and 12th seminar at Boyne Highlands are moving along rapidly. We look forward to a rewarding seminar at Boyne Highlands. More details will be reported in future issues of our Newsletter.

Steven Pollock of Lansing and Michael Brenton of Lansing have agreed to co-chair our September meeting at the State Bar Annual Meeting to be held in Lansing this year. More details will be found in their announcement herein.

Of special concern to our Section and Council is the Social Security Administration's intended change in policy which would no longer allow for allocating a workers' compensation redemption proceeds, attributable to wage replacement benefits, over a claimant's life expectancy, so as to allow increased social security benefits pursuant to the Social Security Administration's statutory language pertaining to the interaction between workers compensation weekly benefits and disability benefits. In order to serve our Section members, we had Evan Zagoria, an expert in social security law, discuss this topic at our November seminar in Detroit. It is our hope that Mr. Zagoria, who made an excellent presentation in November, will have the opportunity to write an article discussing this important topic for this Newsletter. For now, please see the reprinted article by him in this issue, inviting membership in the new Social Security Section.

Again, your Council and officers are looking forward to serving you in the coming year. As always, we welcome your comments and suggestions so that we can be of maximum service to our membership.

Respectfully submitted,

RODGER G. WILL

CONFLICTS: Relationship of Assigned Legal Counsel, Insurer, and the Insured in Workers Compensation Litigation

By Richard F. Zapala

This article is not intended to provide legal advice to attorneys. Rather, it is for guidance. Attorneys should employ their professional and ethical standards, pursuant to the Michigan Rules of Professional Conduct, adopted by the Michigan Supreme Court on October 1, 1988.

Introduction

Over the years, there has been much debate and discussion among counsel concerning the role of the defense attorney assigned to represent an insured employer by an insurance company in a workers compensation case. This article will attempt to clarify the role of the defense attorney vis-à-vis the insured & insurance company and what to do if a conflict arises.

Common Practice/Goals

As a general rule in Michigan workers compensation matters, the defense counsel generally represents two clients: the insurance company and the insured. From a common practice and efficiency standpoint, all work together toward a common goal, that being to represent the mutual interests of the insurance company and the insured in the defense of a contested/litigated claim.

It is important to note that defense counsel maintains both a fiduciary relationship to the insured, as well as to the insurance company. *Atlanta International Insurance Company v Bell,* 438 Mich 512, at 519 (1991).

The insured employer reasonably expects that the insurance company will employ its vast legal and investigative resources to defeat/defend the action for the mutual benefit of both the insurer and insured. *Allstate Insurance Company v Freeman,* 432 Mich 656, at 704, N3 (1989).

As noted in Welch, *Worker's Compensation in Michigan: Law and Practice,* 120.1 (ICLE 3d ed 1996 and Supp. 1997), workers compensation proceedings in Michigan are "much simpler than those in the courts of general jurisdiction" and are "relatively informal." Thus, the usual courts of general jurisdiction rules regarding attorneys and insureds are distinguishable from those involving workers compensation litigation, *i.e.*, a typical civil jury tort case vis-à-vis a workers compensation matter, discussed below.

Special Tripartite Relationship

At a minimum, in regard to all insurance defense litigation, Michigan courts do recognize that a "special tripartite relationship" exists between the attorney, the insured, and the insurer. The relationship results from the contractual "consent" of the insured to have the insurance carrier control the defense of litigation brought against the insured, *e.g.*, the insurance policy (contract). See *Atlanta International Insurance Company v Bell, supra,* at pp. 519 and 528-529.

Contractual Consent

In regard to the typical workers compensation insurance policy, the insurance contract/policy typically provides language to the effect that the insurance company has a "right and duty to defend" the litigation. Policy language typically further includes the insurance

Conflicts, by Zapala *(continued)*

company's right to assign counsel and the insured employer's responsibility to "cooperate with the insurer in the defense of a litigated claim."

Regarding the insurance company's contractual/consensual right to select counsel, control and defend litigation (as contained within most workers compensation insurance policies), most courts generally agree that the insurance company can control the defense of any litigation for the following reasons: "To ensure an orderly and proper disbursement of these [claims] funds and to minimize unwarranted claims, the insurer has exclusive control over litigation against the insured, and the latter is required to surrender all control over the conduct of defense." Appleman, *Insurance Law & Practice,* Section 4681.

Michigan Statutory Authority

Unlike traditional tort insurance litigation in courts of general jurisdiction, workers compensation litigation, pursuant to statute, involves both the insurance carrier and employer/insured. MCL 418.222; MSA 17.237(222) provides that the contested workers compensation application for hearing be served on both the "employer and carrier." Thus, the insurance carrier by statute is a named party and is an active and visible participant.

Dual Representation Permitted

A conflict of interest does not arise, per se, merely because the insured party employer is represented by an attorney compensated by the insurer, notwithstanding the duty owed by such attorney to the insured party. 7A *CJS* Attorney & Client, §156.

In Michigan, dual representation of the insured and insurance carrier is ethically permitted, provided the interests of the insurer and the insured do not conflict. State Bar of Michigan, *Informal Opinions on Lawyer Ethics,* RI-89, June 10, 1991.

Conflicts Can Arise

While it is permissible for defense counsel to represent both the insured and insurer, particularly in workers compensation matters, courts and commentators recognizeuniversally that the tripartite relationship between insured, insurer and defense counsel does contain rife possibility for conflict, e.g., favoritism to one who pays bills, sends business, and long-standing personal/collegial relationships. *Atlanta International Insurance Company v Bell,* supra, p. 519.

Common Potential Workers Compensation Conflicts

Listed below are some common workers compensation conflicts that can occur in a workers compensation litigated matter. Defense counsel should be alerted to these, so appropriate remedial action can be taken to avoid any conflicts of interest.

- Non-cooperation by the insured with insurance company
- Insured is untruthful, fraudulent or in collusion with plaintiff
- Insured gives attorney confidential information adverse to insurance company
- Carrier and defense attorney disagree on settlement/trial posture
- Carrier and attorney disagree on appeal
- Attorney represents same insured with multiple insurance companies
- Attorney represents multiple insureds, all with same insurance company
- Attorney adds dates of injury to a period of no coverage or selfinsurance by insured
- Attorney had prior client involvement with a claimant/insured/carrier who is now an adverse party to the same action.

Primary Duty to Insured

If one or more of the above conflicts arise between the insured and the insurance company, or even if a potential for conflict exists, the defense counsel must be aware that the attorney's duty is a fiduciary one, and the primary/sole duty of loyalty is owed to the insured, not the insurance carrier. See DR5-107(B) of the Code (Canons) of Professional Responsibility, superseded by the Michigan Rules of Professional Conduct, adopted by the Michigan Supreme Court October 1, 1988, and *American Employees v Patterson,* 165 Mich App 657, at 660 (1987) and *Atlanta International Insurance Company v Bell,* supra, pp.519-520.

The courts will also generally resolve any doubt pertaining to the duty in favor of the insured over

that of the insurer. *Allstate Insurance Company v Freeman, supra,* at pp 662-663; 7C Appleman, *Insurance Law & Practice,* §4683, pp 58-59.

Therefore, if a conflict or serious potential for conflict occurs, the attorney's first loyalty is to the insured and he/she may only continue the representation of both the insured and insurer if the attorney's relationship with the insured will not be adversely affected and he/she can adequately represent the interest of each. It is also advisable that both the insurer and employer/insured consent to the dual representation after full disclosure of the conflict or potential for conflict. DR5-105 of the Code (Canons) of Professional Responsibility.

When in doubt as to conflict and its effect, it is best to err on the side of conservatism and decline to represent both.

Solution to Conflict/Separate Interests

As noted above, if a conflict exists, separate representation is in order in cases where either the insurer or policyholder/insured takes a position which would result in the imposition of liability solely upon one at the expense of the other, *e.g*., coverage issues, exposing the insured to a period of no coverage or self-insurance.

Simply stated, where a conflict exists, the insured has a right to independent counsel and the insurer's duty to defend may extend to paying the reasonable value of those legal services and costs in defense of the claim if the conflict does not arise from the insured's own neglect. *Stockdale v Jamison,* 416 Mich 217, at 704, N3 (1982).

Summary

In conclusion, Michigan permits the dual representation of both the insured and insurance company, particularly in workers compensation matters.

The attorney owes a fiduciary duty to both. However, if a conflict exists, the primary duty of the attorney is to the insured.

Furthermore dual representation of both interests is strongly discouraged where the noted conflicts arise.

A Modest Proposal to Apply Cost Containment to Deposition Charges

By Louis Weir, Brighton

I have some concerns about the extreme high cost of taxing depositions in workers' compensation. In my practice, I have had doctors regularly ask for $750.00 or more, and sometimes up to $1,000.00 to do a deposition. Some doctors have also adopted extremely confiscatory cancellation charges, which bear no relationship to the actual cost to the office of rescheduling a deposition.

While I have no data to back this up, I suspect that there have been, in some cases, legitimate workers' compensation claims which were unable to be pursued due to the sheer cost of medical depositions. Whether or not that is true, the high cost of the depositions certainly puts a “chill” on the prosecution of plaintiff's workers' compensation claims. Almost every attorney has his or her own "horror" stories about this issue.

Although these rules would be "mandatory," it would seem to me that attorneys would be allowed to deviate from these rules in the event that they wished to. In other words, these additional rules would simply be a tool that the attorneys could use to prosecute their claims and would not impede them if they chose not to use these, similar to the current cost containment rules for records.

After you have had a chance to review this, I would appreciate any comments that you might have. I have sent this proposal directly to Chief Magistrate Petersen and to the Section Council; if there is enough public and member comment on this, perhaps the bureau could be moved to adopt this policy as an amendment or addition to the recently adopted Magistrate rules.

COST CONTAINMENT RULES FOR MEDICAL DEPOSITIONS IN WORKERS COMPENSATION

Health care workers including, but not limited to: physicians, physician assistants, physical therapists, nurses, and chiropractors, testifying in workers' compensation cases may charge fees for their time spent giving depositions. The fees shall be due to the health care workers as follows:

a. A board certified allopathic or osteopathic physician may charge up to $250.00 per hour for his or her time.

b. Other allopathic or osteopathic physicians may charge up to $200.00 per hour.

c. Licensed chiropractors may charge up to $200.00 per hour.

d. Other health care workers may charge their usual hourly rate for services up to a maximum of $100.00 per hour.

e. Health care workers may ask for up to a $25.00 deposit to hold the deposition time.

f. If depositions are cancelled within 24 hours of the scheduled time noticed for the deposition, then a reasonable fee

Continued p. 6

Cost Containing Depositions ...

may be charged by the health care worker for rescheduling, not to exceed $25.00; if cancelled with more than 24 hours notice then there shall be no cancellation charge. Notwithstanding the above, if an attorney's office has scheduled and cancelled a given deposition two times, then a health care worker can charge for all subsequent cancellations, regardless of notice.

g. Health care workers may charge for up to 15 minutes of preparatory time preparing for depositions.

h. In extenuating circumstances, a health care worker may apply to the Workers' Disability Compensation Bureau for additional funds based on special circumstances. However, the health care worker will not have standing to appear before the magistrate unless that health care worker has given the deposition in dispute.

Annual Section Meeting in Lansing, September 16; Reception September 15 at University Club, 5 p.m.

By Michael Brenton and Steven Pollok, Co-Chairpersons

The Annual Meeting of the State Bar of Michigan will be held in Lansing this year on September 16, 17, and 18. The Workers' Compensation Section annual seminar will begin at 9:00 a.m. on Wednesday, September 16. Our intention is to secure the services of a speaker who is dynamic, respected, and nationally known, and who can offer insights useful to the everyday practice of all workers' compensation practitioners.

To kick off the convention, the Workers' Compensation Section will sponsor a reception at the University Club of Michigan State University, beginning at 5:00 p.m. on Tuesday, September 15, 1998. Those of you who have attended receptions there in the past will surely appreciate the opportunity to again partake of the University Club's outstanding service and cuisine.

Also, during the convention, ICLE will sponsor a state of the law update, although the timing of the update has not yet been established.

We encourage you to block off time on your calendars now, so you will be able to participate in the social and educational benefits which the fall convention is sure to offer.

Past Chairperson's Golf Outing & Dinner, May 29, 1998

Dear Past Section Chairpersons:

We will hold the past chairperson's golf outing and dinner on Friday, May 29, 1998. Please mark your calendars and plan on attending.

The day will begin with lunch at noon followed by tee times commencing at 1:00 P.M. We will be playing a 18-hole best ball scramble on the Oakpointe Golf Course in Brighton that is located behind Rocky's. After golfing, we will sit down and relax together before having dinner at Rocky's. In the near future, I will send you a dinner entree selection form along with any updated information on this event.

If you have any concerns or questions, please contact me. My direct dial telephone number is 517-241-9387.

Craig R. Petersen, Event Chair

Spring Section Meeting and Seminar

Boyne Highlands June 11 and 12, 1998

Dinner Dance
Cocktail Receptions
Golf and Tennis

Chairpersons Tim McAree
(616) 776-3641
Lisa Klaeren, Deborah Strain

Social Security Section Active, Seeking New Members

By Evan Zagoria, SS Section Chair

Our section was created in December 1996. Membership through 1997 was about 90 members. The 1998 membership list indicates that we are a growing group and now have 226 members. I want to thank our old members for rejoining and welcome our new members.

Deanna Lee-Kaniowski is our Chair-Elect, Diane Kwitoski is our Secretary, and Ed Waud is our Treasurer. The Section's Council currently consists of six members. Council districts correspond to the service areas of the five hearing offices in Michigan. Additional seats on the Council are created when membership exceeds a certain number. With our new membership, more seats will exist and opportunities exist for those who wish to service the section. Please call or write me or any officer if you are interested in serving on the Council or other Section activities.

As Section Chair, I have been participating in a Bar workgroup for providing legal representation for disabled children receiving SSI benefits. One of the plans is to train lay people, via a one day seminar and video tape, as representatives. Preliminary feedback and SSA statistics are showing a much lower than anticipated appeal rate for the children affected by the new definition. My personal experience indicates that I am receiving substantially less telephone inquiries for these SSI terminations than for the DA & A terminations. The members of this section should receive a large part of the inquiries in this area. I would ask you to write me with your impressions as to the inquiries you have received on behalf of these disabled children. This will help me plan responses by the Section and for the workgroup. A recent announcement by the Commissioner Apfel indicates SSA will re-notice those children whose benefits are being terminated and give them new opportunities to appeal and request benefits continuation.

I believe we, as lawyers skilled in representing Social Security claimants, have a duty to assist these children. Whether this is in the realm of *pro bono* or for other consideration, we have an obligation to give back to this system. We are in the best position to assist these children. I would ask each of you to seriously consider this responsibility. These cases are not necessarily easy ones, nor is each a winner. There is no real possibility of a fee. For those of you who wish to provide representation please contact me regarding your interest and availability, so I can report back to the workgroup. For those of you who are unfamiliar with the new SSI criteria, the workgroup has produced a rather extensive text. I have decided, with the concurrence of the Section's officers and Council, to provide copies of this text, at Section expense, to Section members. Again, please contact my office promptly if you want or need a copy of this text so I have some idea how many copies to print.

The Section's primary project at this time is to provide some relief as to the high costs we are paying for medical records. One idea under consideration is to utilize "cost containment" procedures similar to those adopted for Workers' Compensation. Alternatively, we might have to pursue legislation, similar to that which has been adopted in several other states. If you have any other thoughts in this area, please contact me. Certain members have been sending me examples of the high fees they are paying. It is not also necessary to send these to the State Bar or NOSSCR.

Ultimately, this section is for you, its members. We hold Section meetings at the State Bar Building in Lansing to encourage everyone to attend. The next section meeting is scheduled for Friday, March 20, 1998, at 10:00 a.m. If you have any ideas, problems, comments or suggestions for the agenda, or suggestions for the Section, please let me know. The Council will also now be meeting once monthly in Lansing.

We are in the process of starting a quarterly newsletter. For those of you with any journalistic talents who would like to help with this, please contact me. If you have any ideas for articles, please also let me know.

A number of members have also inquired as to us putting on a session for CLE credit. This is an ambitious undertaking because we have no professional staff who regularly handles these activities, but it is something we are strongly considering. Not all Section members are in NOSSCR or can attend NOSSCR conferences for CLE credits. ICLE might be able to assist us in this project if there is enough Section interest. I need feedback from you as to your interest in attending, whether you would prefer attending on a weekday or Saturday, topics, prospective speakers, those of you willing to be a speaker, and those of you with any experience in putting on such as session who want to volunteer their help.

I welcome new members from our colleagues in the Workers Compensation bar, and all other lawyers who have an interest in this important field.

Michigan's Workers' Compensation System Is Now On The Web!

Michigan's Workers' Compensation agencies are able to serve the public even better now, thanks to their new web site, announced Consumer & Industry Services Director Kathleen Wilbur.

The site address,

http://www.cis.state.mi.us/wkrcomp/

accesses the three agencies of the workers' compensation system. They include:

*Bureau of Workers' Disability Compensation & Funds Administration - Jack Wheatley, Director

*Board of Magistrates - Craig Petersen, Chairperson

*Workers' Compensation Appellate Commission - Donald G. Miller, Chairperson

Information expected to be available will include the Workers' Disability Compensation Act along with Rules applicable to the Bureau, the Board of Magistrates and the Appellate Commission. The Board of Magistrates site plans to provide maps and directions to the various offices and hearing locations around the state. Other information is expected to include statistics, such as the number of compensable injuries per year, pending contested cases and amount of benefits paid, both for weekly benefits and/or medical benefits.

Regular updates will include new policy letters, updated data and other applicable information.

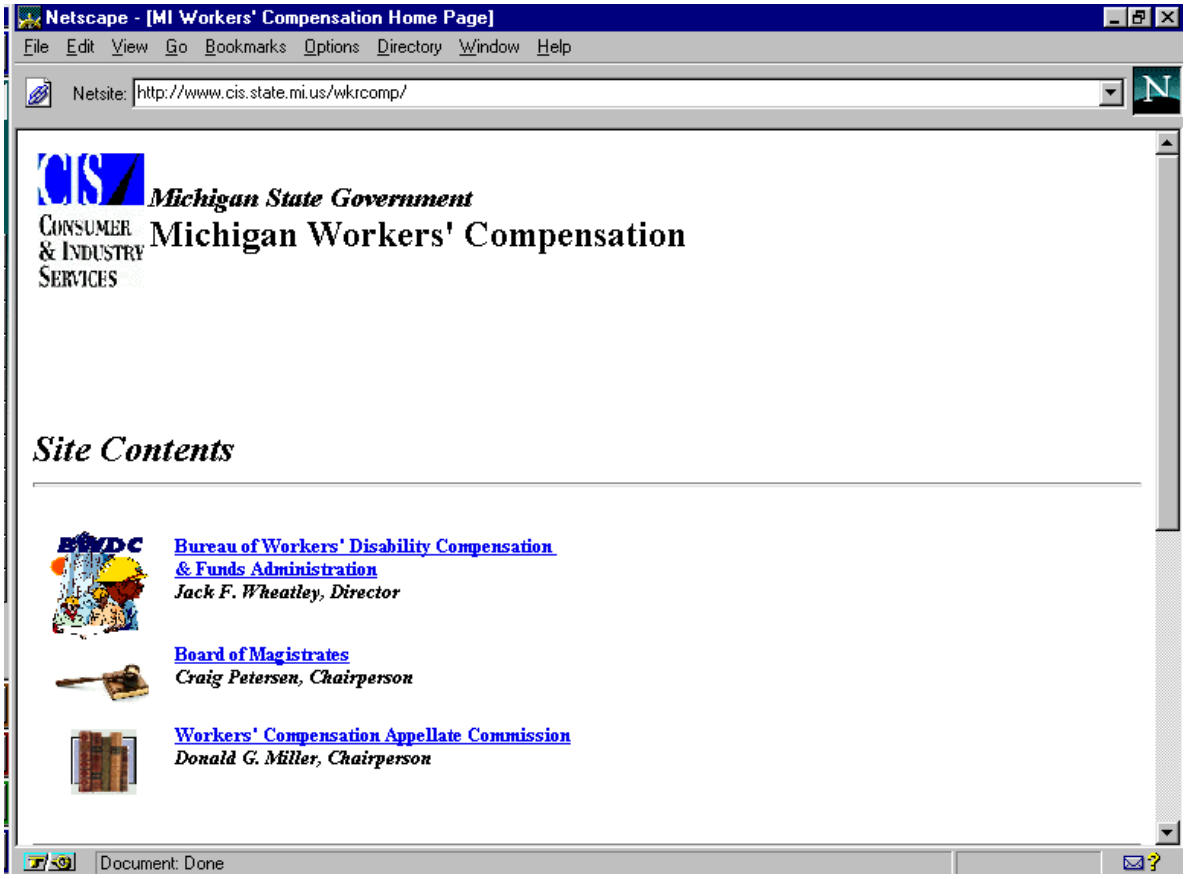
"This site enhances existing Workers' Compensation information outlets," Wilbur said. "Internet users can access significant information that they otherwise would have to contact the bureau to obtain."

The Workers' Compensation system web site is another step in the Department of Consumer & Industry Services' goal of full Internet access to each of its many and diversified bureaus, commissions and offices.

Appellate Commission Opinions Available Now

Donald G. Miller, Chairperson of the Workers Compensation Appellate Commission, announces that the Commission's opinions are now available online. As of the end of February, it was anticipated that all of the 1997 and 1998 opinions would be loaded on the server. "Word search is still not available (it's complex and requires additional software), but we are progressing toward it," said Miller.

The address is **www.cis.state.mi.us/wkrcomp/wcac/forms.htm**



RECENT COURT DECISIONS

By Jerry Marcinkoski

The Supreme Court has not issued any decisions in workers' compensation cases since our last newsletter. However, the Supreme Court has granted leave in two workers' compensation cases and acted in other pending workers' compensation cases. Since our last newsletter, the Court of Appeals has released a number of workers' compensation decisions. The Workers' Compensation Appellate Commission has also released a large number of opinions of interest.

SUPREME COURT

Cases On Leave Granted

The Supreme Court recently granted leave in *Layman v Newkirk Electric*, SC Docket No. 105245. The issue in the case relates to whether cases should go to the Workers' Compensation Appellate Commission or the Board of Magistrates on remand from the courts. The Supreme Court originally considered this issue last term in *Stepp v General Motors*, SC Docket No. 103099. However, the Court dismissed the *Stepp* appeal as improvidently granted.

The Supreme Court also granted leave in *Matney v Southfield Bowl*, SC Docket Nos. 107295, 107392. This case addresses the two year continuous disability provision of §356(1).

In December 1997, the Supreme Court heard oral argument in *Hagerman v Gencorp Automotive (After Remand)*, SC Docket No. 107059. This case addresses the proximate cause standard of causation in death cases as recited in §375(2).

Bitar v Wakim, SC Docket No. 103663 continues to pend before the Court on leave granted. The Court last term ordered further briefing. The case presents questions relating to application of the exclusive remedy provision where an employee of a corporation slips and falls on property owned by the corporation.

Finally, in *Rea v Regency Olds/Mazda/Volvo*, SC Docket No. 99568, the Court vacated its grant of leave to appeal. The case had been pending before the Supreme Court for three terms and had been the lead case on the definition of disability.

COURT OF APPEALS DECISIONS

Court Of Appeals Interprets *Derr*

In *McJunkin v Cellasto Plastic Corp*, ___ Mich App ___; ___ NW2d ___ (CA Docket No. 198732, decided October 31, 1997), the Court of Appeals had occasion to interpret the Supreme Court's opinion in *Derr v Murphy Motors Freight Lines*, 452 Mich 375; 550 NW2d 759 (1996). Derr has been controversial and subject to conflicting opinions. In *Derr*, the Court faced the question of whether an offer of favored work that was extinguished by the company's bankruptcy automatically revived the claimant's right to weekly compensation benefits.

The *McJunkin* Court concluded that plaintiff initially unreasonably refused his favored job. The Court noted, however, that after plaintiff's surgeon's testified in the compensation case that plaintiff might be able to perform the favored job, plaintiff telephoned defendant offering to return to work only to learn that the job had been phased out. The job had been kept open approximately six months and had been phased out 4 - 6 weeks before plaintiff's reapplication for the favored work.

The *McJunkin* Court interprets *Derr* as holding that benefits are not permanently forfeited but only suspended during the period of unreasonable refusal. *McJunkin* said that the correct reading of *Derr* is that once the offer of favored work is withdrawn, benefits must be reinstated as long as the employee is still available for work.

Holden After the Remand

You might recall that *Holden v Ford Motor Co (After Remand)*, ___ Mich App ___; ___ NW2d ___ (CA Docket No. 195440, decided October 24, 1997) had been the original case outlining the scope of review of factual matters by the Workers' Compensation Appellate Commission. *Holden* was remanded to the Appellate Commission for further consideration of the substantive issue, the compensability of plaintiff's heart claim in light of *Farrington v Total Petroleum, Inc*, 442 Mich 201; 501 NW2d 76 (1993).

Mr. Holden had worked as a supervisor of food services for Ford. After climbing the stairs at work one day, he was found lying over his desk. He died at the hospital with the death certificate listing hypertension and ateriosclerosis as the cause of death. The Commission applied *Farrington* balancing the occupational and nonoccupational factors to determine whether work contributed "in a significant manner" toward the heart attack. The Commission concluded that, under the totality of circumstances, work did not contribute significantly toward Mr. Holden's demise. Mr. Holden had been somewhatoverweight, had preexisting hypertension and arteriosclerosis, smoked 2 ½ - 3 packs of cigarettes per day, and had a drinking problem.

The Court said that the Commission correctly applied *Farrington* and determined that the stair-climbing, when viewed in light of plaintiff's nonoccupational factors, did not significantly contribute toward the decedent's demise. The Court also agreed with the Commission that under *Farrington* the generalized complaint of stress that the decedent lodged about all aspects of his job did not support a finding of compensability.

Bureau And Commission Can Apply *Franges*

In *McMiddleton v Second Injury Fund*, 225 Mich 326; ___ NW2d ___ (1997), plaintiff suffered a work-related injury when she fell down an open elevator shaft. She received workers' compensation benefits, claimed total and permanent disability benefits, and sued the elevator company in a third-party action. The Second Injury Fund filed a notice of lien in the third-party action, but did not intervene.

Years after the third-party claim was concluded, plaintiff prevailed on appeal with her total and permanent disability claim. The Fund reduced plaintiff's differential benefits to reflect its lien in the third-party action. Plaintiff challenged the reduction. Both the Magistrate and Commission held that they lacked jurisdiction

to adjudicate the validity of the lien.

The Court of Appeals reversed. The Court said that, while the Bureau and Commission do not have jurisdiction to calculate the attorney fees and allocate the expenses in the third-party action (such tasks being exclusive to the court), the Bureau and Commission do have jurisdiction to determine the validity of the lien and apply *Franges*.

The Court of Appeals also said that the fact that the Fund did not intervene in the Circuit Court action to preserve its lien was not fatal because it had filed a notice of lien in the third-party case. The Court said that, although it is better practice to formally intervene, the workers' compensation benefits provider is not required to do so to protect its lien.

No Reimbursement From Silicosis And Dust Disease Fund

In *Dvorak v Faulkner Construction Co*, ___ Mich App ___; ___ NW2d ___ (CA Docket No. 194526, decided November 21, 1997), the decedent died of mesothelioma of the peritoneum, a cancer in the abdominal lining resulting from asbestos exposure. The employer sought reimbursement of benefits that surpassed the statutory threshold level of benefits described in §531 from the Silicosis, Dust Disease, and Logging Industry Compensation Fund. The Commission denied the employer's request for failure to prove that the claimant died from a condition that posed a threat to the industry.

The employer appealed arguing that while the claimant died from peritoneal mesothelioma, he also had pneumoconiosis - a condition for which, per the employer, specific proofs of threat to industry were unnecessary.

The Court held that it was not necessary for it to address the question of whether "threat to industry" proofs are necessary where pneumoconiosis is the cause of disability or death because the death in this case was attributable to the cancer not the pneumoconiosis.

Dual Employment

In *Bendion v Penobscot Management Co (On Remand)*, 225 Mich App 235; ___ NW2d ___ (1997), the employee was injured while working for Penobscot and she also held another job working as a domestic three days per week for a family. She sought inclusion of the wages she earned as a domestic into her average weekly wage. The wages plaintiff earned as a domestic had not been earned at employment "covered by" the Act, under §371(1). Plaintiff argued that the wages should be included because, unlike §371(1), §371(2) refers to "all employment" without §371(1)'s limiting language that the wages must be at covered employment.

The Court of Appeals, affirming the Workers' Compensation Appellate Commission, held that the wages earned as a domestic are not to be included in the calculation of plaintiff's average weekly wage. The Court held that when both §371(1) and §371(2) are read together they require that the average weekly wage be determined by including wages earned in all employment that is covered by the Workers' Compensation Act.

Double Benefits For Illegally Employed Minor

In *Demogola v Shellhouse Sawmill*, ___ Mich ___; ___ NW2d ___ (CA Docket No. 194333, decided November 21, 1997), the Court of Appeals held that a seventeen-year-old minor was entitled to the double benefits described in §161(1)(l). This provision says that a minor who is illegally employed shall receive double compensation in the absence of the fraudulent use of permits or certificates.

The Court referred to the Youth Employment Standards Act (YESA), MCL 409.101; MSA 17.731(1) et seq, to determine the legality of plaintiff's employment. The Court said that, even though plaintiff did not work at "hazardous" work as described in YESA, his employment was nevertheless illegal because he did not have a work permit, worked for more than six consecutive days, and worked more than 48 hours in some weeks, all violative of provisions of YESA.

Dependency In Death Cases

In *Cohoon v Fruehauf Trailer Corp (On Remand)*, 225 Mich App 203; ___NW2d___(1997), the Court of Appeals addressed a dependency issue in a death case. At the time of the employee's death, he had a 27-year-old son who was mentally incapacitated from earning. As such, he was a conclusive dependent under §331. The employer paid him death benefits for 500 weeks. At the expiration of the 500 week period, the son petitioned for additional benefits. The Magistrate denied the petition for additional benefits, the Commission affirmed, and the Court of Appeals affirmed as well.

The Court said that the Act only provides for the possible payment of benefits beyond the usual 500 week period if at that time there are minor children under the age of 21 or, in certain circumstances, the age of 18. The Court said that there is no statutory authority to extend benefits beyond 500 weeks solely on the basis that at that time there remains a dependent of the decedent who is mentally incapacitated from working.

No Right To Excess Surplus Held By The Accident Fund

In *Fun 'N Sun RV, Inc, v State of Michigan*, 223 Mich App 542; ___ NW2d ___ (1997), the plaintiffs in this civil action were policyholders of the Accident Fund who claimed a vested right in any Accident Fund surplus existing in 1990, prior to the sale of the Accident Fund in 1994. The trial court granted defendant summary disposition. The Court of Appeals affirmed. After reviewing the history of the Accident Fund and the particular provisions of §701 et seq of the Act, the Court concluded that the state was not contractually bound to pay Accident Fund policyholders funds that had been placed in the excess surplus escrow account.

WORKERS' COMPENSATION APPELLATE COMMISSION

The First Post-*Haske* Decisions

The Commission has now had occasion to apply *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997) to a number of cases. The Commission's opinions illustrate a two-step analysis, with different factors informing each step. The first step is whether there is "disability". The second step is whether there is "compensable" disability. *Morrow v Flint Board of Education*, 1997 ACO #510; Garrett v Coil Steel Processing, 1997 ACO #625; *George v Hackley Hospital*, 1997 ACO #679; *Marsh v Granger Construction Co*, 1997 ACO #642.

The Commission has summarized the elements that affect each of this two-pronged determination as follows:

"Put simply, an employee must show 1) a workplace injury, 2) a disability, and 3) wage loss due to the injury, in order for there to be entitlement to weekly benefits. If an employee proves a workplace injury, disability and subsequent wage loss, the employer has the opportunity to present proofs that the wage loss is not related to the injury, but is instead due to other, non-work-injury-related factors. Such factors might include avoidance of work, malingering, termination from employment for reasons unrelated to the injury, the employee's voluntary choice to pursue other activities or any other relevant facts which a defendant may choose to present to the trier of fact." *Garrett*, supra.

The Commission has explained that a Magistrate errs on the first inquiry - the "disability" inquiry - if the Magistrate should find that a person is not disabled where they cannot perform one job within their qualifications and training. In *Morrow*, the Commission explained:

"As a result, under *Haske* plaintiff is disabled because there is at least one job in his area of qualifications and training that he cannot return to. To the extent the magistrate's opinion ruled that inability to perform two specific prior jobs which defendant did not, as a matter of law, constitute disability, that decision is inconsistent with the Supreme Court's most recent reinterpretation of the 1987 definition of disability and is reversed."

The Commission has explained that with respect to the second inquiry - whether the disability under the first prong is "compensable" - the Magistrate errs if he or she does not undertake the following inquiry:

"Thus, pursuant to *Haske*, an employer may 'refute the causal connection between the partial disability and the employee's unemployment with evidence that other factors are the cause of the unemployment,' such as avoidance of work. In this case, the evidence introduced by defendant was aimed precisely at proving that plaintiff was avoiding work and that this had become the true cause of his unemployment. Whether the evidence presented by defendant is sufficient to meet the burden of proof by preponderance of the evidence is of course a question of fact for the magistrate, and it is essential that the magistrate address this question of work avoidance. . . " *Damuth v Coca-Cola*, 1997 ACO #589.

The Commission has emphasized that it is not plaintiff's burden to prove he or she is not avoiding work, but rather the employers' burden to prove work avoidance at trial or, following an award, via petition at the Bureau:

"Defendants are always free to locate work for their injured employees whether it be favored work, or regular work within their qualifications and training. This can be done at any time and a petition for a hearing on such issues may be filed at any time." *Oster v Art Van Furniture, Inc*, 1997 ACO #701.

See also, *Lee v Chrysler Corp*, 1997 ACO #618.

Has *Haske* created an "all-or-nothing" procedure where entitlement to benefits is either at the employee's maximum weekly rate or no benefits at all? *Mayse v Wirt Transport Co*, 1997 ACO #528 suggests that *Haske* does not require an "all-or-nothing" proposition. A Magistrate can award a partial rate of compensation if the Magistrate believes that the claimant is avoiding lesser paying work.

In *Mayse*, the employer proved through testimony of a vocational rehabilitation expert that there were jobs within the claimant's post-injury limitation and that the claimant was avoiding such jobs. The defendant's counselor had advised plaintiff of job openings and plaintiff did not pursue the job leads other than make one phone call. The Magistrate, after excluding from consideration most of the jobs identified by the vocational counselor on the basis that they were not actually available, found that three jobs identified by the counselor were within a reasonable distance of plaintiff's home and actually available to him. The Magistrate calculated the average of the three available jobs and gave the employer credit for the amount of wages avoided. The Commission affirmed under *Haske.*

Finally, the Commission has had occasion to address the question of whether the Magistrate has authority to consider testimony of vocational rehabilitation counselors to resolve questions of work avoidance or, on the other hand, whether such a dispute is confined to the director of the Bureau under §319. The Commission said that, "there is no requirement for a hearing before and decision from the director before a magistrate may take up the question." *Burke v Welk KO Fabricators, Inc*, 1997 ACO #468.

Relitigation Of Retiree Presumption

In *Land v Chrysler Corp*, 1997 ACO #664, the employee had originally unsuccessfully litigated a claim that he satisfied the retiree standard of disability contained in §373. Plaintiff later filed a new petition claiming that his condition had worsened and that he nowsatisfied the retiree standard of disability. The Magistrate dismissed plaintiff's claim on a threshold basis, holding that res judicata precluded relitigation of the issue.

The Commission reversed. The Commission said that in enacting the retiree standard of disability the Legislature did not modify the longstanding rule that any party can claim a change of condition and have a decision on the merits of that issue.

Does §301(5) Apply To The Total And Permanently Disabled?

In *Ballard v Schwan's Ice Cream/Husky Food Service*, 1997 ACO #649, the claimant suffered an amputation of his legs as a result of a work-related motor vehicle accident. He eventually returned to work for another employer. The defendant had paid plaintiff 800 weeks of full benefits, pursuant to the conclusive presumption of total and permanent disability. Upon expiration of the 800 weeks, the employer began taking credit for the wages plaintiff earned. Plaintiff was ultimately laid off from the subsequent employer after seven years of post-injury work. The issue was whether §301(5)'s "reasonable employment"/favored work provisions applied to this totally and permanently disabled claimant.

The Commission held that it does not. The Commission held that §301(5) applies to partially disabled claimants, totally disabled claimants, and one of the two groups of totally and permanently disabled claimants, namely: those who have a total and permanent disability due to the loss of industrial use of a member. The Commission said that §301(5) does not apply to claimants who have suffered actual amputations because they will remain within the definition of total and permanent disability for their lifetime.

Recusal Of Magistrate Reversed

In *Sowinski v Wolpin Co*, 1997 ACO #638, the plaintiff moved to recuse a magistrate on the basis that the Magistrate had advised the parties on a pretrial date that as an employer of a small business, one of his employees was robbed at gunpoint similar to the issue presented in this case. The Magistrate denied the request to recuse himself. Plaintiff took the matter to the Chief Magistrate who granted the motion on the basis that, while the original Magistrate was capable of deciding the case without bias, plaintiff's perception of impartiality was reasonable and justified recusal.

The Commission reversed on the basis that the Chief Magistrate did not apply the correct legal standard. The Commission agreed with the Chief Magistrate that the rulesgoverning disqualification are "cloudy", but the Commission relied upon the Michigan Court Rules and two court cases to say that actual bias must be present and the mere perception of bias was insufficient for recusal.

Police And Firefighter Presumption Of The Work-Relatedness Of Respiratory And Heart Illnesses

In *Price v Bloomfield Township*, 1997 ACO #702, the Commission reversed the Magistrate's denial of benefits for a heart condition suffered by a police officer. The Commission emphasized the strength of the statutory presumption of §405, which provides that respiratory and heart illnesses are presumed to arise out of and in the course of employment. The Commission said that, given this presumption, defendants are required to come forward with evidence of a non-work-related causation that constitutes "positive proof of a cause independent of the employment." This plaintiff's preexisting hypertension, elevated cholestorol, and genetic predilection toward heart disease were insufficient to rebut the statutory presumption.

Reduction In Like Benefits Does Not Negate Election Of Like Benefits

In two separate opinions, *Crowe v City of Detroit*, 1997 ACO #257 and *Finch v City of Detroit*, 1997 ACO #304, the Commission resolved identical issues relating to the receipt of "like benefits" by Detroit police officers under §161(1)(a). In both cases, there was no dispute that the employees elected the duty disability pensions provided by the city charter rather than workers' compensation benefits. The issue was, given that duty disability pension benefits after 25 years of service are reduced by approximately 50% under the charter, can the plaintiffs now seek workers' compensation benefits? Plaintiffs argued that the change of circumstance should operate to negate their original election of such benefits.

The Commission disagreed with the plaintiffs. Relying upon *Mackay v City of Port Huron*¸ 288 Mich 129 (1939), the Commission held that the plaintiffs are still receiving duty disability pensions which are like benefits regardless of their amount. Therefore, they made an election and that election continues.

Attorney Fee Disputes

In *Hernandez v General Motors Corp*, 1997 ACO #412, the original case had culminated in an open award by the Magistrate which was affirmed by the Commission. While the case was pending on appeal, the plaintiff had resolved a third-party case for $500,000and it also appeared that a second third-party case had been settled for $50,000. Plaintiff's cases were handled by different firms. The workers' compensation defendant took credit for the third-party case against the 70% benefits owing during the appeal. After completion of appeals, the defendant filed a petition at the Bureau seeking an order establishing its rights relative to its lien on the third-party recovery. A second petition was also filed by the law firm which had represented plaintiff in the workers' compensation action. The issue to be decided was the claim by plaintiff's workers' compensation counsel for fees.

The Commission held that the third-party case is irrelevant to the process of calculating attorney fees in the workers' compensation case. The compensation case should be considered in a vacuum for purposes of attorney fee calculation. The fee should be calculated on the basis of the compensation which was or would have been accrued as of the completion of the original action regardless of the existence of a third-party case. The Commission remanded the case to the Magistrate to conduct a hearing to determine reasonable attorney fees and costs.

In *Frantz v B&D Drywall Supply, Inc*, 1997 ACO #426, the Commission resolved another attorney fee question arising under the following scenario.

Following an injury, plaintiff filed both a workers' compensation claim and a third-party circuit court action based upon the injury. He was represented by two different law firms. Plaintiff obtained an open award of benefits that was ultimately affirmed on appeal. While that workers' compensation action was pending, plaintiff recovered a substantial amount of money in the third-party action.

Plaintiff and defendant in the compensation case were unable to agree on the amount of money owed plaintiff and his counsel. Plaintiff argued that the accrued compensation benefits owed (mainly the 30% attorney fee) was not subject to *Franges.* The Magistrate disagreed and the Commission affirmed. The Commission did say, however, that the Magistrate's decision should be modified to reflect the fact that plaintiff's counsel is entitled to a fee based upon the accrued compensation due his client. The opinion does not indicate who pays this attorney fee.

Fitts' Interpretation Of The Claim Provision Analyzed

In *Hess v Steelcase, Inc*, 1997 ACO #404, the Commission received a case remanded from the Court of Appeals for reconsideration in light of *Fitts v City of Detroit Water Department (On Remand)*, 218 Mich App 558 (1996). In *Fitts*, the Court of Appeals had interpreted the claim provision, holding that the words "last day of employment" in §381(1) are not synonomous with "last day of work."

The Commission said that, under *Fitts*, the mere fact that the employee ceased performing work on a particular day does not make that day his "last day of employment." Instead, the correct inquiry requires an analysis of the particular facts of the case to determine that point in time when the worker is no longer being treated like an employee.

The defendant in *Hess* argued that plaintiff had ceased being treated like an employee years before he withdrew his pension

benefits from the company and, therefore, the pension withdrawal date should not be considered his last day of employment. The Commission remanded the case to the Magistrate to determine when the "last day of employment" as contemplated by *Fitts* actually occurred.

Effect Of Lifetime Benefits On Death Benefits

In *French v Pollock Co,* 1997 ACO #560, the Commission was faced with the following factual scenario. During his life, the employee filed for and was voluntarily paid benefits. The voluntary pay agreement incorporated the two year back rule since plaintiff had waited a number of years after his last day of work before petitioning for benefits. Following the employee's death, his spouse filed a death claim. The issue presented was the effect of the two year back rule on the period of death benefits payable to the widow. Plaintiff took the position that the 500 week provision of §321 began to run as of the date benefits were first paid. The defendant took the position that the 500 weeks began to run from the decedent's last day of work. The distinction is important because §375(2) provides that lifetime benefits payable decrease the available death benefits. In three separate opinions, a majority of the three-person panel of the Commission agreed with plaintiff. One member of the majority held that the widow's claim is independent of the two year back rule applied to the employee's claim and another member of the majority emphasized the particular language of the voluntary pay agreement in the lifetime case. The voluntary pay agreement's language had effectively "move[d]" the date of injury for purposes of calculating death benefits to the date lifetime benefits commenced.

Payment Of Medical Expenses After An Award

In two cases the Commission had occasion to address questions of the payment of medical expenses following a final award of benefits.

In *Brown v SMART,* 1997 ACO #669, plaintiff had been awarded weekly benefits and also reasonable and necessary medical expenses for various orthopedic problems. Plaintiff later complained that defendant had ceased paying for chiropractic treatment without filing a petition with the Bureau relieving it of its liability for reasonable and necessary medical treatment under the original decision.

The Commission agreed with plaintiff. The Commission explained that, pursuant to *Garcia v McCord Gasket Corp,* 449 Mich 16 (1995), the way to determine whether ongoing medical expenses are the defendant's liability is to consider whether the medical expense was contemplated as a reasonable and necessary medical expense at the time of the original trial. The Commission said that in this case the Magistrate clearly contemplated chiropractic treatment. The Commission said that, while post-trial medical expenses could be disputed as not reasonable and necessary, the defendant could not discontinue payments unilaterally. Instead, it must obtain an order permitting discontinuation.

In *Arnold v Dunn Electric Co*, 1997 ACO #612, the Commission faced a related medical expense question. The case had originally been litigated and plaintiff awarded benefits, including medical expenses, for various physical complaints. After the conclusion of the trial, plaintiff began treating with a psychiatrist and requested payment of that medical expense in a new petition. The Magistrate awarded them.

The Commission affirmed. In so doing, the Commission addressed who has the burden of proof in such cases. The Commission said that the burden lies with the plaintiff when the treatment is provided by a new doctor or is of a different nature from the type of treatment that had been provided at the time of the first hearing. However, if the medical treatment is of the same nature and by the same provider as that originally litigated and the defendant is simply maintaining that it is no longer appropriate, then defendant has the burden of proof.

The Commission's Scope Of Review Of Factual Matters

In *Jamison v General Foods Corp,* 1997 ACO #598, the Commission undertook an historical analysis of the scope of review by the Commission and its predecessors in the workers' compensation system. The decision makes for interesting reading for anyone interested in the history of the workers' compensation system.

The purpose of the analysis was to decry the amount of appeals to the Commission that do nothing more than implicitly invite de novo review of the Magistrate's decision. The Commission emphasizes that: the Commission will not substitute its judgment for that of the Magistrate; the Magistrate's credibility determinations are entitled to deference; the Magistrate's choice of which medical expert opinion to accept is within his or her discretion if the choice is reasonable; and, although the Magistrate may give preference to a treating expert's opinion, the Magistrate is not obligated to do so. The Commission said that appellants raising factual challenges should refrain from simply presenting the points favorable to their case without considering the evidence adopted by the Magistrate and without demonstrating how the specific findings by the Magistrate are unsupported.

Does Reduction Of Post-Injury Wages Increase The Level Of Partial Benefits?

The Commission has had two occasions to address whether in partial disability cases a post-injury decrease in wages affects the plaintiff's partial disability rate. The first case addresses calculation of average weekly wage under §371 and the second the partial disability rate under §361(1).

In *Laker v Checker Motors Corp,* 1997 ACO #566, plaintiff worked as a metal finisher which led to work-related carpal tunnel syndrome. He eventually returned to work as an inspector at a rate of pay lesser than that of a metal finisher. He was paid partial disability benefits. A later union contract reduced wages in all categories, including the wage in plaintiff's original category of metal finisher. The defendant adjusted plaintiff's partial rates to reflect the reduction in metal finishing work. The Magistrate approved the reduction. The Commission reversed.

The Commission explained that the Magistrate erred by, in effect, recalculating plaintiff's average weekly wage at the time of injury. The Commission emphasized that one's average weekly wage is "fixed" at the time of injury, per §371. The Commission explained that the case did not present a §361 partial disability question relating to what plaintiff was able to earn subsequent to the injury.

By contrast, in *Kurz v Michigan Wheel Corp,* (and thirteen

related cases), 1997 ACO #681, the average weekly wage of the plaintiffs at the time of injury included the value of bonus and profit sharing payments (which were considered part of the cash wage notfringe benefits). The plaintiffs returned to work with no reduction in base wages and they remained eligible for the profit sharing and bonuses as well. Sometime later the profit sharing plan and bonuses were restructured pursuant to a new collective bargaining agreement and no such payments were made thereafter. Plaintiffs argued for a partial rate of compensation since their present average weekly wage (given the absence of the profit sharing payments and bonuses) was now less than what they were earning at the time of injury. The Magistrate rejected plaintiff's claims and the Commission affirmed.

The Commission focused on the statutory proviso that the correct inquiry post-injury is the amount that the claimant is "able to earn" and *Haske's* and *Sobotka's* emphasis that wage loss must be directly related to the injury and not non-injury factors. Under such analysis, the Commission said that these plaintiffs' lower wages today were not the result of their injuries. The Commission also rejected plaintiff's argument that since general economic conditions caused the elimination of bonuses and absence of profit sharing payments they were entitled to a partial rate. The Commission explained that *Sobotka* is not "a blanket rule" that economic factors are completely irrelevant in determining whether post-injury wage loss is due to injury.

Coordination Of Old-Age Social Security

In *Grayson v Morbach & Associates, PC,* 1997 ACO #278, plaintiff suffered from a work-related disability with the defendant applying the age 65 reduction provision of §357. Plaintiff challenged the age reduction on the basis that, although he is eligible for old-age Social Security benefits, he is not receiving Social Security benefits due to the fact that he is earning too much income.

The Magistrate and Commission rejected plaintiff's argument. The Commission said that the Magistrate correctly held that actual receipt of Social Security benefits, as opposed to eligibility and entitlement to them, is not the correct requirement.

Social And Recreational Activities

The Commission has decided two cases relating to §301(3)'s proviso which says that an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered by the Act.

In *Schwartz v St. Mary's Hospital*, 1997 ACO #653, the plaintiff worked at the same place as her husband. She had no driver's license so she rode to work with her husband two hours before her shift began. She was in the habit of going to the cafeteria and meeting with friends before she commenced work. While doing so one day, she volunteered to give a coworker a neck rub and, in positioning her chair behind the coworker, fell down two stairs injuring herself. The Magistrate denied benefits on the basis that plaintiff was socializing at the time of injury and, also, because she was not at work within a reasonable time prior to working hours.

The Commission reversed and awarded benefits. The Commission catalogues the types of cases that have been found to constitute social and recreational activities and distinguished this plaintiff's activities from such cases. The Commission also found that, under the circumstances of this case, plaintiff's presence at the workplace, although "a relatively long period of time" prior to the commencement of work, was not unreasonably premature.

In *Angel v Jahm, Inc,* 1997 ACO #308, the claimant, a vice-president, went on an employer-sponsored cruise. While the cruise ship docked at Martinique, plaintiff and his wife rented motorbikes for sightseeing purposes and plaintiff was injured in a motorbike accident. The Magistrate awarded benefits, but the Commission reversed. The Commission said that, while it is reasonable to expect that employees on special missions will do more than stick strictly to work-related matters, there comes a point where such reasonable expectation ends. The Commission said that plaintiff's decision to use his "free time" to explore the island on a motorbike was primarily social or recreational activity and also a deviation from any special mission.

Arising Out Of And In The Course Of Employment

In *Hawkins v State of Michigan,* 1997 ACO #708, the Commission affirmed the Magistrate's denial of benefits where a plaintiff claimed that his mental disability resulted from publicity relating to his efforts as an undercover agent for the state's Department of Social Services. The Commission's opinion contains a catalogue of many cases interpreting the arising out of and in the course of employment through the decades. The Commission then offers the following summation of the present state of the law in this area as follows:

"Thus, we express our understanding of the current state of the law for issues relating to arising out of and in the course of employment. Determination of compensability depends on evaluation of four elements: 1) the nature of the hazard which led to injury, 2) the direct benefit to the employer from the employee's work related activities at the time theywere performed, 3) the activity of the employee at the time of the injury and 4) the location of the employee, either at the place where work is to be performed or away from it. Each element operates on a continuum which ranges from unrelated to employment to clearly work related. In addition, no single factor is necessarily determinative of compensability, but must be evaluated in conjunction with the others."

Dual Employment Provision

In *Russell v County of Saginaw,* 1997 ACO #593, plaintiff claimed that the Magistrate erred in not finding dual employment under §372 under the following facts.

Plaintiff worked year-round for the county as a youth care specialist. She was also working during the normal school year for a school district. The question was whether she could be considered to have been engaged in dual employment when she was injured during the summer. Plaintiff's argument was that she had worked a couple of summers for the school district in the past at a different position and that she considered herself an on-call employee of the school district during the summer.

The Magistrate and Commission rejected plaintiff's argument saying that plaintiff was not "engaged" in more than one employment at the time of her injury because she had never worked during the summer at her present position and that her contract with the school district had ended in June with a new contract to have commenced in August.

Calculation Of Partial Rates Using Bureau's Tables

In *McCalla v Marine City Nursery, Inc*, 1997 ACO #504, the Commission explained how to calculate partial rates of compensation where the claimant has returned to work in years after the claimant's date of injury, as follows:

"In order to determine the after tax amount of earnings in any given year after the year of injury it is necessary to apply the rate table for the year those earnings were received in order to comply with the statutory mandate that the after tax earnings be used to determine the partial rate. It is precisely because the tax laws and regulations alter the after tax amount in each different year that there is a new Rate Table for each ensuing year. If an employee has earnings in 1991, the after tax amount of those earnings is determined by the tax regulations in that year and in no other year. As a result, it is necessary to employ the 1991 Rate Table to determine the proper after tax amount of earnings in 1991. By applying the 1987 Rate Table to plaintiff's earnings in years after 1987, defendants do not accurately determine the after tax amount of plaintiff's subsequent earnings in different years. This is contrary to the statutory mandate in section 361(1)."

En Banc Decision Addressing Entitlement To Benefits Where Employee Voluntarily Quit Favored Job

The Commission issued an en banc opinion in *Perez v Keeler Brass Co*, 1997 ACO #687 involving a claimant who voluntarily quit a favored position. The "voluntary quit" cases have recently proved a fertile area of litigation under the reasonable employment sections of the Act §301(5), where a distinction has been made between claimants losing their favored jobs, on the one hand, and claimants quitting their favored jobs, on the other hand. See, *e.g., Covieo v Tes Division of CCTC*, 1997 ACO #213; *Mitchell v Eagle Cleaning Co*, 1997 ACO #509; *Barber v Unisys Corp*, 1997 ACO #402.

The facts of *Perez* were that plaintiff suffered a work-related back injury which left him with restrictions. The employer provided plaintiff with work within these restrictions. Plaintiff stopped working, claiming that the restricted work aggravated his symptoms and was beyond his ability. The Magistrate disagreed, finding that plaintiff's voluntary departure from work was an unreasonable refusal to perform the work. The Magistrate suspended benefits until that point in time, three years later, when plaintiff's counsel sent a letter to the employer saying that his client was willing to return to the job. The Magistrate did close the award, however, as of a particular date on the basis that the plaintiff recovered from his disability.

A majority of the Commission (five commissioners) held that an employee who voluntarily quits a favored job within his capacity forfeits his entitlement to benefits. The Commission said that in voluntary quit cases there is no issue regarding the length of time the job is held open. The employer's processing of the paperwork is not a withdrawal of the offer of favored work, as opposed to acknowledgment of the employee's desire to quit.

The majority then went on to discuss alternative theories, assuming (as did the dissent) that the Magistrate did not find a voluntary quit but rather only a rejection of an offer of favored work. The Commission explained that under *Derr v Murphy Motors Freight*, 452 Mich 375 (1996), the following inquiry is necessary: if the favored position is not open, the question to be asked is whether the employee is available for work. Here, the Commission said that plaintiff was unavailable to perform the favored work at the time it was allegedly withdrawn (i.e., at the time of termination) because plaintiff was then employed in New Jersey.

Finally, the majority concludes by saying that even if there was a withdrawal of favored work, as opposed to voluntary abandonment of the job, plaintiff would not prevail because he was terminated for just cause due to his violation of a company policy. Thecompany policy held that an absence of three days or more without calling the employer results in automatic termination.

One concurring commissioner said that the question of suspension versus forfeiture and other related questions are irrelevant insofar as plaintiff did not make himself available to work until after the Magistrate found that his disability ended. The dissent would affirm the Magistrate's closed award on the basis that plaintiff did not voluntarily quit his job but rather simply temporarily rejected an offer of favored employment.

Mental Disability Claims

In *Densmore v Hoffman-Laroch, Inc*, 1997 ACO #259, the Commission addressed a pattern of arguments it says it has seen following *Corbett v Charter Township of Plymouth*, 453 Mich 522 (1996). The Commission said:

"We have noticed a recent pattern of misinterpretation of the *Corbett* decision (specifically, the case of *White v McLouth Steel Products)* by some claimant advocates. These advocates proposed that *Corbett* stands, not for the proposition that pre-existing conditions are not a bar to recovery, but instead for the proposition that pre-existing conditions do not matter. Such a misinterpretation of *Corbett* directly contradicts the *Gardner* requirement of a comparison of occupational and non-occupational factors and cannot withstand scrutiny. In fact, the Supreme Court in *Corbett* affirmed the Commission's weighing of occupational and non-occupational factors." (emphasis in original).

In accordance with *Densmore*, the Commission has resolved cases considering the claimant's pre-existing condition as a non-occupational factor to be weighed against the occupational factors as in heart cases. *Ripen v Kelsey-Hayes Co - Milford*, 1997 ACO #572; *Taylor v Red Lobster*, 1997 ACO #553; *Gibson v Kirkhof/ Goodrich Div*, 1997 ACO #623; *Gatica v Hurly Medical Center*, 1997 ACO #522.

By contrast, where the Magistrate finds that actual events occurred at the workplace and an absence of outside stressors contributing to the disability, the Commission has reversed a denial of benefits and awarded mental disability benefits. See, e.g., *Jennings v Department of Natural Resources*, 1997 ACO #665. In Jennings, the Commission noted that the fact that plaintiff claimed "harassment" and did not prove "harassment to the Magistrate's satisfaction, did not matter if the actual events of employment which plaintiff complained actually occurred and significantly aggravated her problem."

Section 301(5)

In *Burton v Capitol Transit*, 1997 ACO #674, the Commission said that the criteria for determining whether a claimant has

established a new wage earning capacity under §301(5) is, as under the old favored work doctrine, consideration of whether claimant has been employed in recognized regular employment with the ordinary conditions of permanency. The Commission said that *Wade v General Motors Corp*, 199 Mich App 267 (1993) reiterated this criteria. The Commission explained that the factors recited by the Court of Appeals in *Doom v Brunswick Corp*, 211 Mich App 189 (1995), i.e., the severity of the injury and resultant disability, the nature of the subsequent work performed, and reasons for loss of the job, are factors that inform the controlling precedent of *Wade*.

Practice Pointers

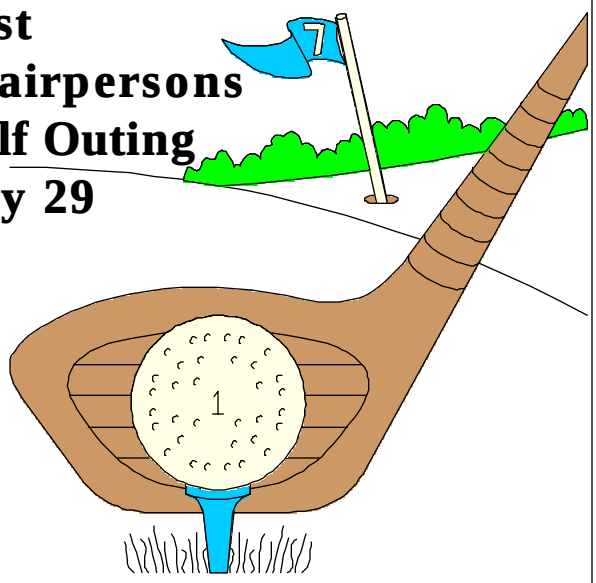
A few Commission cases are worth a brief mention for the practice pointers involved.

The Commission has had occasions to "urge practitioners to state affirmatively and unequivocally what issues are involved at trial" because it is difficult to fault a Magistrate's opinion as insufficient where the parties have not identified the specific questions to be answered. *McGinn v Crittenden Construction Co*, 1997 ACO #534; *Cain v Waste Management, Inc*, 1997 ACO #249.

A claimant is not allowed to use a tape recorder as a notetaking device to provide his counsel information about a medical examination scheduled by defendant. *Crawford v Classic Design, Inc*, 1997 ACO #303.

In *Paige v Manpower of Kent County, Inc*, 1997 ACO #603, the Commission said that a medical expert's opinion that says that a disability "may" or "could" be work-related is sufficient. By contrast, use of the word "might" is too speculative.

Past Chairpersons Golf Outing May 29



Contact Craig Petersen for your reservation at (517) 241-9380

Section Council Members, 1997-98

Rodger G. Will, Chairperson
2300 First National Building, Detroit 48226-3521
(313) 961-7363; Fax: (313) 961-8875

James D. Ryan, Vice-Chairperson
121 West Cedar Street, Kalamazoo 49007-5251
(616) 382-5143; Fax: (616) 382-1896

Martin D. Glista, Secretary
710 Howard Street, Kalamazoo 49008
(616) 388-4353; Fax: (616) 388-4401

Richard Wood, Treasurer
300 Renaissance Center, PO Box 4333, Detroit 48243
(313) 446-4474; Fax: (313) 446-4476

Tonya Fedewa
934 Scribner Avenue NW, Grand Rapids 49504
(616) 774-0003; Fax: (616) 774-2147

Michael Flynn
1440 Peck Street, Box 27, Muskegon 49443-0027
(616) 726-4861; Fax: (616) 725-8144

Sandra Ganos
30300 Northwestern Highway, Farmington Hills 48334
(810) 865-2400; Fax: (810) 865-2404

James Geroux
10 South Main, #400, Mount Clemens 48043-7903
(810) 466-7603; Fax: (810) 465-0448

Alexander Ornstein
19400 West 10 Mile Rd, Suite 111, Southfield 48075
(248) 352-3311; Fax: (248) 352-3965

Charles Gilfeather
101 North Washington, #812, Saginaw 48607-1297
(517) 753-3461; Fax: (517) 753-3951

Alan Helmore
25800 Northwestern Highway, Southfield 48037-0222
(810) 746-2744; Fax: (810) 746-2760

Leonard Hickey
250 Monroe Avenue NW, #800, Grand Rapids, MI 49503-2250
(616) 831-1716; Fax: (616) 831-1701

Craig Petersen
PO Box 30016, Lansing 48909
(517) 241-9380; Fax: (517) 241-9379

Mediators Would Be Empowered to Redeem Cases Under $5,000

(Editor's note: It is our understanding that the following bill has passed the Senate and is in committee in the Michigan House.)

SENATE BILL No. 786

November 4, 1997, introduced by Senators ROGERS, DE BEAUSSAERT, STEIL and STILLE and referred to the Committee on Human Resources, Labor and Veterans Affairs.

A bill to amend 1969 PA 317, entitled "Worker's disability compensation act of 1969," by amending sections 836 and 837 (MCL 418.836 and 42.8.837), as amended by 1994 PA 271.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 836.(1) A REDEMPTION AGREEMENT FOR $5,000.00 MAY BE APPROVED BY A MEDIATOR. A REDEMPTION AGREEMENT OF MORE THAN $5,000.00 SHALL BE APPROVED ONLY BY A WORKER'S COMPENSATION MAGISTRATE. A redemption agreement shall ~~only~~ be approved ONLY by a worker's compensation magistrate OR MEDIATOR, AS APPLICABLE, if the worker's compensation magistrate OR MEDIATOR finds all of the following:

(a) That the redemption agreement serves the purpose of this act, is just and proper under the circumstances, and is in the best interests of the injured employee.

(b) That the redemption agreement is voluntarily agreed to by all parties. If an employer does not object in writing or in person to the proposed redemption agreement, the employer shall be considered to have agreed to the proposed agreement.

(c) That if an application has been filed ~~pursuant to~~ UNDER section 847 it alleges a compensable cause of action under this act.

(d) That the injured employee is fully aware of his or her rights under this act and the consequences of a redemption agreement.

(2) In making a determination under subsection (1), factors to be considered by the worker's compensation magistrate ~~shall~~ OR MEDIATOR, AS APPLICABLE, include, but ARE not ~~be~~ limited to, all of the following:

(a) Any other benefits the injured employee is receiving or is entitled to receive and the effect a redemption agreement might have on those benefits.

(b) The nature and extent of the injuries and disabilities of the employee.

(c) The age and life expectancy of the injured employee.

(d) Whether the injured employee has any health,disability, or related insurance.

(e) The number of dependents of the injured employee.

(f) The marital status of the injured employee.

(g)Whether any other person may have any claim on the redemption proceeds.

(h)The amount of the injured employee's average monthly expenses.

(i)The intended use of the redemption proceeds by the injured employee.

(3) The factors considered by the worker's compensation magistrate OR MEDIATOR, AS APPLICABLE, in making a determination under this section and the responses of the injured employee ~~thereto~~ TO THOSE FACTORS shall be placed an the record.

(4) An employer ~~shall be considered~~ IS a party for purposes under this section.

See. 837. (1) All redemption agreements and lump sum applications filed ~~under the provisions of~~ section 835 shall be approved or rejected by a worker's compensation magistrate OR MEDIATOR, AS APPLICABLE.

(2) The director may,, or upon the request of ~~any of the parties~~ A PARTY to the action shall, review the order of the APPLICABLE worker's compensation magistrate OR MEDIATOR entered under subsection (I). In the event of review by the director and in accordance with such rules as the director may prescribe and after hearing, the director shall enter an order as the director considers just and proper. Any order of the director under this subsection may be appealed to the appellate commission within 15 days after the order is mailed to OR PERSONALLY SERVED ON the parties.

(3) THE DIRECTOR MAY SET ASIDE A REDEMPTION OF $5,000.00 OR LESS APPROVED BY A MEDIATOR IF A REQUEST IS MADE TO THE DIRECTOR WITHIN 15 DAYS THE MEDIATOR'S APPROVAL. THE DIRECTOR MAY SET ASIDE THE REDEMPTION WITHOUT PREJUDICE FOR ANY REASON.

(4) LEGAL COUNSEL IS NOT REQUIRED FOR EITHER PARTY IN THE CASE OF A REDEMPTION OF $5,000.00 OR LESS HEARD BY A MEDIATOR.

(5) ~~(3)~~ Unless review is ordered or requested within 15 days after the date the order of the worker's compensation magistrate is mailed to OR PERSONALLY SERVED ON the parties, the order ~~shall be~~ IS final.

Section Activities Calendar, 1998

* **Winter Meeting, St. Kitts, March 1-7**
* **Past Chairperson Golf Outing, Brighton, May 29**
* **Spring Meeting, Boyne Highlands, June 11 & 12**
* **Annual Meeting and Seminar, Lansing, September 15 & 16**

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

Rodger Will, Chairperson
Martin D. Glista, Newsletter Editor

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

Material for publication should be sent to the editor at:
Benefiel, Farrer & Glista, 710 Howard Street, Kalamazoo MI 49008

March 1998 Newsletter
Workers Compensation Section
State Bar of Michigan
306 Townsend Street
Lansing, MI 48933