State Bar of Michigan

Workers' Compensation Section Newsletter

Fall 2010

From the Chair

Change ...

By David DeGraw, Chairperson

Contents

In my humble opinion there is no finer season and no finer place than autumn in Michigan. While I appreciate that other folks might not share my view, I love the changing colors, the new football season, the rapidly approaching holiday's and, yes, even the nip in the air. Autumn is nature's reminder that things change. Fortunately when you look past the changes of autumn, to the four wonderful seasons that play out in Michigan, you also see that season change is cyclical. Summer is gone but it will be back. The cold winter is coming but it will not last forever. Be patient and the season you prefer will come around again.

We have seen significant change in the economy of Michigan. That change has had a deep effect on our legal practices. While I am of the opinion that we will never go back to our "Golden Age", I am mindful of the cyclical nature of most things. I am encouraged by how resourceful and creative the citizens of this state have been over its history. In less than 100 years we transformed automobiles from an expensive novelty that smelled bad and scared the horses into a virtual necessity of life. Most families own not one but several. The question became not whether you have a car but "What kind of car do you have?" Michigan more than any other state is responsible for the development and manufacture of automobiles and the generation of an industry that provided good honest work and income to a broad range of social and economic groups. We should all be proud of that accomplishment and heritage. We should use that legacy as the basis for optimism that the economy of Michigan can and will improve.

Most folks, from individuals to businesses, are responding to our tougher times by doing things differently. Yes, many businesses are leaving the state, but there are strong and varied efforts afoot to attract new jobs and new businesses. We also have many innovative and resourceful groups with good ideas for changing the business mix of our economy. I am confident that those efforts in all sectors will bear fruit, and better times are coming. The businesses that are staying are making significant changes in how they do things. We still have the finest skilled workforce in the world. We also have very creative and innovative forces working to change our bedrock businesses so they remain viable and remain able to provide

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Tom Ruth, 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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desperately needed jobs. Our task as lawyers and as leaders in our communities is to foster a healthy approach to these inevitable changes. Our economy is in its winter phase right now, but spring will come.

I urge each of you to help foster healthy optimism about the future of our state. I urge each of you to remember our history and be confident that better times are within reach.

I also urge each of you to continue to treat each other with respect and civility as the environment and reality of our WC law practices continues to change. It is easy to be nice when things are going well. Continuing to be civil and cordial when times are more difficult is the hallmark of a true professional.

David DeGraw
Chairperson

Congratulations

Congratulation to Ray Cardew on his induction to the Michigan Workers' Compensation Hall of Fame. Ray was unable to attend the Spring meeting and accept his Hall of Fame plaque in person. He recently returned to work and Murray Feldman was able to get this picture of the two of them. See page 9 for pictures from the Spring meeting.

Great Victory on Medicare Liens

By Denice M. LeVasseur

A federal Court of Appeals has "corrected" Medicare in a wrongful death case settled in Florida. The conditional payment by Medicare was $38,875.08. The Court of Appeals held that Medicare gets only $787.50.

The case is *Bradley v Sebelius*, Docket No. 07-01690-CV-ORL-31GJK and the link is http://www.ca11.uscourts.gov/opinions/ops/200913765.pdf.

In *Bradley*, Charles Burke was taken from a nursing home to a hospital where he died from the complications of a bed sore following a three month hospital stay. Medicare paid $38,875.08 for Mr. Burke's medical care.

Ms Bradley, on behalf of the estate and ten surviving children, presented a wrongful death claim to the nursing home and its liability insurance carrier. The claim was settled for policy limits, a mere $52,500. Ms. Bradley notified Medicare of the settlement. Medicare claimed the total amount it paid, less procurement costs, or a net amount of $22,480.89.

Upon an application filed by Bradley with the probate court, the court allocated the proceeds of the settlement. Counsel gave notice to Medicare of the probate court proceedings and invited Medicare to participate. Medicare declined to appear or to participate.

The probate court determined that Medicare was entitled to $787.50. Medicare rejected this amount and the case proceeded through the system. On September 29, 2010, the 11th Circuit Court of Appeals held that Medicare's position was not supported by the MSP statutory language and its regulations. It held that the Medicare field manuals are not the law. The Court also noted the absurd result that Medicare's position would produce. Medicare's position was that it would only recognize an allocation based on a court order on the merits of the case. The 11th Circuit Court of Appeals noted the strong public interest in the expeditious resolution of lawsuits through settlement. It held that Medicare's position would have a chilling effect on settlement, would compel plaintiffs to force their tort claims to trial, cause a disincentive to accept reasonable settlement offers and allow tortfeasors to escape responsibility.

We'll have to wait to see if it is appealed and if it causes Medicare to change its policy on liens. 🛠

Stop the Presses!

The Section was prevailed upon by contributing members to Hold Off on the usual publication of the Newsletter in September. The political climate, as well as the uncertainty of positions and appointments, necessitated the delay. The Newsletter will be back on track for the next issue, which will arrive as usual, in November. "So close, but yet so far!" 🛠

From the Editor

As always, many changes in our world of workers' compensation since the last Newsletter. After a successful Spring meeting, we saw many magistrates leave the bench, new members voted to the section Council, as well as new members of the WCAC. I invite you to review the sidebar information for a listing of the new Council members, as well as the articles setting forth the new additions to the WCAC. Congratulations to Magistrate Ken Birch as the new Chief Magistrate.

On a totally unrelated note, if you see attorney Dan Zolkowski ask him about his band, he is the drummer and they are quite talented. Perhaps they can get booked for the Spring meeting? 🛠

Tom Ruth -Editor

Notes from the Director

By Jack Nolish, Director, WCA

I was born on Friday the 13th. My mother told me it was about high noon. As long as I can remember I have not had a fear of that date. Rather, it has provided some very interesting birthday parties. I am not what you might call a Triskaidekaphobiac. I do not fear the number. However, as of this time, I am confronting a 13 that is really causing me a problem. While Magistrate McAree is now on sick leave for a couple weeks, and after the departure of three of our Magistrates recently to Social Security, we are down to **13** magistrates. We had 26 when I took the bench in February, 2004 and that was a reduced number down from 30. Hopefully, McAree will enjoy a speedy recovery and we will get back to 14 in short order. That number is still short of our now authorized number of 17. The Qualifications Advisory Committee has finished interviewing candidates and a new list of potential magistrates has gone to the Governor. You are probably aware, however, that the selection of magistrates is made by the Governor with the advice and consent of the Senate. You are also aware that there has been some difficulty with the Governor's appointments in the last several weeks so it is difficult to know when the bench will be back to its newly reduced "full strength." This reduction in magistrate positions is already manifesting itself in docket delays and longer periods to reach decisions in cases. Justice delayed is justice denied for all parties. Even at 17, we will have per magistrate docket loads approaching 1,000 in an era where cases are more complicated than ever.

I do wish to congratulate Ken Birch on his appointment by Governor Granholm to serve as Chair of the Board of Magistrates. As you can see from my remarks above, he is coming in to a challenging environment and I wish him well. I look forward to working with Ken to deal with these difficult times.

Although the number of contested case filings continues to be historically low, there has been a recent influx of over 500 contested case filings due to the Delphi bankruptcy and the re-negotiation of the GM Disability hourly pension plan. It will be some time before these complicated matters will be resolved.

We are trying desperately to weather a perfect storm. The confluence of severe state budget reductions; Social Security's expansion; and the business community's unwillingness to support funding the WCA through means other than the state general fund, have combined with the upcoming round of magistrate appointments, to produce a situation where the teeter-totter of the adjudication system docket has tottered. We are now understaffed and there is simply no way to put a positive spin on the situation. The next waive of problems comes soon when 6 of the remaining magistrates are up for re-appointment in the end of January, 2011. The expiration of those terms will create further problems in moving the docket and re-appointment or the making of new appointments for those positions is unlikely to occur for several months. You may have heard that there is an election coming but the new administration will not be in place until the first of the year.

The Agency itself has undergone significant reductions including staffing reduced from a peak of over 200 to the present level of 134. You are well aware of the reduction in fixed hearing sites from 14 to 8 and the reduction of temporary traveling magistrate sites from 9 to 3.

We are in the midst of getting information about those staff electing to take the early retirements. I am aware of 10 but the window for acceptance is open through November 5 and over 40% of our over-all staff is eligible under the plan. We have not been advised about replacement options in terms of replacing one for one or some other ratio. Since we have been operating under years of hiring freezes, we have an aging staff with little in the way of next generation replacements. I have been director since 12/05 and I have hired one person as a replacement for a retirement and that occurred a couple years ago.

These factors combine to produce serious erosion in the underlying bed rock of Workers Compensation. The 100 year old fundamental concept of simplified, no-fault entitlement to limited benefits for job related injuries being exchanged for the exclusive remedy protection for employers is jeopardized when we cannot adjudicate the rights of the parties in a timely fashion.

These personnel problems notwithstanding, when compared to the rest of the nation, Michigan's Workers' Compensation program continues to have relatively low costs. During this political season, you may hear about business costs in Michigan being a significant barrier to economic development. As for Workers' Compensation, the facts do not support such a conclusion.

- In its 2008 biennial nationwide workers' compensation insurance premium study, the Oregon Department of Consumer and Business Services reported that:
  - Michigan was below the national median of all states for workers' compensation insurance premiums.
  - Michigan insurance premiums are significantly lower in cost than Alabama and Mississippi, states that are often mentioned as low cost labor states.
- Based on the 10th Edition of Workers Compensation Research Institute (**WCRI**) studies, Michigan's workers'

compensation program is described as… "a competitive asset for the state..." Michigan is in a study group consisting of Indiana, Wisconsin, Minnesota, Iowa, Tennessee, Pennsylvania, Texas, Maine, Florida, California, Maryland, North Carolina and some additional references to Louisiana, Ohio and Kentucky. The core study group represents some 60% of all WC benefits paid in the country.

- WCRI concludes: "The Michigan workers' compensation system provided a better value proposition for both employers and injured workers."
- Michigan indemnity costs per claim with more than seven days of lost time that were lower than the study states, including several states that Michigan often competes with for business.
- The average medical cost per claim was 34% lower than the median studied states.
- The duration of disability benefit payment was 5 to 6 weeks shorter than Massachusetts and Pennsylvania; 15 weeks shorter than Louisiana.
- Michigan has lower costs overall as Michigan employers paid 20% less for workers' compensation costs for an average case than the median of the comparison states (IN; IL; WI; MN; IA; TN and PA. Not in the study but with the same result were KY and OH.)
- Michigan has lower medical costs and utilization per claim than typical when compared to the 14-state study group including lower prescription drug utilization and costs.
- Medical costs grew at a slower rate than the typical state.

- Michigan WCA has a national leadership role in **Electronic Data Exchange** (EDI). In its continuing efforts to cut operational costs and improve customer service:
  - We have six insurance groups currently (representing 10 individual insurance companies) filing various mandated insurance forms electronically, including the Accident Fund (the state's largest writer of workers' compensation policies).
  - When fully implemented next year, approximately 50% of all insurance filings received by the agency will be electronic. Last year, we had 293,964 such filings. Over the last 4 years, we have gone from 0% to 36% electronic. Since we have over 200 companies writing WC coverage in Michigan, those that write relatively few policies will still need to have a paper filing option available.
  - Now in the works is the implementation of systems for electronic filing of claims information. Please remember, however, that we are working with a COBAL programmed mainframe computer system that is some 20 years old.

- The **Health Care Services** division, now down to only two people, is developing a web-based system for filing of the Annual Medical Payment Report and the renewal of the Certification of a Carrier's Professional Health Care Review Program. This will reduce paperwork and staff requirements once it is operational. I think many of you know, however, that getting a new system operational can present "challenges." Our cost containment rules and process continues to be a successful tool in keeping medical costs well under control.
- **CMS**, Medicare, continues to be a significant cost factor in terms of both time and money. Although the total number of cases delayed awaiting resolution of CMS issues has gone down for the first time since we started tracking the numbers, in 2010 as of 9/9, over $9,000,000 has been placed in set-aside accounts and conditional payment reimbursements have totaled over $350,000. These payments have occurred in 642 of the 4,204 redemptions that occurred in the time period and are in percentage equivalent of what we have seen in the last three years of tracking.
  - We have been advised that CMS will have a new contractor in place in about 2 months that will be handling the set-asides and conditional payments. I suspect there will be some transitional issues but hope things will move smoothly.
  - The new contractor is: "Medicare Secondary Payer Recovery Contractor" found by Googling MSPRC.

Lastly, in the good news/bad news column is the fact that since we began using the state Average Weekly Wage in 1982 as a factor in the determination of weekly wage loss benefits, the AWW has gone down from the 2009 figure of $834.79 per week to 2010 figure of $828.73. This has resulted in a reduction in the maximum weekly benefit rate being capped at $748, down from $752. This is good news for those paying weekly benefits, not so good for those entitled to receive them. WCRI has reported that our rate capping system has resulted in Michigan injured workers' benefits being lower than what they would be in other states in about 1/3 of our cases.

The Workers' Compensation Agency and indeed Workers' Compensation itself faces significant challenges in the coming years. It will be several months before the new administration comes into office and whatever impact that may have becomes evident. At this juncture, we do not know if there will be any restructuring or other significant changes. Stay tuned ... . 🛠

Michigan Workers' Compensation Appellate Commission Update

By Murray A. Gorchow, WCAC Chairperson

Appointments to the Appellate Commission

Governor Granholm has made three appointments to the Workers' Compensation Appellate Commission. Commissioner **Granner Ries** has been re-appointed to a new term ending September 30, 2014. **James Harvey** has been appointed to complete Donna Grit's term ending September 30, 2011. **George Wyatt III** has been appointed to a term ending September 30, 2014, replacing Roger Will. These appointments stand unless rejected by the Senate within 60 days.

Jim Harvey comes to the Commission from private practice with the firm of Kelman Loria, PLLC, where he was a partner. He has practiced workers compensation, at the trial and appellate levels, as well as social security disability since 1976. He is also a former law clerk to the late Hon. Wade H. McCree, Jr. at the 6th Circuit U. S. Court of Appeals. He is a 1971 graduate of Michigan State University, and received his law degree from Wayne State University in 1974.

George Wyatt comes to the Commission from private practice with the firm of Braun Kendrick Finkbeiner PLC., where he was a senior attorney. His practice focused on civil litigation for over 30 years, with an emphasis on workers compensation proceedings at the trial and appellate levels for the past 20 years. He is a 1971 graduate of the University of Michigan, and received his law degree from Vanderbilt University in 1975.

I am delighted to welcome Jim and George, two very qualified workers compensation practitioners, to the Commission.

Commissioner Donna Grit leaves the Appellate Commission for the SSA

Appellate Commissioner Donna Grit left the Commission at the end of August, to accept an appointment as an Administrative Law Judge with the Social Security Administration. She will be serving close to home in the Grand Rapids SSA hearing office. Our loss is definitely the Social Security Administration's gain. Donna has been a tremendous asset to the workers compensation community, and has well served the people of the State of Michigan. She served on the Board of Magistrates for 12 years from 1994 through 2005 at the Agency's Grand Rapids hearing office. She did so with distinction, earning a well deserved reputation for fairness and for her knowledge and command of the law. She was a prolific and thoughtful opinion writer who was very committed to her work.

Donna brought the same high level of skill, productivity and commitment to the Appellate Commission when she was appointed a Commissioner in April 2006, where she served with distinction for the next 4 years.

Everyone who has worked with Donna has found her a delight to work with on a daily basis. We send Donna our heartiest congratulations and give her our best wishes for every success with her new endeavor.

Commissioner Rodger Will Retires

On September 30, at the end of his current term on the Appellate Commission, Rodger Will retired after ably and honorably serving in the workers compensation community for 44 years. Even before he was appointed to serve on the Commission in 2004, he had already earned induction into the Michigan Workers Compensation Hall of Fame in 2002. Rodger was our Workers' Compensation Section Chairperson from 1997 to 1998, after having served on the Section Council the preceding 6 years. He was a member of our Section every year since he became an attorney.

Rodger began his career in workers compensation in 1966 as an Assistant Attorney General representing the Second Injury Fund and the Silicosis and Dust Disease Fund. See, *e.g.*, *Whitt v Ford Motor Co.,* 383 Mich 726 (1970); and *Rasar v Chrysler Corp*., 382 Mich 169 (1969). He also made his mark as a practicing workers compensation trial and appellate attorney with the firm of Kelman, Loria, Will, Harvey & Thompson from 1971 to 2004, See, *e.g., Wozniak [I] v GMC*, 198 Mich App 172 (1993); and *Wozniak [II],* 212 Mich App 40 (1995). While working at Kelman Loria, Rodger also taught workers compensation at Wayne State University Law School for a number of years during the late 1980's and early 1990s.

At the Commission, we have been the beneficiaries of Rodger's unique historical knowledge of the Act and its evolution over the years through legislative changes and interpretations by the courts. He has been a productive, fair and thoughtful contributor to the work of the Commission, and has well served the people of the State of Michigan.

Rodger is also a delightful and unique personality. His "punny" sense of humor is well known (if not necessarily appreciated)

Appellate Commission Update
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by anyone who has ever come in contact with him for even 10 seconds or read his opinions at the Commission. Although he usually outlasts me, I love attempting to go toe-to-toe with him in a serial pun-off. It is one of the pleasures I have enjoyed from knowing him over the years and having worked with him this past year at the Commission. Rodger is *sui generis*, one of the unique, one-of-a-kind, workers compensation personalities and treasures of our community.

We all send Rodger our best wishes for his well deserved retirement.

Commission "True Majority" Required: When 1+1≠2

In the case of *Torme Findley v DaimlerChrysler Corp*., ___ Mich App ___, (No. 291402, 8/24/10), the Court of Appeals held that if the Commission panel deciding a case does not have two panel members concurring in the fact finding adopted and the legal rationale for the outcome, then there is not a "true majority," and the decision and order must be vacated and remanded to the Commission. In that case, the lead Commissioner wrote an opinion affirming the magistrate's denial of benefits to plaintiff. The second panel member, without more, concurred only in the result reached. The third panel member dissented. Plaintiff appealed. The Court wrote that "in order for a decision of the WCAC to be final and reviewable by this Court, it must be a true majority decision." The Court emphasized that a "concurrence in result only is inadequate for appellate review, as it does not shed light on the factual findings and legal reasoning used by the majority in reaching its ultimate conclusion." The Court added that a "true majority" of the "the WCAC must state the facts it *adopted*, not merely summarize the magistrate's findings, and must also explain its legal reasoning. *Caveat attorneys! Caveat Commissioners!*

Reminder: Read and Follow the WCAC Rules

In *Frederick Jefferson v Trinity Health Michigan et al*, 2009 ACO #52, the case arrived before the Commission "in a procedural tangle." The employer had forfeited its right to both an appeal (since its claim for review had been dismissed because the transcript had not been timely filed [§861a(5)]), and its cross appeal was not timely filed [§861a(6)]. The Commission noted that the dismissal of a claim for review is a substantive adjudication, and does not grant the party the right to file a cross appeal to argue the same matters which it could have argued as a consequence of having filed a claim for review. The prior adjudication of dismissal cannot be reheard as part of a cross appeal. *Guss v Ford Motor Co*, 275 Mich 30 (1936).

In any event, in *Jefferson*, the cross appeal was not timely filed. *A letter purporting to be a cross appeal was filed, timely if it were legally sufficient, but it is not.* Rule 4(1) [R418.4] provides that "[a] cross appeal shall be received by the commission not later than 30 days after the cross appellant has received a copy of the appellant's brief," which is consistent with MCL 418.861a(6). Rule 4(5) further establishes that "[a] cross appeal *shall be filed on the claim for review form* specifically identifying that the party cross appeals the magistrate's decision." [Emphasis supplied.] The Commission footnoted that this rule, effective in 2006, was designed to alter prior practice, which had allowed an appellee to file a brief, timely as a cross-appeal, which left the Commission and the appellant and other appellees guessing as to whether affirmative relief was being sought on an issue requiring a cross appeal to be timely filed. See, *e.g.*, *Schambers v National Redi Mix, Inc*, 244 Mich App 546, 552 (2001). In this case, plaintiff-appellee had relied upon the untimely filings of the appellant-employer, and had not responded to issues raised only by them.

Attorneys who engage in appellate practice before the Commission are advised to always review and comply with the Commission's rules to facilitate the decision-making process on their case, and to avoid any difficulties. 🛠

Invite someone to join the section

http://www.michbar.org/sections/pdfs/app_03v2_exst.pdf

Michigan Workers' Compensation Agency Update

By Kenneth Birch, Chief Magistrate

Since I last wrote for the newsletter, there have been significant changes to the Board of Magistrate which have unfolded one after another and continue at an unprecedented rate. As you may recall, the Board was reduced from 26 to 17 members effective 1-26-10, and myself and Jim Kent had taken a retirement and were back in private practice. In April Val Jarvis took a position as a Federal Social Security Judge; Jim Kent was quickly called out of retirement to help cover the absent dockets in Detroit. On May 30, we tragically lost Magistrate Michael T. Harris who suddenly passed away due to a heart attack. Board Chair, Chris Ambrose, asked if I would be willing to fill Mike's term; I accepted with a heavy heart. In August, Board Chair, Chris Ambrose, Jim Kent, and Melody Paige all were given appointments to be Federal Social Security Judges. The Governor appointed me to Chair of the Board of Magistrate on September 23, 2010.

As the Chair of the Board of Magistrates, my first official communication to the Section has to do with bar cooperation. We are now down to 13 magistrates for the whole state of Michigan and the attorneys who practice in front of us can be very helpful in making these next few months productive for all parties. First of all, let me assure all the members of the Worker's Compensation Section that we are trying cases, and that if there are cases ready to be tried the Magistrates will try the cases. We can use the assistance of Bar in facilitations, being prepared, taking advantage of self-serve dockets, and reducing the number times cases are set for either control dates or trials.

All cases should be facilitated in one way or another before trial. Attorneys may use mediators, Magistrates if available, or probably the quickest and most realistic facilitation is other Comp Attorneys. Pick them and schedule them at the party's convenience at offices or any agency. It is not surprising to see experienced attorneys with intractable cases suddenly find room to compromise when a third disinterested party evaluates their case. Once the cases are facilitated, please try to be prepared when presenting them for trial or redemption. It would be extremely helpful to have all the paper work signed and ready to go when the case is submitted to redeem. Also, we are not discouraging redemption by affidavit in appropriate cases. Early morning redemptions keep our dockets clear and get attorneys on their way expediently; the Magistrate will go out of their way to accommodate early morning redemptions if given adequate notice.

Before trials, exhibits should be exchanged and marked including depositions. Please cull all medical records to only the material or relevant information needed; it does not help to have raw data from lab reports and blood tests. Practice records which in include visits for colds, flues and some highly personal non-work related medical conditions waste the Magistrate time and expose party's personal medical records to being part of an open public record. Trial strategy and preparation is never easy; however, if counsel can pare down the issues and stipulate to undisputed facts, the time consuming writing tasks of Magistrates will be easier to manage.

The self-serve dockets are a way for lawyers to streamline the time they spend at agencies on cases which are not ready for trial. Out side the courtroom, without taking up Magistrate time, attorneys can agree to the next date they return to the agency on any particular case. Some attorneys have traditionally used the agency dockets as their personal tickle system; those attorneys should start to manage their calendar without the use of agency dockets and taking up time in front of Magistrates. The Magistrates expect the attorneys to set self-serve dates far enough into the future that on the next scheduled date something substantial can be accomplished. One or two control dates are adequate before a case is set for trial.

Finally, remember! Our Section has the reputation of being collegial and considerate to each other. Keep treating our sisters and brothers at Bar with respect and dignity and take a little extra time to be conscientious of the situation of the Magistrates.

Pictures from the Spring Dinner

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

Retroactive Application Of *Karaczewski* Overruled

In *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455; _____ NW2d_____ (2010) (SC Docket No. 137500, rel'd July 31, 2010), a majority of the Supreme Court via split opinions overruled the retroactive application of *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007). The controversy in this case relates to the out of state injury provision of the Act, MCL 418.845. In order to understand the Court's ruling in *Bezeau,* the tortured history of the case law interpretation of § 845 must be recalled.

Prior to January 13, 2009, § 845 said that Michigan could exercise jurisdiction over out of state injuries only if the injured employee was a resident of Michigan at the time of injury and was employed under a contract of hire made in Michigan. The Supreme Court, however, read the residency requirement out of the Act in *Roberts v IXL Glass Corp*, 259 Mich 644; 244 NW 188 (1932). After a number of published Court of Appeals decisions in the 1980s that did not follow *Roberts*, the Supreme Court reaffirmed *Roberts* in *Boyd v W G Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993). Then three years ago, in *Karaczewski*, the Supreme Court overruled *Boyd/Roberts*. *Karaczewski* held that the statute was to be applied as written and both the Michigan residency and Michigan contract of hire was required. *Karaczewski* concluded by saying that it's holding applied to all pending cases where there had not yet been a final judgment as of the date of the opinion. The date of the *Karaczewski* opinion was May 23, 2007.

When *Karaczewski* was released *Bezeau* was on remand before the Magistrate, following substantial appellate proceedings unrelated to the jurisdiction issue. Before the Board of Magistrates on remand, defendant argued Michigan did not have subject matter jurisdiction over Mr. Bezeau's claim because he had not been a resident of Michigan at the time of his injury, citing *Karaczewski*. The Magistrate agreed and dismissed plaintiff's claim. That ruling was affirmed by the Appellate Commission and the Court of Appeals denied leave. Plaintiff appealed to the Supreme Court. The Court's recently released decision was the result of that appeal.

The issue was: Should *Karaczewski* be overruled, at least with respect to its retroactive reach? The lead opinion of the Supreme Court was authored by Justice Weaver, with Justice Hathaway concurring. They overrule the retroactive effect of *Karaczewski*, and that point alone. Justice Cavanagh concurred with that result but arrived at his conclusion via different legal reasoning. Whereas Justices Weaver and Hathaway relied upon the *stare decisis* approach articulated in *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), Justice Cavanagh expressed his preference for a modified version of the *stare decisis* approach articulated by Chief Justice Kelly in *Petersen v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009). Chief Justice Kelly concurred with these Justices but would go further and overrule *Karaczewski* in its entirety.

Justice Young, with Justices Corrigan and Markman concurring, dissented and would not overrule any aspect of *Karaczewski*.

The net result is: *Karaczewski*'s holding remains good law but its retroactive reach does not. That is, the holding applies only toto dates of injuries after May 23, 2007, if they have yet to be litigated to conclusion.

But, wait there is more. All of the above has limited practical significance today in light of the fact the Legislature amended § 845, effective January 13, 2009. Section 845 now says Michigan can exercise jurisdiction over out of state injuries "if the injured employee is employed by an employer subject to this act and if either the employee is a resident of this state at the time of injury or the contract of hire was made in this state." This legislation overrules the substance of *Karaczewski* (and goes further than *Boyd/Roberts*). As reported in the last Section Newsletter, the Supreme Court in *Brewer v A.D. Transport Express, Inc*, 486 Mich 50; 782 NW2d 475 (2010) held that this amendment is not retroactive and only applies to injuries occurring on or after its effective date of January 13, 2009.

Court of Appeals

In contrast to the recent history of no published (and few unpublished) Court of Appeals' workers' compensation decisions, there has recently been seven Court of Appeals decisions released with respect to workers' compensation. Two are published and, therefore, can be cited as precedent; the other five are unpublished and non-precedential.

Res Judicata Does Not Bar Second Action Against Statutory Employer

In the published decision *Bennett v Mackinac Bridge Authority*, ____ Mich App ____; ____ NW2d _____ (2010) (CA Docket No. 287628, rel'd August 31, 2010), the Court of Appeals addressed *res judicata*.

Plaintiff was a painter on the Mackinac Bridge. He filed for workers' compensation against his employer on the basis of a work-related injury to his right knee. He "was apparently aware that his employer lacked workers' compensation insurance at the time." His employer did not appear at the hearing. Plaintiff prevailed obtaining an open award of benefits. Unable to collect on the award, plaintiff then initiated a separate statutory principal/"shoot through" action against the alleged principals or general contractors of his immediate employer, pursuant to MCL 418.171. The alleged statutory employers claimed plaintiff's action was barred by *res judicata*. The Magistrate and Appellate Commission agreed. Plaintiff appealed the dismissal of his case on *res judicata* grounds to the Court of Appeals, which granted leave.

The Court then ruled that plaintiff's § 171 action was not barred by *res judicata* and remanded the case for reinstatement of plaintiff's claims against the alleged statutory principals. The Court grounded its ruling on the fact that there was no mandatory joinder requirement in the statutory principal provision. The Court said there was no obligation on plaintiff's part to join the alleged statutory principals in the initial action because, with one exception, the Act does not require the joinder of parties in workers' compensation proceedings. The Court added that "although it may have been unwise for plaintiff to believe that Allstate [his immediate employer] would have sufficient assets to pay his workers' compensation benefits, there was nothing inherently improper in plaintiff's initial decision to proceed against his uninsured direct employer only."

The Court concluded by saying that on remand plaintiff "may not invoke the doctrine of res judicata offensively" to bind the alleged statutory principals with the open award previously determined because the alleged statutory principals did not have notice of the initial action. This case has been appealed to the Supreme Court.

Split Opinions From The Workers' Compensation Appellate Commission

In the other published decision, *Findley v Daimler Chrysler Corp*, ____ Mich App ____; ____ NW2d _____ (2010) (CA Docket No. 291402, rel'd August 24, 2010), the Court of Appeals addressed the legitimacy of decisions from the Workers' Compensation Appellate Commission's three-person panels where there is a lead opinion, a concurring in result opinion, and a dissent. The question presented was: Is there a true majority opinion in such circumstances?

The Appellate Commission's specific opinion was authored by one Commissioner with a second Commissioner concurring in the result only. The third Commissioner dissented. There have been a number of decisions from the Appellate Commission like this in the last couple years. In fact, *Findley* had originally been consolidated with three other cases raising this common issue, but *Findley* was ultimately decided on its own by the Court. The Court in *Findley* held that "no true majority opinion exists" under these circumstances "because a majority of commissioners did not agree as to the critical facts of the matter." The Court said that a concurrence in result does not "shed light on the factual findings and legal reasoning used by the majority in reaching its ultimate conclusion." The Court found such decisions from the Appellate Commission "not properly reviewable" and remanded the case to the Commission for a proper opinion. This case has been appealed to the Supreme Court as well.

Proximate Cause Standard In Fatal Heart Case

In the unpublished case *Paige v City of Sterling Heights*, rel'd May 18, 2010 (CA Docket No. 290377), the Court of Appeals affirmed the award of death benefits on the basis that the factfinding below had the requisite factual support.

This case had already amassed a long history, having previously produced a Supreme Court opinion: *Paige v City of Sterling Heights*, 476 Mich 495; 720 NW2d 219 (2006). The Supreme Court had remanded the case to the Magistrate for determination of whether the claimant met the "*the* proximate cause" standard in MCL 418.375(2). This provision requires that in non-instantaneous death cases the claimant demonstrate the work-related injury was "the proximate cause" of the death. Here, the decedent suffered a heart attack in 1991 that was adjudicated to be work-related during his lifetime. He suffered a fatal heart attack ten years later in 2001 after having long ceased work.

The Magistrate on remand found the work-related heart attack to be "the proximate cause" of the later death and the Appellate Commission affirmed.

The Court of Appeals granted leave and likewise affirmed. The Court said the Appellate Commission had properly found that the most immediate, efficient, and direct cause of the death was coronary artery disease, which had already been determined to be work-related in the lifetime action. The Court also cited medical testimony to the effect that the decedent's left ventricle did not contract normally as a result of his prior heart attacks as well as the cumulative damage from myocardial infarctions. The Court said it would not substitute its judgment for factual findings that have the requisite record support.

Denial Of Benefits For Injury While Traveling Reversed

In *Salenbien v Arrow Uniform Rental Limited Partnership*, unpublished Court of Appeals' decision, rel'd September 16, 2010 (CA Docket Nos. 291517 and 291543), the Court reversed a denial of benefits by the Appellate Commission and Magistrate in a case where an employee sustained serious

injuries in a multi-vehicle accident just after completing a sales call on the employer's behalf.

Plaintiff worked as a salesperson that entailed travel on sales calls. He had just completed a sales call on his employer's behalf minutes before becoming involved in the multi-vehicle accident. His automobile insurance carrier commenced workers' compensation proceedings to recover the no-fault benefits it had paid on his behalf from his employer. Thereafter, plaintiff also initiated workers' compensation proceedings for the same injuries.

The Magistrate denied plaintiff's claim noting that the general rule is that an employee injured on the way to or from work is not entitled to benefits, unless the claimant demonstrates the case fits within one of the recognized exceptions to the rule. The Magistrate concluded the general rule applied in this case. In a 2-1 decision, the Appellate Commission affirmed. The Appellate Commission noted, amongst other things, plaintiff had no memory of where he was headed after leaving the sales call.

The Court of Appeals reversed. The Court first rejected the no-fault carrier's and plaintiff's argument that plaintiff's destination after leaving the sales call was irrelevant. The Court said that if plaintiff had completed the purpose of his sales meeting and was en route home or on a personal trip, then his injuries would not be deemed work-related. The Court said a "non-work-related destination at the time of the accident would remove plaintiff's injuries from the scope of the WDCA, while a work-related destination would bring his injuries within the ambit of the WDCA."

But, the Court agreed with plaintiff that, while plaintiff had no memory of his intended destination after leaving the sales call, there was "significant circumstantial evidence that plaintiff's destination at the time of the accident was defendant's Jackson office, where he intended to perform tasks in furtherance of defendant's business." The Court cited evidence that supported that conclusion and said that:

> In light of this circumstantial evidence and the magistrate's finding that plaintiff's friend and his cousin provided "reliab[le]" testimony, the [WCAC] majority's conclusion that plaintiff had failed to establish by a preponderance of the evidence that his destination at the time of the accident was work-related is not supported under the any competent evidence standard.

The Court therefore reversed the denial and remanded for proceedings consistent with the opinion.

Necessity To Prove That "Wage Loss" Is Related To Work-Related Disability

In *Finley v Sam's Club*, unpublished Court of Appeals' decision, rel'd May 18, 2010 (CA Docket No. 289437), the Court reversed the Appellate Commission's and Magistrate's open award and remanded the case relying upon *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 8; 760 NW2d 586 (2008).

Plaintiff was a licensed optician. She had worked for Sam's Club and claimed a work-related disability in the form of carpal tunnel syndrome. The reason for her termination of employment at Sam's Club, however, "was plaintiff filling an expired prescription in violation of the law and company policy."

Both the Magistrate and Appellate Commission ruled in plaintiff's favor concluding that she had demonstrated disability. Defendant argued on appeal that – even if plaintiff did prove "disability" under the first sentence of MCL 418.301(4) and *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002) – plaintiff was not entitled to weekly benefits because she had failed to satisfy the second sentence of § 301(4). That sentence says "[t]he establishment of disability does not create a presumption of wage loss." Quoting *Romero*, the Court explained:

> "'an employee must establish a work-related disability under MCL 418.301(4) *and* demonstrate that the disability resulted in wage loss.' *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 8; 760 NW2d 586 (2008) (citation omitted and emphasis added). In *Romero*, this Court stated that even if an employee showed a disability, the employee must further prove wage loss. *Id*. 'Additionally, the employee's unemployment or reduced wages must be causally linked to the work-related disability.' *Id*. at 8-9 (citations omitted). The panel in *Romero* made clear that there must be a linkage or causal connection between the injury or disability and the wage loss in order to establish a loss that gives rise to a right to benefits. *Id*. at 9." (Emphasis in original).

The Court held that "by focusing only on plaintiff's wage earning capacity, i.e., her 'disability,' and never specifically addressing whether that 'disability' resulted in actual wage loss," the Appellate Commission legally erred. The Court remanded the case for consideration of the wage loss issue consistent with *Romero*.

Remand To Set Hourly Rate For Attendant Care And Home Modifications

In *Curry v American Axle & Manufacturing Co*, unpublished Court of Appeals' decision, rel'd July 8, 2010 (CA Docket No. 292403), the Court remanded a case where attendant care and home modifications had been awarded.

The Magistrate had granted attendant care benefits of four hours per day. The Magistrate added "the 'record does

not establish an appropriate hourly rate for the attendant care services' and consequently left it up to the parties 'to agree to a reasonable rate' or request a hearing on the issue." On appeal to the Appellate Commission, the Commission set the rate at $6.00 per hour with reference to a prior final decision from the Magistrate. The Court of Appeals reversed on the rate question. The Court said that where the record is silent on the current rate for attendant care services the case must be remanded for the Magistrate to take proofs regarding the rate because the trial "proceedings eliminated the opportunity to present the evidence at a hearing to complete the record."

In a similar vein with respect to the home modifications found reasonable and necessary, the precise cost of such modifications was never resolved. It was left to the parties to agree amongst themselves or apply for a hearing if they could not agree. Again, the Court of Appeals said the burden was on the plaintiff to establish this point and "it was improper for the magistrate and WCAC to invite the parties to resolve the reasonableness issue. Where the record clearly supports that home modifications are necessary, the matter is remanded for the magistrate to take proofs regarding specific modifications and the anticipated cost."

Workers' Compensation Appellate Commission's Reversal Affirmed

In *Baldwin v American Axle & Manufacturing Holdings*, unpublished Court of Appeals' decision, rel'd August 12, 2010 (CA Docket No. 291117), the Court – on remand from the Supreme Court – affirmed the Appellate Commission's reversal of an open award of benefits.

Plaintiff claimed a work-related injury to her lower back. The Magistrate found in plaintiff's favor. On appeal to the Appellate Commission, the Commission reversed after closely reviewing the medical evidence, plaintiff's testimony, and the Magistrate's basis for the award. Plaintiff appealed that reversal to the Court of Appeals where leave was denied. On further appeal to the Supreme Court, the Supreme Court remanded the case to the Court of Appeals to hear on leave granted.

The Court of Appeals on remand rejected plaintiff's argument that the Appellate Commission engaged in *de novo* review by finding the factual basis for the Magistrate's decision unconvincing. The Court said:

> We believe that the WCAC properly reviewed the matter within the confines of its statutory standard of review. It is clear to us from the WCAC decision that the WCAC was duly cognizant of the deference to be given to the magistrate's decision. However, the WCAC is required to review the magistrate's decision under the "substantial evidence" standard, which permits the WCAC to consider the entire record of the hearing, including all of the evidence in favor and all of the evidence against a certain determination. The WCAC thoroughly explained how Dr. Tong's testimony, plaintiff's testimony, Dr. Buszek's testimony, and the MRI evidence did not provide competent or credible support for the findings for which the magistrate cited the particular evidence. It is apparent to us that the WCAC properly engaged in the requisite comprehensive review of the "whole record" and explained why the record was inadequate to justify the magistrate's findings and why, consequently, deference to those findings was not warranted.

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Results are free and available for year-end planning in December. Free assistance will be available to help you internalize findings. Separate surveys are offered for private and non-private practitioners to help avoid wading through inapplicable questions. The survey should take 15 minutes to complete. You can stop and restart where you left off at any time as long as you use the same computer.

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