Summer 2000

Workers Compensation Section Newsletter

State Bar of Michigan Workers Compensation Section

ANNUAL SECTION MEETING/ELECTION SEPTEMBER 22 AT DETROIT'S COBO

The annual business meeting and election of new officers on September 22 will occur at 9:30 a.m. in room W2-63 on level 2 of Cobo Center. With all of the recent court decisions and with proposed legislation looming, there should be plenty to discuss. Program chairperson Richard Wood has arranged for Dr. Richard M. Singer to discuss the diagnosis and treatment of upper extremities disorders at 10 a.m., immediately following the conclusion of the business meeting.

Dr. Singer will perform a complete physical examination of an upper extremity, explaining the signs and tests as he goes along. The doctor will need a volunteer from the audience. Perhaps he can twist your arm?

Boyne Highlands is a Success

More Pictures on back page

Miron Moves To G.R.

Mediator Mike Miron begins work in his new location, Grand Rapids, on August 28, 2000. John Cooper and Steve Washington did a fine job of covering that venue during the vacancy and can now focus on their respective dockets.

Supreme Court Expands WCAC Scope Of Review

Court also Excludes Social Activities on Business Trips

The Supreme Court reaffirms its holding in Holden. The Court, determines that the Act delegates ultimate fact-finding to the WCAC.

Jerry Marcinkowski reviews this case and more inside.

Cocktail Party September 21 at Atheneum Suites

The Worker's Compensation Section and the Social Security Lawyers Section will hold a joint cocktail reception at second floor Euripedes Room of the Atheneum Suite Hotel, 1000 Brush Ave., in Detroit between 4:30 PM and 6:00 PM on Thursday. You can take the people mover right from Cobo to Greektown, where you'll find the Atheneum Hotel, as well as Trappers' Alley, many fine Greek restaurants, and a nearby Casino. So rip yourself away from the office and get over to the Euripedes Room, but remember, as Roger Wills might say: "Euripedes, Eumemedes."

Kalamazoo Bureau Gets New Digs

On July 24, the bureau moved to 940 N. 10th St., Kalamazoo, MI 49009-9178, which is just west of the M43/US 131 interchange. The new telephone number is (616) 544-4440. The new fax is (616) 544-4444.

New Saginaw Mediator

by Craig Petersen

I am pleased to announce the appointment of Mark Long as our Saginaw mediator. He commenced his employment on Monday, August 21, 2000. Mark was employed as a program specialist with the Funds Administration of the bureau.

Prior to his employment with the Funds Administration, Mark worked as a claims examiner with the Accident Fund of Michigan. Please join me in welcoming Mark to his new position.

If it's Tuesday, it must be Baraga

For some time now, the UP docket has been condensed into one week per month, as far as trials are concerned. Tuesdays in Baraga, Wednesdays and Thursdays in Escanaba and Fridays in Sault Ste. Marie.

The 2001 schedule is: January 23, 24, 25, 26: February 27, 28, March 1, 2: March 27, 28, 29, 30; April 24, 25, 26, 27; May 22, 23, 24, 25; June 26, 27, 28, 29.

Michigan Worker's Compensation Board of Magistrates' Exam Scheduled for October 13, 2000

NOTICE

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

The qualifying examination for positions on the Worker's Compensation Board of Magistrates will be given on October 13, 2000 in Lansing, Michigan. Applicants will be tested in the areas of:

Knowledge of the Worker's Disability Compensation Act.

Skills in fact finding.

Michigan rules of evidence.

Knowledge of human anatomy and physiology.

Applicants who have already successfully passed the examination do not need to retake the exam. To meet the requirement of five years' legal experience as an attorney in the field of Worker's compensation, an applicant must document to the Qualifications Advisory Committee a period of time totaling five years during which the applicant met one of the following criteria:

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

A significant portion of personal practice has been in active worker's compensation appellate practice representing claimants or employers.

Service as a member of the former Worker's Compensation Appeal Board or the Worker's Compensation Appellate Commission.

Persons who successfully complete the written examination or meet the five years' experience requirement will be personally interviewed by the Qualifications Advisory Committee to determine their suitability for the position, especially with regard to his or her objectivity. If you are interested in being considered for a position on the Board of Magistrates, send your résumé to the address below by September 28, 2000. Please include a cover letter clearly stating whether you are applying to take the examination or you meet the five years' experience requirement.

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

RECENT COURT DECISIONS

By Jerry Marcinkoski

SUPREME COURT

Scope of Factual Review by the WCAC and Courts

In the consolidated cases *Mudel v Great Atlantic & Pacific Tea Co* and *Connaway v Welded Construction Co*, ___ Mich ___ (2000), the Supreme Court explained the scope of the Worker's Compensation Appellate Commission's review of factual findings by the Magistrate. The Court also explained the courts' review of Appellate Commission decisions.

With respect to the Commission's review of Magistrate decisions, the Court said that the Act "grants the WCAC certain fact-finding powers and permits it in some circumstances to substitute its own findings of fact for those of the magistrate, if the WCAC accords different weight to the quality and quantity of evidence presented." The Court said that the statutory review power of the Commission "means that the WCAC need not necessarily defer to all the magistrates' findings of fact." The Court described the Commission's scope of review as "highly fact intensive". The Court said that the Act vests "the WCAC with fact-finding power", including the power to make "independent factual findings" and "original findings of fact."

With respect to the courts' review of Commission decisions, the Court said that "[r]eview by the Court of Appeals and this Court begins with the WCAC's decision not the magistrate's" because the "judiciary is simply not empowered to look beyond the WCAC's findings of fact." Even if the courts "determine that the magistrate's decision is better supported than the WCAC's, [that] does not mandate reversal of the WCAC". The Court said the Legislature "delegates to the WCAC the role of ultimate fact-finder" whose findings are reviewed by the courts under an "any evidence" standard by the judiciary.

In making these rulings, the Court reaffirmed the Commission's and Courts' scope of review as they had been originally described in *Holden v Ford Motor Co*, 439 Mich 257 (1992). The Court specifically overruled *Goff v Bil-Mar Foods, Inc, (After Remand)*, 454 Mich 507 (1997). *Goff* had described the Commission's factual review powers as more limited and the Courts' review of Commission decisions as more probing. The Supreme Court also overruled *Layman v Newkirk Electric Associates, Inc*, 458 Mich 494 (1998). *Layman* had also described the Commission's fact-finding power as limited and further required the Commission to remand rather than originate fact-finding.

In applying their holdings to the cases at hand, the Court affirmed the Commission in *Mudel*. The Court said that "the WCAC acted within its authority when it affirmed the magistrate's open award of benefits but altered the statutory basis for that award." The Court also affirmed the Commission in *Connaway* where the WCAC "reversed the magistrate's award of wage loss benefits" on a date of injury question.

The Court's opinion concludes with a short summation of citations for various propositions relating to the Commission's scope of review and the judiciary's scope of review.

Justice Kelly concurred in part and dissented in part from the majority opinion. Justice Cavanagh agreed with Justice Kelly.

Social And Recreational Exclusion

In *Eversman v Concrete Cutting & Breaking*, ___ Mich ___ (2000), the Supreme Court reversed the Court of Appeals and reinstated the Appellate Commission's denial of benefits. The Court said that an employee injured during an out-of-town work trip while pursuing an activity the major purpose of which was social or recreational is not covered by the Act, pursuant to §301(3).

The employee in this matter was assigned construction work outside of Michigan. At the work site in Pennsylvania, work was canceled on the day in question because of rain. The employee and his partner spent a good part of the day thereafter drinking, playing pool, and visiting bars. The employee was injured when hit by a car while crossing the street from the last bar/restaurant to the motel where he was staying.

The Court said that the relevant provision in the Act under such circumstances is §301(3). This section provides in pertinent part that "an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act." The Court said that considerations such as: whether the employee was on a "special mission" or a "traveling employee," whether the employee deviated from the work purpose of the trip, and whether the employee's intoxication contributed to his injury were unnecessary. Instead, the focus is: whether the major purpose of the employee's activities were social or recreational. The Court said that "[e]xamining the totality of circumstances surrounding Eversman's activities during the six-hour episode" yields the conclusion that "his conduct fell within the exception set forth in subsection 301(3)."

Justice Cavanagh concurred in the result, but would use a different analysis in denying benefits. Justice Kelly dissented and would award benefits.

COURT OF APPEALS

Reasonable Employment And Vocational Rehabilitation

In *Sell v Mitchell Corporation of Owosso,* ___ Mich App ___ (2000), the Court of Appeals had its first opportunity to address a favored work/"reasonable employment" case subsequent to the Supreme Court's recently decided trilogy of cases involving favored work: *Russell v Whirlpool Financial*, 461 Mich 579 (2000)/*McJunkin v Cellasto Plastic Corp*, 461 Mich 590 (2000)/*Perez v Keeler Brass Co*, 461 Mich 602 (2000).

The *Sell* case had previously resulted in a published Court of Appeals' opinion, 198 Mich App 683 (1993). In essence, this employee had litigated a claim for weekly wage loss benefits and also independently had litigated her right to vocational rehabilitation.

The specific aspect of the case addressed by the Court in this round of proceedings was whether plaintiff's expressed willingness to return to "reasonable employment", which she had previously rejected in favor of vocational rehabilitation, entitled her to a reinstatement of weekly benefits given the Supreme Court's trilogy, particularly the *McJunkin* case.

The Court of Appeals applied *McJunkin* and remanded the case to determine "whether plaintiff actually ended the period of refusal and whether the light duty position ceased to become available." The Court noted that while "plaintiff advised defendant of her availability to work", she had not complied with the employer's instructions to report to a physical. The Magistrate was ordered to determine "whether plaintiff's conduct actually constitutes acceptance of defendant's offer." Furthermore, the record was unclear whether the employer was still able to offer the favored job. That too is to be determined on remand.

In the course of this decision, the Court of Appeals also bemoaned the confusion and protraction of this matter due in part to the intertwining litigation on the favored work issue and the vocational rehabilitation issue.

WORKER'S COMPENSATION APPELLATE COMMISSION

En Banc Opinion On Favored Work

The Commission decided *en banc* the case of *Woodhams v Federal-Mogul Corp*, 2000 ACO #341. In it, the Commission addressed the question of how an employer's defense under the definition of disability in §301(4) as interpreted by *Haske v Transport Leasing, Inc, Indiana,* 455 Mich 628 (1997) interacts with §301(5), particularly as interpreted by the Supreme Court's trilogy of cases on favored work.

The facts of the case were stipulated by the parties with no testimony or proofs taken. The parties agreed that the employee was laboring at favored work for the employer as a result of a work injury. She had not yet accumulated 100 weeks of favored work when she left for a hysterectomy, for which she missed five weeks of work.

The employer took the position that it need not pay benefits because the employee's unemployment for those five weeks was unrelated to the work injury and, therefore, there was no compensable disability under §301(4) as interpreted by *Haske*. The employee countered by saying that §301(5) took precedence and that since she had not yet completed 100 weeks of favored work, she was entitled to benefits for the five weeks.

The Commission agreed with the employee. The Commission said that, particularly in light of the Supreme Court's recent trilogy, "any involuntary loss of reasonable employment, even if unrelated to the [work] injury, is governed by the provisions of §301(5)(e) and not by *Haske*." The Commission cautioned, however, that its decision was tied to the stipulated facts. It explained:

> *Having said this, it must be emphasized that section 301(4) and* Haske *have not lost applicability. Loss of reasonable employment after working for less than 100 weeks does not permanently entitle the employee to continuing compensation benefits. Section 301(5)(e) simply prevents the employer from using the loss of reasonable employment as the basis to deny benefits. This means that an employee who has lost work, having been employed for less than 100 weeks, may still be denied benefits, if upon proper proof the employee is found to be avoiding or refusing work under* Haske *or where disability is no longer related to the work injury.*

The Commission suggested that if the facts had not been stipulated but there had been proof that the employee "wasn't capable of performing otherwise available work within her qualifications and training because of her surgery," the result could have been different, *i.e.,* a denial of benefits under §301(4) rather than an award under §301(5)(e).

This decision implies that the employee is cloaked with a presumption of an ongoing work-related disability for 100 weeks. The burden of proof under §301(4) and *Haske* apparently shifts to the employer when the employee involuntarily stops favored work during the first 100 weeks. The employer must show that the employee not only lost her specific job because of a non-work-related problem (in this case, the hysterectomy), but that she also was unable to perform other available work within her restrictions (if there was any).

Scenes from Boyne

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