State Bar of Michigan

Workers' Compensation Section Newsletter

Summer 2005

From the Chair

This year has passed by much more rapidly than any other. This will be my last article as your Chairperson. I feel compelled to reflect on my term as your Section Chairperson, the last nine years of my service on the Council and even the full 33 years I have been involved in the practice of Workers' Compensation law.

Many things come to mind. First, there were the changes in the Act itself passed by the Legislature over the years. Then there is the pendulum-like approach in the application and interpretation of the Act at both trial and appellate court levels, swinging first in favor of the worker and then shifting to favor the employer and back again. There have also been some surprising decisions handed down by the Court of Appeals and Supreme Court. I also look back on the Section's financial difficulties, the seminars and many other specific topics. It is obvious that much has changed over the years. However, there is one constant part of the practice of Workers' Compensation Law –the people who practice and administer the Law.

Over the years I have seen the general practice of law deteriorate from a "professional approach" to an "anything to win" approach. This seems to be particularly evident in matters involving litigation. It seems that the practice of law has become completely "dollar driven" rather than the pursuit of justice. In addition, there seems to be a generalized lack of mutual respect between attorneys. There is a growing lack of credibility between lawyers. The practice is being made much more difficult than is necessary as a result of what appears to be actual conflict between lawyers rather than the advocacy required in representing clients. The public at large is mirroring the attitude of the lawyers. If we don't respect each other, why should the public?

Workers' Compensation lawyers are truly different from other litigating lawyers. To outsiders we appear to be friends. We are! We know each other and frequently know the families. We care about the welfare of each other and generally respect each other as individual persons. As a rule, we are cooperative in sharing information without the need for the motion practice that occupies so much of the civil court dockets. We seem to know that maintaining our own credibility is as important as winning the specific case. Perhaps the single most significant attribute that we share is the respect for

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This newsletter is published quarterly by the Workers' Compensation Section, State Bar of Michigan

Murray Feldman, 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.

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Article submissions are due for:
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Board of Magistrates Chairperson's Report

Magistrate Jack A. Nolish

Centuries ago, the Ides of March proved to be bad days for Julius Caesar. For the much loved and well-utilized computer system at the Workers Compensation Agency, WORCS, the Ides of April have proven to be equally disastrous.

Our story begins with the noblest of intentions: For some time, the largest volume of paper handled by Lansing staff consisted of the 400/401 forms that report beginning and end of insurance coverage. Over 200,000 of these forms are processed each year by a small but devoted staff that laboriously enters the data from each form into the system. The insurance industry has been anxiously awaiting the arrival of Electronic Data Interchange (EDI) so the coverage information could be filed electronically saving staff, postage and paper handling costs on both ends of the process. Our computer people have been working on this for some time and on April 16, 2005, the Department of Information Technology (DIT) began performing database reorganization in preparation for the implementation of several new programs that were needed for the EDI process.

Some things work out better than others.

The database reorganization failed midway and could not be restarted. When DIT staff attempted to restore the database to its previous state so that they could try the reorganization again, it was discovered that the backup tapes were not complete. The WORCS data is stored on "disk packs" and new packs are added, as additional data storage space is needed. In March of 2003 and again in January of 2005, the sixth and seventh disk packs were added. Unfortunately, it was discovered by DIT that the backup program had been hard coded to back up only five disk packs, and this was never changed when the new packs were added. As a result, all of the data that was stored on the two latest packs were lost (over 1.7 million records). The report screens that you see when making inquiries of the system became incomplete. The system lost the ability to generate docket printouts and analysis. The system could not automatically generate notices of pre-trials or other matters. The records of past benefit payments or prior claims became unavailable.

The phrase has been heard that there has been a loss of hearings records. It is important to clarify what that means. For our data people, each item such as a trial date of 5/18/05 is a "hearing record." We have lost reliable access to thousands of such dates, compiled over the 14-year history of the system.

We have not, however, lost any recordings of the hearings. The digital court reporting records were not affected by this computer problem in anyway. They are stored in a completely different system with its own back-ups and are stored in each courtroom's PC.

How does this WORCS problem affect the day-to-day handling of cases? From the practitioners' standpoint, there is very little impact. The new files will not have printouts of past benefits paid and we will not easily be able to discover if someone has had a prior case or claim.

The records of coverage, however, are all intact so proper carriers can be notified. In addition, the EDI Proof of Coverage programs were finally implemented on May 31, 2005 and this will ultimately and dramatically decrease the number of paper filings we receive from carriers.

On the bright side, Lansing staff has been able to get all the new filings back on track and we have returned to the 7-day turn-around on new filings that we enjoyed before the crisis.

There is still, however, delay in the handling of amended applications and

re-filings. Those cases require retrieval of files and verification and re-entry of data into the system. Also, a majority of the notices and orders have had to be hand-typed instead of system generated, which takes considerably more time.

The trial dockets are being handled through an Excel based spreadsheet system at the local hearings offices. Our staff was able to put together this alternative system in very short order and we are now getting docket reports and the return of case aging information.

When I am wearing my Magistrate hat, I can say that the computer crisis has not significantly impacted on my day to day handling of cases. When wearing my Chairperson hat, the absence of reliable case history information is making the allocation of resources and docket balancing process more difficult. As I am called upon to review Magistrate performance, the lack of docket aging information does pose a bit of a problem. In the coming months, however, between the Excel approach and the docket data being re-entered, this problem should diminish over time.

I would be remiss in this discussion without extending thanks to Kathy Rademacher, Administrator of Claims Processing, and Lori Raby, Senior Systems Analyst, in Lansing. Kathy and Lori have devoted hundreds of hours to fixing the computer problems and, even in the face of enormous challenges, have supported me in any way they can with data for administrative purposes. Kathy, Lori and the rest of the Claims Processing staff are to be applauded for the efforts and devotion to duty "above and beyond."

In closing, I want to thank all concerned for their patience in getting past these problems If you have any questions, do not hesitate to call me at 313-456-3673.

Magistrate Jack A. Nolish
Chairperson
Board of Magistrates
Workers' Compensation Agency
Michigan Department of Labor and Economic Growth

Minority Recruitment Committee Formed

The Committee on Minority Presence (C.O.M.P.) was recently formed by several workers' compensation practitioners who were concerned over the lack of minority employment in several areas in the workers' compensation field.

Under the sponsorship of this Section, C.O.M.P. is coordinating the presentation of an introductory seminar to the field of workers' compensation. The seminar will be held through the month of August in Detroit and by telecast to Saginaw, Grand Rapids, and Lansing.

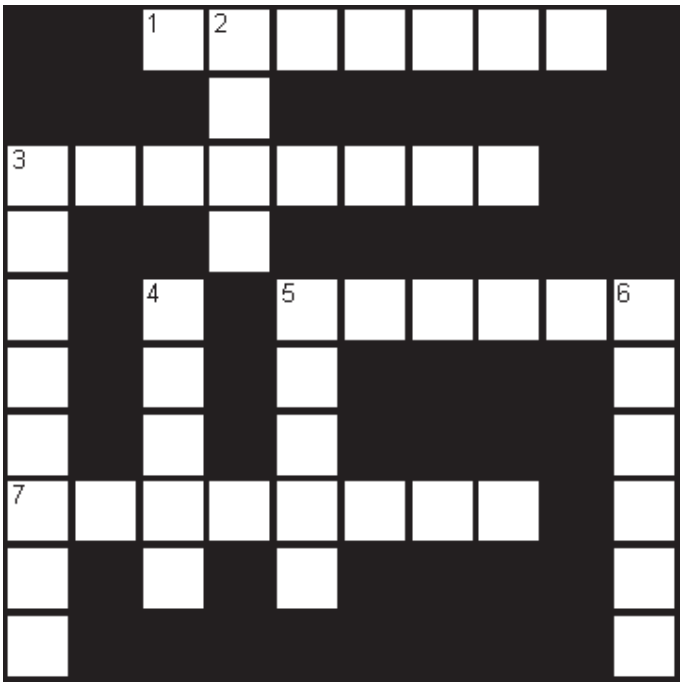
C.O.M.P. will coordinate efforts to inspire any and all minority individuals to express interest in workers' compensation by attending the seminar and seeking out employment opportunities.

Committee members will be available to mentor and tutor interested individuals who seek any employment opportunities in the workers' compensation field.

C.O.M.P. calls upon all insurance carriers, TPA's, law firms, and vocational/medical service providers to seriously consider qualified minority candidates for employment opportunities in the workers' compensation area. C.O.M.P will be available as a resource reference for those interested in obtaining or providing such employment opportunities.

For further information please contact: Ivy Thomas Riley at (313) 456-3654 or Phil Brown at (313)237-3011.

The Summer Puzzle



Across

1. Not-so-secret number for the defense

3. Cruelly Manipulating Settlements

5. Appealingly blueblooded counsel

7. July place to be

Down

2. Recently raised in a T & P case

3. "Happiest lawyer in North America"

4. Doesn't works as it used to

5. Determined Magistrate

6. Longest serving Magistrate

The solution can be found on page 14.

Announcement

Workers' Compensation Agency
Qualifications Advisory Committee

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

To meet the requirement of five years of experience, an applicant must document to the QAC a period of time totaling five years during which the applicant met one of the following criteria: 1) a significant portion of personal practice in active workers' compensation trial practice representing claimants or employers; 2) a significant portion of personal practice in active workers' compensation appellate practice representing claimants or employers; 3) service as a member of the former Workers' Compensation Appeal Board or the Workers' Compensation Appellate Commission. **If there is any question as to whether the five years of experience has been met, applicants are encouraged to take the exam so as not to be deemed unqualified.**

The exam will be given on September 16, 2005 in Lansing, Michigan. Applicants will be tested in the areas of knowledge of the Workers' Disability Compensation Act; skills in fact finding; knowledge of human anatomy and physiology; and Michigan rules of evidence. Applicants who have already successfully passed the exam do not need to retake it.

Persons who meet the five years of experience requirement or who successfully complete the written exam will be personally interviewed by the QAC in October 2005 to determine their suitability for the position, especially with regard to his or her objectivity.

Applicants who were interviewed and recommended to the governor in October 2004 must reapply if they are still interested, however, they do not need to be re-interviewed. If they reapply, their name will be sent to the governor with the same recommendation they received in October 2004. If any of these individuals wish to be re-interviewed, the QAC will interview them again and make a new recommendation based on the second interview.

Applications from all those wishing to apply must be received by September 9, 2005.

Application forms are available on the agency's web site at *www.michigan.gov/wca* or by calling

517-322-1106. The mailing address is: Qualifications Advisory Committee (Attn: Sue Bickel), Workers' Compensation Agency, P.O. Box 30016, Lansing, MI 48909. All applicants must complete this form including those who previously qualified, those wishing to take the exam, and those basing their application on five years of experience.

July 7, 2005

Misplaced last quarter's newsletter?

Don't be upset.

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

From the Chair
Continued from page 1

our opposing attorney in representing his or her client. We have been able to maintain civility with each other while aggressively representing the opposing arguments in litigation.

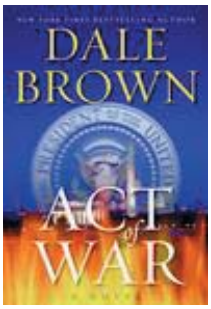
It is this cooperative and respectful approach that enables Workers' Compensation Lawyers to handle the substantial number of files we work with daily. We are patient with each other as we move between jurisdictions on a single day. Generally we respond to phone calls and letters requesting information. Simply put, it is our civility with each other that makes it possible to do the job and have fun doing it.

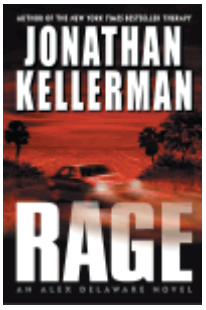
I am proud to be a Workers' Compensation Lawyer. I am honored to have served the Section as your Chair.

At the annual meeting of the State Bar in September, members of the Section will be voting on some very significant matters. Obviously we will be electing a new Council and Officers. In addition, you will be voting on two amendments to our Bylaws. The amendments involve changing the date of our Annual Section Meeting from being held concurrent with the State Bar meeting to our Spring/ Summer Meeting. The Council and Officers will be elected in the spring or summer and will be able to plan for their term beginning in the fall. The second amendment is to formally change the Bylaws to conform to the vote you had three years ago that increased the dues by $5.00. I encourage your attendance.

Alan S. Helmore
Chairperson
Workers' Compensation Section
State Bar of Michigan

Rage, by Jonathan Kellerman, RandomHouse Audio, 11 1/2 hours. A two year-old child is killed by two teens; one dies in a youth lockup within a month of sentencing. The other dies eight years later within a month of his release. This is another one of the Dr. Alex Delaware/ Lt. Milo Sturgis series. A good read that moves fast. *Act of War*, by Dale Brown is from Harper Audio and runs six hours. A refinery is nuked by a Latin American Terrorist Group whose aim is to bring down one multination company that seems to want to rule the world. Remember what they say about absolute power corrupting...T*he Plot Against America* is by Philip Roth and the premise is that Charles Lindburgh defeats Roosevelt in the election of 1940. Very chilling consequences. Houghton Mifflin Audio, 15 hours. *Hot Kid*, by Elmore Leonard. A budding U.S. Marshal has to take out the son of a multimillionaire whose new hobby is robbing banks. Harper Audio. Very entertaining for that long ride to your deps.





Civility—A Lost Art?

By Richard F. Zapala

Maybe it's my observation alone, but has our profession lost some of the noble esteem it used to have in days bygone? I think the answer is obvious—it has. If so, then who is to blame? The answer reminds me of the Pogo cartoon, wherein he replies to his son, "…we have met the enemy and he is us."

"Civility" as defined by the Merriam-Webster Dictionary is "Courtesy, Politeness…A polite act or expression." While "ethics" deals with behavior we as lawyers "must do" as a member of our legal profession, "civility," or professionalism as we call it, deals with behavior we "should do." In my opinion, this is a higher standard.

Many can probably identify numerous and recent acts of our fellow colleagues who have engaged in conduct that while lawful, is rude, disrespectful and downright disparaging. Query, while we see it in others, do we also see our own transgressions? These discourteous acts have likely been inflicted not only upon you personally, but also upon fellow attorneys, clients, members of the public, and the bench.

We as attorneys should remember and take heed that passionate and effective advocacy is not synonymous with overt acts of aggressiveness, bullyism, rudeness and disrespect, nor are acts of civility in our conduct demonstrative acts of weakness.

One need not be a "pit bull" to advance the best interests of your client; in fact, it may be detrimental. In my experience, those who prevail over the long run are the most respected, professional, civil and ethical attorneys.

I have selected below some basic simple acts of conduct in our day-to-day practice (to do and not do) which may appear "banal" or "old fashioned" but are worthy of your personal thought when advocating on behalf of your clients.

Uncivilized attorneys:

- Bully
- Perform ludicrous or extravagant antics.
- Yell or shout at an adversary, or any one else for that matter.
- Use vulgarities or name calling in oral or written communications.
- Interrupt others when they are speaking.
- Make false, misleading, or deceptive statements.
- Make groundless objections at depositions or trials.
- Undertake abusive and/or excessive discovery.
- Take on your client's hostility.
- Cast aspersions" on the integrity of opposing counsel and/or the judges you appear before.
- Are habitually late.
- Are unprepared.
- Dress inappropriately.

These last four points clearly show a lack of respect for our profession, clients, opposing counsel and the bench.

Civility Means We:

- Are honest.
- Are courteous and polite to all.
- Promptly answer/return telephone calls.
- Show up on time!
- Are well prepared and up on current law.
- Withdraw claims and defenses when it becomes apparent they do not have merit or are superfluous.
- Agree to reasonable requests for extensions of time or adjournments when your client will not be adversely affected.
- Consult, where feasible, with opposing counsel when scheduling depositions.
- Cooperate with opposing counsel when scheduling changes are requested—if cancelled, notify as soon as possible.
- Be a positive mentor—take a newer attorney under your wing.
- Devote some of your valuable time to "public/community services."
- Recognize if you have a substance abuse problem or are under excessive stress—seek help!

Please give the above criteria some serious thought and rededicate yourself to our noble profession. I especially urge our workers' compensation section members to apply the Golden Rule [Do unto others as you would have them do unto you] to their daily work—namely, treat others (i.e. fellow attorneys, clients, witnesses, all staff, opposing parties and the bench) the way you would want to be treated. By doing so, our members will reclaim the noble profession of law by shaping a culture of excellence… You are accountable for your actions and our profession and YOU can make the difference!

References

A. ABA Creed and Pledge of Professionalism
Adopted by the American Bar Association House of Delegates, August 1988

B. **Standards for Professionalism and Civility Among Attorneys**
Orange County Bar Association of California, 2005

C. Michigan Rules of Professional Conduct (MRPC)-
"Professionalism"
Adopted Oct. 2, 1988

D. The American Inns of Court (2002)
-History
-Mission and Goals
-Professional Creed
-The Bencher

E. Publishers- Hall Syndicate, Inc. Walt Kelly, Earth Day 1971- Pogo.

Redemption Poem

Finding himself in Circuit Court one morning with some spare time and inspired by Magistrate Barney's poetry columns, Daryle Salisbury composed the following original redemption poem. After clearing the unusual procedure with his client, Mr. Salisbury proceeded to recite this poem on the record for the redemption, which was approved by Magistrate Barney.

Hearing dates are in the past
Today, a settlement is here at last.

You understand that you could choose
To go to trial, and win or lose,
But on this day, you are telling us,
"I'm satisfied, no further fuss."

You understand the money offered is full and final,
There will be no more without a trial.
That this covers all injuries, inflictions or conditions
Whether treated by surgeries, prescriptions or physicians.

But keep in mind, there is a deduction,
For costs and attorney fees, that makes a reduction,
In the actual amount you receive.
But that sum is fair, you do believe.

Now, even though we are here today,
There remains 15 days for you to say,
"I've changed my mind. This is not right!"
And, if indeed that is your plight,
You must tell the magistrate — the Judge
Who will then decide to stay firm, or budge.
But once that 15 days is past
This money settlement is yours at last.

Now, do you want this settlement approved?
Then just tell the Magistrate, that you are moved
To participate, in defendant's full and final offer,
To put this money in your coffer. 🛠

State Bar of Michigan
Annual Meeting
September 22-23, 2005

Kellogg Center, Michigan State University

WORKERS' COMPENSATION TRIAL & PRACTICE SEMINAR

A four-session no-cost program
on Wednesdays
August 3 through **August 24**
from **5:00 to 7:00 p.m.**
at locations in
Detroit, Grand Rapids, Lansing and Saginaw

These video-conference sessions are for new comers and experienced practitioners in the area of workers' compensation. The sessions cover:

***August 3* -- Michigan Workers' Compensation Act and case decisions**
Moderator: Mark Robbins, Esq., Plunkett, Cooney, Detroit
Panelists: Gerald Marcinkoski, Esq., Lacey & Jones
Daryl Royal, Esq.

***August 10* -- Workers' compensation trial practice**
Moderator: Phillip Brown, Esq., City of Detroit Law Dept.
Panelists: Magistrate John Baril, Magistrate Carol Guyton, Magistrate Valencia Jarvis, and Mediator Ivy Thomas Riley

***August 17* -- Understanding the medical of workers' compensation**
Moderator: Melvin Houston, Esq.
Panelists: Dr. Victor Gordon and Dr. James Blessman

***August 24* -- Rapid fire seminar and workers' compensation panel of experts**
Moderator: Milton Means, Esq.
Panelists: Alan Helmore, Esq. -- President, State Bar Workers' Compensation Section
Jack Nolish -- Chair, WCA Board of Magistrates
Martha Glaser -- Acting Chair, Workers' Compensation Appellate Commission
Denice LeVasseur, Esq. -- LeVasseur & LeVasseur
Thomas Burden -- Mediator, Workers' Compensation Agency
Chui Karega, Esq. -- Practitioner
Guy Hostetler -- HFA Rehab

Reservations are required. To register for the no-cost seminar, call Hilda at **248-357-7013**. Please reserve your space by **July 25, 2005**. All four locations have limited seating (Detroit - 100; Grand Rapids - 25; Lansing - 25; Saginaw - 50).

Recommended text for the seminar is ***Worker's Compensation in Michigan: Law & Practice*** by Edward M. Welch. The book can be obtained directly from ICLE in Ann Arbor. **A special discount coupon is available upon registration.**

The seminar is sponsored by the Workers' Compensation Section of the Michigan State Bar in conjunction with the Michigan Department of Labor & Economic Growth, Workers' Compensation Agency.

Recent Decisions

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

The Supreme Court is approaching the end of its term as of the time these case summaries are submitted. The Court has released its decision in *Bailey v Oakwood Hospital and Medical Center and Second Injury Fund*. And, as we were going to press with the last newsletter, you might recall that *Cain v Waste Management, Inc/Transportation Insurance Co and Second Injury Fund* had just been released and noted. Both *Bailey* and *Cain* are now summarized below. We are also still awaiting the Supreme Court's resolution of *Reed v Yackell/Hadley/Herskovitz/Mr. Food, Inc*, a case in which the Section filed an *amicus curiae* brief.

Bailey v Oakwood Hospital and Medical Center and Second Injury Fund

In *Bailey v Oakwood Hospital and Medical Center and Second Injury Fund*, SC No. 125110, filed June 29, 2005, the Supreme Court addresses the Vocationally Disabled (f/k/a Vocationally Handicapped) provisions of Chapter 9 of the Act, MCL 418.901 *et seq*.

Chapter 9 limits the employer's liability for injuries sustained by certified "vocationally disabled" persons to those benefits accruing during the period of 52 weeks after the date of injury. Chapter 9 requires the "carrier" to notify the Second Injury Fund when "it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury." MCL 418.925(1). The notification to the Fund is required "[n]ot less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury." *Id.*

The employer in *Bailey* was a self-insured hospital and medical center. Plaintiff was hired by the employer as a certified vocationally disabled person. Plaintiff sustained a work injury and the employer failed to notify the Fund of its potential liability within the requisite timeframe. The essence of the controversy in this case at the Supreme Court level was: does the employer remain liable to the plaintiff after 52 weeks or does the Fund become liable despite the late notice to it?

The Court held that timely notification to the Fund "is not a condition precedent to the fund's obligation" to reimburse the employer for benefits after the 52nd week. Instead, the Fund is liable after the 52nd week even if the Fund receives late notice. The only exception to this rule is if the employee loses eligibility for workers' compensation benefits before the carrier provides the Fund with notice. In that instance, the Fund need not reimburse beyond the time period when the employer's payments should have ended. The *Bailey* Court concluded by remanding the case for determination of the unresolved factual question of whether plaintiff was "avoiding work."

In reaching its conclusion, the *Bailey* Court explicitly overruled *Valencic v TPM, Inc*, 248 Mich App 601; 639 NW2d 846 (2001) and *Robinson v General Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000) to the extent that they were inconsistent with the Court's ruling.

Cain v Waste Management, Inc/ Transportation Insurance Co and Second Injury Fund

In *Cain v Waste Management, Inc/Transportation Insurance Co and Second Injury Fund*, 472 Mich 236; 697 NW2d 130 (2005), the Supreme Court addressed specific losses and total and permanent (T&P) disability.

With respect to specific losses, the Court held that plaintiff can recover specific loss benefits even though the limb in question had not been amputated. That is, a specific loss recovery can follow if the limb has "no practical usefulness." This ruling represents a slight "clarification" of *Pipe v Leese Tool & Die Co*, 410 Mich 510; 302 NW2d 526 (1981). The determination of usefulness is to be made under an "uncorrected" test, *i.e.*, without reference to corrective devices such as braces.

With respect to the T&P disability question, the Court held that Mr. Cain was correctly awarded T&P disability benefits under MCL 418.361(3)(b) for the loss of both legs because one leg had been amputated and the other leg meets the specific loss test. You might recall the Supreme Court had previously denied Mr. Cain T&P disability benefits under the "loss of industrial use" provision of MCL 418.361(3)(g), saying that a corrected standard applied to determine T&P under that provision. 465 Mich 509; 638 NW2d 98 (2002).

The upshot of both *Cain* Supreme Court decisions insofar as T&P is concerned is: a corrected test applies to § 361(3)(a), (e), (f), and (g), with an uncorrected test applying to subdivisions (b), (c), and (d).

Reed v Yackell/Hadley/Herskovitz/ Mr. Food, Inc

As of the time this is submitted, *Reed* remains pending unresolved before the Supreme Court. *Reed* is an appeal from a circuit court case. The Section was invited to file an *amicus curiae* brief and we did. The issue in the case touching on workers' compensation is whether plaintiff was an "employee" within the meaning of MCL 418.161(1)(*l*) and (n) of the Act. Resolution of that question should determine whether plaintiff's exclusive

Continued on next page

Recent Decisions
Continued from page 9

remedy is within the workers' compensation system, rather than the civil court. The Section's position in its *amicus curiae* brief was that the Workers' Compensation Agency has exclusive jurisdiction to determine whether a person is an "employee" or not.

Court of Appeals

The drought of opinions from the Court of Appeals in workers' compensation cases continues. There are no published Court of Appeals workers' compensation decisions to report, as has been the case now for many months.

Workers' Compensation Appellate Commission

Robertson Revisited

Three years ago in *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002), the Supreme Court held that an objective, reasonable person standard applies to evaluate the employee's perception of actual employment events under MCL 418.301(2). The *Robertson* Court remanded that case for application of its rule. Since then, the case has gone through a number of remands between the Commission and the Magistrate. After the initial remand, the Magistrate held that Mr. Robertson's perception was unfounded. The Commission reversed that ruling. 2004 ACO #153. The Commission then remanded the case to the Magistrate a second time with instructions the Magistrate determine whether plaintiff's reasonable perception of actual work events contributed "in a significant manner" toward his mental disability as is also required in MCL 418.301(2).

On the last remand, the Magistrate insisted that plaintiff's perception of work events was unfounded. The Magistrate found that, while plaintiff perceived retaliation and harassment from his supervisor as a result of plaintiff's refusal to paint the supervisor's boat, that perception was unreasonable. The Commission disagreed explaining it had already determined plaintiff's perception was founded and, therefore, that question was no longer in play. The Commission then proceeded to resolve the "significant manner" inquiry without further remand because "the magistrate continues to disregard our directive."

The Commission noted that plaintiff's "reaction" to objectively founded perceptions of work events is a subjective determination. The Commission then found that the work events were more significant than non-work-related explanations for plaintiff's mental problems. Consequently, plaintiff's mental disability was deemed compensable.

The Commission's decision was a 2-1 ruling. The dissent would hold that the Magistrate's decision could be read to have found as fact that work's contribution was insignificant, even though the Magistrate's decision was "sketchy" on that point.

Franges and Magistrate Jurisdiction

In *Hayden v General Motors Corp*, 2005 ACO #150, the defendant filed a petition for reimbursement and credit against its future workers' compensation liability as a result of plaintiff's settlement of a third party claim. MCL 418.827 and *Franges v General Motors Corp,* 404 Mich 590; 274 NW2d 392 (1979). The Magistrate denied defendant's request on the basis that the Board of Magistrates lacks jurisdiction to make the determinations sought by defendant.

The Commission affirmed. The Commission said that two decisions from the Court of Appeals "seemed to be in conflict with each other" on whether the Board of Magistrates has jurisdiction to make such rulings. Compare and contrast, *Seay v Spartan Aggregate, Inc*, 183 Mich App 46; 454 NW2d 186 (1990) and *McMiddleton v Second Injury Fund*, 225 Mich App 326; 570 NW2d 484 (1997). After reviewing these cases, the Commission said that "the jurisdiction of the Board of Magistrates appears appropriate only if the application of MCL 418.827(6) is not a necessary component" of the matter before the Magistrate. Subsection 6 of § 827 says that the expenses of the third party recovery must first be apportioned by a "court." Since expenses were an "important" consideration in defendant's argument before the Magistrate, the Commission said the Magistrate was correct in declining jurisdiction.

Interlocutory Appeals

In *Lopez v Hardys Holsteins, LLC*, 2005 ACO #151, plaintiff filed an interlocutory appeal from a Magistrate's decision denying her pretrial motion to quash defendant's subpoena for production of documents. Defendant sought such documents apparently to ascertain whether plaintiff was an illegal alien and, therefore, subject to the holding of *Sanchez v Eagle Alloy, Inc*, 254 Mich App 651; 658 NW2d 510 (2003).

The Commission at the outset of its opinion reminded the parties of its reluctance to hear and resolve interlocutory appeals. The Commission said that, while it has authority to resolve interlocutory appeals from Magistrates, review of interlocutory appeals is discretionary. The Commission explained interlocutory review would only be granted upon showing of a compelling reason why awaiting the Magistrate's final decision would not afford the aggrieved party an adequate remedy.

The Commission then held there was no compelling reason offered by plaintiff and an adequate remedy would be available to plaintiff after the Magistrate's decision on the merits. Therefore, the Commission denied plaintiff's request for consideration of the interlocutory appeal. The Commission added that the material sought by defendant was "certainly material and germane to the issues at hand considering the current state of the law."

"Employees" or Not?

Two interesting cases were recently decided by the Commission addressing the issue of whether the plaintiffs constituted "employees".

In *Peck/Auto Club Insurance Association v Elliott's Amusements, LLC*, 2005 ACO #140, the plaintiff was hired by defendant to erect and operate a carnival game. When the carnival season ended in Michigan, the defendant permitted its manager to use the game equipment at a three-week engagement at a carnival in Florida. The manager asked the plaintiff to come to Florida to operate the game there. Plaintiff agreed. Plaintiff and others drove in one of defendant's vehicles to Florida. An automobile accident occurred enroute resulting in death of some of the occupants and injuries to plaintiff. The question presented was whether plaintiff was an employee of the Michigan company at the time of the accident.

The Magistrate held that plaintiff was a statutory employee of the company, MCL 418.171, but only through the time the Michigan carnival season ended and not at the time of the automobile accident. The Commission disagreed.

The Commission found that plaintiff was in the direct employ of the Michigan company at the time of the automobile accident. The Commission added that, even if plaintiff was not a direct employee, then the Michigan company remained a statutory employer under § 171 because its manager had hired plaintiff and the manager was uninsured.

Still further, the Commission added "[i]n the alternative," that at the time of the automobile accident a "joint venture" existed between the manager, the defendant, and the Florida carnival where the manager intended to use plaintiff's services. The Commission said that where the joint venture does not have its own carrier, each entity involved in the joint venture has liability. The Commission then remanded the case for a determination of whether the injury arose out of and in the course employment, disability, wage loss, and other unresolved issues.

In *Shue v LC Building*, 2005 ACO #125, the defendant hired framing carpenters on an hourly basis. Plaintiff claimed he was an "employee" of that defendant emphasizing that his hourly pay was a prime indicator of employee status. The Commission – affirming the Magistrate – concluded that plaintiff was an independent contractor. The Commission said that hourly pay was simply the most expeditious way for this defendant to keep its project going, in contrast to soliciting bids from contractors. The Commission also noted plaintiff had his own tools and had worked as an independent contractor for other concerns. In the course of its decision, the Commission said that, even if the contract of hire requirement is satisfied with reference to *Hoste v Shanty Creek Management, Inc*, 459 Mich 561; 592 NW2d 360 (1999), the inquiry must still proceed to determine whether the person hired was an independent contractor or as an employee.

Sington Remand From Court of Appeals

Floyd v Detroit Diesel Corp, 2005 ACO #111, is the first indication from the Court of Appeals how it views *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). The Commission had this case returned to it on remand and quoted the Court of Appeals' remand order in its remand decision. The Commission said:

> This matter returns to us by way of remand order from the Michigan Court of Appeals.[1] The Court of Appeals included the following observations and instructions in its remand order:
>
> > In lieu of granting leave to appeal, the Court orders pursuant to MCR 7.205(D)(2) that the August 10, 2004 order of the Worker's Compensation Appellate Commission (WCAC) is VACATED to the extent it finds that plaintiff cannot perform all jobs paying the maximum wage within his qualifications and training and is therefore entitled to benefits. The matter is REMANDED for reconsideration of the question whether plaintiff is disabled under MCL 418.301(4) as interpreted by *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). The WCAC concluded: "the actual job plaintiff performed for this employer was one with tasks (the cylinder head portion and the drill job portion). As the drill job 'task' was outside plaintiff's physical ability to perform, he was unable to perform all of the jobs with defendant which paid the maximum within his qualifications and training." The WCAC erroneously concluded that because plaintiff could not perform part of his job,

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> he could perform no job at a maximum wage within his qualifications and training. Its finding that plaintiff could perform only of the two tasks of his job supports only the conclusion that plaintiff cannot perform a single job within his qualifications and training. Our Supreme Court overturned this type of analysis, set forth in *Haske v Transport Leasing, Inc*, 455 Mich 628; 466 NW2d 896 (1997), when it issued *Sington*. On remand, the WCAC "should consider whether the injury has actually resulted in a loss of wage earning capacity in work suitable to the employee's training and qualifications in the ordinary job market," *Sington*, *supra* 462 Mich 158, and in doing so, it should consider "the particular work that [plaintiff] is both trained and qualified to perform, whether there continues to be a substantial job market for such work, and the wages typically earned for such employment in comparison to [plaintiff] wage at the time of the work-related injury." *Id.* at 157. The application for leave to appeal is otherwise DENIED for lack of merit.
>
> This Court retains no further jurisdiction.
>
> [1] Court of Appeals # 257805, dated Februay 4, 2005.

In its remand decision, the Commission first explained why it had previously affirmed an open award in light of *Sington*. The Commission then noted, however, that, given the Court of Appeals' vacation of the Commission's prior decision, the Court of Appeals has now provided "instructions that a more extensive *Sington* analysis be conducted." Consequently, the Commission remanded the case to the Magistrate to reopen the record for further proofs and a "more extensive *Sington* analysis … utilizing each of the steps outlined in *Riley v Bay Logistics*, 2004 ACO # 27 and *Wegienka v Monsanto Chemical Co.*, 2004 ACO # 324."

Other *Sington* Remands

A good number of other cases continue to be remanded directly from the Commission to the Board of Magistrates for a *Sington* analysis. Some cases have been remanded a second time to Magistrates for such *Sington* evaluations. *E.g.*, *Braun v Brownies Sign Co, Inc*, 2005 ACO #98; *Mahan v Wal-Mart Stores, Inc*, 2005 ACO #123; *Stefanko v Ford Motor Co*, 2005 ACO #131. In *Mahan*, the Commission expressed some frustration with the necessity to remand a second time, saying:

> Because plaintiff has prevailed on the issue of credibility and accordingly as established a work related injury we next turn to the troubling issue of disability pursuant to *Sington v Chrysler Corporation* 467 Mich 144 (2002).
>
> > By the time we had remanded this cse in June of 2004 the Commission, on numerous occasions had outlined the employee's burden of proof and the magistrate's fact finding obligations. In that connection in footnote 3 of our June 2004 decision we cited three cases discussing the obligations of the magistrate and the plaintiff. Notwithstanding our citation of these cases and our specific instructions to the magistrate pertaining to the *Sington* review in this case, the review that was conducted fell short of our expectations and left the Commission with the task of remanding to a new magistrate[4] or performing the *Sington* review based on the record made.
> >
> > Because the defendant asked that the record be reopened, and the magistrate refused the request, we remand this matter with direction to the magistrate assigned, to allow the parties to reopen the record. This record leaves far too many unanswered questions for this Commission to do a *Sington* analysis and be left with an abiding belief that justice has been done for either of the parties.
> >
> > In supplementing the record, in this case, the parties are reminded of our decisions in *Riley v Bay Logistics* 2004 ACO# 27 and *Wegienka v Monsanto Chemical Company*, 2004 ACO# 324 in terms of the burden of proof on the respective parties.
> >
> > This case is remanded to magistrate. We retain jurisdiction.
> >
> > [4] Mastrate Block has since left the Bench.

Attorney Fees on Medical Expenses and Disagreement About *Rakestraw*

In *Beattie v Wells Aluminum Corp*,

2005 ACO #157, the Commission addressed two currently contentious questions: (1) under what circumstances can attoney fees for nonpayment of medical expenses be imposed on the employer/carrier under MCL 418.315(1)'s concluding two sentences?; and, (2) does the rule in *Rakestraw* apply to pre-existing work-related conditions or is it limited to only pre-existing non-work-related conditions?

The Magistrate had found one of the employer's two carriers liable for a closed period of benefits. The Magistrate also imposed attorney fees on that carrier for nonpayment of medical expenses. The Magistrate reasoned that the award of weekly benefits for the closed period was minimal and, under such circumstances, the award of attorney fees on unpaid medical expenses was warranted.

The Commission disagreed with the Magistrate. The Commission said the concluding sentences of § 315(1), which say a "magistrate may prorate attorneys fees at the contingent fee paid by the claimant" where the employer "fails, neglects, or refuses" to pay medical expenses, was not intended "to set up an automatic award of attorney fees in every case where a medical service/bill is ultimately awarded." The Commission said that, instead, imposition of attorney fees on the employer or carrier is a matter of discretion for the Magistrate.

A majority of the Commission then held that a Magistrate cannot impose the fees "based only his opinion that such would promote the assistance of counsel in medical dispute cases where there are only minimal wage benefits in dispute." The Commission majority said the Magistrate must consider whether there was neglect or a breach of duty by the employer and carrier in not paying a medical bill. The Commission majority remanded the case saying that, before any attorney fees could be assessed on the defendant, there must be "some preliminary findings by the magistrate before the magistrate exercise[s] 'discretion' and award[s] attorney fees based on neglect or breach of duty by the employer." The Commission majority explained that, at a mininum, the Magistrate must find the medical expense reasonable and necessary and that the employer had appropriate notice the medical expense was due.

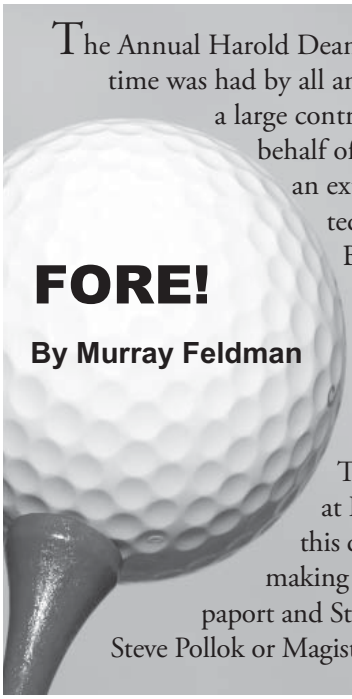
The separate concurring opinion agreed with the majority that attorney fees should not be imposed on the employer/carrier automatically and that the plaintiff has the burden of proving the employer and carrier guilty of a breach of duty in order for the Magistrate to award attorney fees. The concurring Commissioner added, however, that she agreed with the Magistrate that imposition of attorney fees can be based on promotion of the assistance of counsel in medical dispute cases where there are mininal or no wage loss benefits from which to obtain an attorney fee.

With respect to the *Rakestraw* issue, the Commission majority resolved the dispute between which of the two carriers was liable by saying that the *Rakestraw* rule does apply to pre-existing work-related injuries where a subsequent aggravation is claimed. The Commission majority acknowledged that there are some Commission decisions to the contrary, but the Commission majority said "the better view" is that *Rakestraw* applies to pre-existing work-related injuries as well as pre-existing non-work-related injuries.

The Commission majority added that, while it has held in some cases "evidence of increased symptoms, short of pathologic change, can, in limited circumstances provide the basis for a magistrates' finding a medically distinguishable condition," *e.g.*, *Hale v Borgess Medical Center*, 2004 ACO #266, there still must be "proof of a new and different type of pain, probably of a permanent nature."

The concurring Commissioner acknowledged "a split opinion in the Commission as to whether *Rakestraw*" applies to prior work injuries. The concurring Commissioner would hold that *Rakestraw* is limited to pre-existing non-work-related conditions.

Regardless of *Rakestraw*'s application or not, all Commissioners agreed that the earlier carrier was liable and not the last day of work carrier in this case. 🛠



FORE!

By Murray Feldman

The Annual Harold Dean WC Open was held on June 24, 2005. A good time was had by all and, thanks to the generosity of those in attendance, a large contribution was made to Harold's charity of choice on behalf of all the participants. As usual, Ray Bohnenstiehl did an extraordinary job and is to be congratulated. Spotted in the crowd were Bruce Roberts, Tom McNally, Bill Listman, Ted Felker, Sr., and former Magistrate Susan Cope.

Knowing what a generous group we workers' comp lawyers are, another opportunity to contribute to a worthy cause, have a good time, and play a great course, comes up on August 26, 2005 at 9:00 a.m. The annual Rapaport Green Memorial Tournament at Forest Acres West golf course is scheduled. Please put this date on your calendar, as your attendance assists in making possible a contribution in the names of Roger Rapaport and Stewart Green to a worthwhile charity. Contact either Steve Pollok or Magistrate L'Mell Smith for further information. 🛠

Poetry

By Magistrate Mike Barney

The poet, trying to surprise his God
composed new forms from secret harmonies,
tore from his fiery vision galaxies
of unrelated shapes, both even & odd.
But God just smiled, and gave His know-all nod
saying, "There's no surprising One who sees
the acorn, root and branch of centuries;
I swallow all things up, like Aaron's rod.

So hold this thought beneath your poet-bonnet:
no matter how free-seeming flows your sample
God is by definition the Unsurprised."
"Then I'll return, "the poet sighed, to sonnets
of which this is a rather pale example."

"Is that right?" said God. "I hadn't realized…"

The poem above is a rather clever example of a sonnet, the next received form I wish to expound on. Generally considered to have been invented by Giacomo da Lentino around the year 1200 A.D., it was perfected by the Italian poet Francesco Petrarch in the 15th century, perfected again by Shakespeare in the 16th century, and has been a staple of poetry ever since, for both good and ill.

A sonnet consists of 14 lines, no more, no less; classic sonnets are written in the distinctive rhythm of *iambic pentameter* (five iambic feet per line, alternating rigidly unstressed and stressed syllables) arranged in a variant of one of two different rhyme schemes: *abab cdcd efef gg*, or *abba cddc effe gg*; but notice the example above, different from either of these schemes. The lines of classic sonnets are also arranged by separating the first eight (the octet) from the last six (the sestet), which arrangement allows the poet room to develop an argument or describe a situation in the first part, then resolve the argument or describe what the poet feels about the situation in the latter part of the poem, often setting apart the last two lines for a summation or conclusory statement.

Most modern authorities (and many poets, who should know better) consider any fourteen line poem to be a sonnet. They are wrong, of course. Though a sonnet need not follow its form strictly (for example, written in iambic pentameter), it should have some identifiable rhythm and rhyme scheme. Following are three examples, all somewhat different formally, but all clearly sonnets:

Sonnet 130

My mistress' eyes are nothing like the sun;
Coral is far more red than her lips' red;
If snow be white, why then her breasts are dun;
If hairs be wires, black wires grow on her head.
I have seen roses damask'd, red and white,
But no such roses see I in her cheeks;
And in some perfumes is there more delight
Than in the breath that from my mistress reeks.
I love to hear her speak, yet well I know
That music hath a far more pleasing sound;
I grant I never saw a goddess go;
My mistress, when she walks, treads on the ground:
And yet, by heaven, I think my love as rare
As any she belied with false compare.

Absolution

accept all apologies
withal the bane
what's there to gain
holding psychologies
that don't obtain
a basis of charity?

loosen your memory
of all the pain
absolve your enemy
(just one more poor Cain
wrestling the rain
ignored by satori

as are we all—
Fall or no Fall.)

Post-Coitum Tristesse (A Sonnet)

Why
do
you
sigh,
roar,
fall,
all
for
some
hum-
drum
come
— mm?
Hm..

As you can see, sonnets come in all sizes, shapes, and subject matters, but despite the differences, they have in common the essentials that make them sonnets: number of lines, an identifiable rhythm, and rhyme.

Next time, the Ghazal.

(The first and third poems above were written by the well-known scriveners W, Shakespeare and B. Leithauser; the author of the second shall be anonymous so as to spare embarrassment to both he and the audience.) 🛠

A Response to Ed Welch on *Sington*

By Jerry Marcinkoski, Lacey & Jones

In the last Section Newsletter, Ed Welch authored an article "Revisiting *Sington* [*v Chrysler Corporation*, 467 Mich 144; 648 NW2d 624 (2002)]." (*Workers' Compensation Section Newsletter*, Spring 2005). Ed's suggestions in that article, while thoughtful as always, warrant a response because Ed is suggesting approaches that, I submit, contravene the statute and case law on wage earning capacity.

Partial Disability

What Ed finds "most troubling about the current interpretation of *Sington*" by the Workers' Compensation Appellate Commission is its resolution of the following question:

> "Does 'able to earn' [in the partial disability provision, MCL 418.361(1)] mean wages actually earned or wages the worker has the capacity to earn?" *Id.*; bracketed words added.

Ed criticizes the Commission for equating "able to earn" with capacity to earn, as opposed to "wages actually earned." Ed said the Commission's view represents a "radical departure from previous interpretations." *Id.*

To the contrary, the Commission's equation of "able to earn" with capacity to earn, rather than "wages actually earned," is in complete accord with historic Michigan case law. Nearly 70 years ago, the Supreme Court said:

> "What is meant by the term 'wage-earning capacity after the injury?' It is not limited to wages actually earned after an injury, for such a holding would encourage malingering and compensation is not a pension." *Hood v Wyandotte Oil & Fat Co*, 272 Mich 190, 192-193; 261 NW 259 (1935).

This view permeates Michigan case law from both the Supreme Court and the Court of Appeals. A few examples are:

> "The applicability of § 361 does not hinge on whether the employee has actually returned to some form of work." *Juneac v ITT Hancock Industries*, 181 Mich App 636, 641; 450 NW2d 22 (1989).
>
> * * *
>
> "It will be noted that the proviso in question refers to "wage earning capacity." Obviously such expression does not necessarily have reference to wages actually received." *Babcock v General Motors Corp*, 340 Mich 58, 65; 64 NW2d 917 (1954).
>
> * * *
>
> "His post-injury earnings do not necessarily determine the fact of his disability." *Medacco v Campbell Foundry Co*, 48 Mich App 217, 222; 210 NW2d 359 (1973).
>
> * * *
>
> "[P]laintiff fails to take into account the Legislature's reason for determining that wage-earning capacity, rather than actual wages earned, is the criterion by which entitlement to benefits is measured." *Leizerman v First Flight Freight Service*, 424 Mich 463, 473; 381 NW2d 386 (1985).

Therefore, rather than it being a "radical departure from previous interpretations" to equate "wage earning capacity" with "ab[ility] to earn," to hold otherwise would be a "radical departure from previous interpretations."

This point is not of mere academic concern. It has a practical effect and can be significant in adjudicating cases. For example, Ed's view holds that if a person does not actually return to post-injury work and earn wages, then the employee cannot be charged with *any* wage earning capacity for to do so would create a "theoretical" wage earning capacity. But, the existence of a wage earning capacity is not an either-or proposition, *i.e.*, are you working post-injury or not? A person can have a real wage earning capacity yet never exercise it. To have an unexercised wage earning capacity does not necessarily mean the wage earning capacity is "theoretical." Instead, as the Commission has developed over a decade now, there is a category that lies between "wages actually earned" and a "theoretical" wage earning capacity. That is the area of "real jobs in the real world." *Braddock v Bellrose, Inc*, 1994 ACO #525. This real-jobs-in-the-real-world concept developed as a result of *Sobotka v Chrysler Corp*, 447 Mich 1; 523 NW2d 454 (1994). It remains relevant today as reflected in *Sington* and the Appellate Commission's post-*Sington* case law development. [*E.g.*, *Sington v Chrysler Corp (On Remand from Supreme Court)*, 2003 ACO #92. "We believe to a large extent *Sington* signals a revitalization of *Braddock* and its progeny, at least as a jumping off point for many factual determinations necessitated by *Sington*."]

Sington Itself

Also, Ed's interpretation of key points in *Sington* reflects more the dissent in *Sington* than the majority opinion. For example, *Sington*'s emphasis on the wage earning capacity inquiry troubles

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Response

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Ed to the point where he suggests an "approach [that] should lessen the perceived need for the use of wage-earning capacity in calculating partial benefits." Yet, the words "wage earning capacity" appear in the statute itself in MCL 418.301(4). They are a statutory mandate not merely an optional approach. And, as indicated, they do not translate simply into wages actually earned. In distinguishing its holding from that of the dissent in *Sington*, the *Sington* majority explicitly said:

> "Contrary to dissent's position, there obviously is a distinction between "wages earned" and 'wage earning capacity.' … It is simply inaccurate to state that 'capacity to earn wages and wages earned will rarely differ.'" *Sington* at 170-171.

Finally, Ed's suggested "alternative approach" to *Sington* says factfinders could perhaps find disability "regardless of the [employee's] ability to perform all jobs at the maximum wage-earning capacity." (Bracketed words added). If a factfinder did that, it would directly contradict the Supreme Court *Sington* majority. The majority, quoting with approval Justice Weaver's dissent in *Haske*, said:

> "'Where an employee is qualified and trained in more than one job, then his wage-earning capacity includes consideration of all those jobs under the plain meaning of subsection 301(4). Whether "a limitation" exists in an individual's "wage earning capacity" where that individual is qualified and trained in more than one job therefore requires consideration of the effect of the work-related disease or injury on earning capacity in *all those jobs* in which the individual is qualified and trained.'
>
> We agree with Justice Weaver that the language of § 301(4) requires a determination of overall, or in other words, maximum, wage earning capacity in all jobs suitable to an injured employee's qualifications and training." *Sington*, 467 Mich at 159 (emphasis in original).

Conclusion

Like it or not, both the statute, historic Michigan case law, and the *Sington* majority make it explicitly clear that "wage earning capacity" is the proper focus *and* wage earning capacity is not the same as whether wages are actually earned. One is certainly free to express disagreement with the present state of the law and suggest legislative changes, but – in the meantime – the law is what it is. ⚒

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