State Bar of Michigan

Workers' Compensation Section Newsletter

Fall 2011

Contents

From the Chair

As the World Turns

The Council of the Section met on September 9, 2011. The purpose of this meeting was to review and vote on whether the Council, and the Section, through the Council, could support changes being proposed in the Workers Disability Compensation Act.

The Council did vote to support a number of the proposed changes in the Act submitted by the Committees previously established by the Council during the August 22, 2011 meeting. The proposed changes which garnered the support of the Section Council will be submitted to the membership in e-mail blasts to be sent out in the next couple of days. I am exceedingly proud of the work the Council has done.

When I wrote my first article for this publication I had a number of questions concerning this ongoing assault on the Workers Disability Compensation Act. I have been able to get some information but I am still without definite answers concerning those questions.

Apparently the Self Insureds and the Chamber of Commerce are the driving forces behind this movement. Drafts of proposals for the Self Insureds and authored by persons known and not named here are the basis for, and identical to, legislation which will be introduced in the legislature soon...in days or weeks. The Actions of the Council and the Section in drafting and supporting proposals was in response to this proposed legislation which was foreseen as being readied for immediate introduction/passage. The Council acted to see that the Sections voice and position with regard to such legislation could be established and communicated to the legislature in the event that the proposal hit the legislatures floor and proceeded with lightening speed.

The Section Councils vote does not support the circulated proposal attributed to the Self Insureds. It must be remembered that the Section and the Council do not propose legislation. We are called upon to comment and suggest support or opposition to legislation and suggest changes that will improve the practice of the law to the betterment of all of our clients. What we have done is to prepare a position of the Section and the Council to present to the legislature and its members who ask for it. THEY MAY NOT ASK FOR IT.

We have done what can be done. We may be a voice crying out in the wilderness or we may be the voice of reason amidst a confusion of specific interests. We hope our opinions will be sought. In the meantime....the world turns.

Sincerely, *John M. Sims*

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

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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MSPRC Self-Service Information Feature

The MSPRC is adding a Self-Service Information feature to its Customer Service Line. This new feature gives callers the ability to get the most up-to-date Demand and Conditional Payment amounts as well as the dates those letters were issued without having to speak with a Customer Service Representative. Some additional benefits include:

Extended Calling Hours - This new feature is available 24 hours a day, 7 days a week. Callers can now get case information outside of the MSPRC Hours of Operation.

No Wait Time - With the Self-Service Information Feature, there is no wait time to get case information. Callers no longer have to experience the wait time associated with speaking to a Customer Service Representative.

Unlimited number of cases inquiries on one phone call - Callers involved with multiple recovery cases can request information on additional cases with the same call.

Callers will need the following information to utilize the Self-Service Feature:

- Case identification number (found on all MSPRC correspondence)
- Beneficiary's date of birth
- First five letters of the Beneficiary's last name as it appears on their
- Medicare card
- Last 4 digits of Beneficiary's Social Security number (or full Medicare number)

The Self-Service Feature went live on September 30, 2011. 🛠

Legislation Introduced

Legislation was introduced in the Senate regarding WC changes:

SB 708 - Introduced by Sen. Mark Jansen: Worker's compensation; definitions; definition of disability and conditions on compensation for covered injuries; modify. Amends secs. 301, 315, 331, 353, 354, 360, 361 & 801 of 1969 PA 317 (MCL 418.301 et seq.); adds sec. 306 & repeals ch. 4 of 1969 PA 317 (MCL 418.401 - 418.441).

Link: *http://legislature.mi.gov/doc.aspx?2011-SB-0708* 🛠

Editor's Note: *Since this article was written, HB 5002 and SB 708 were introduced and the Section presented its position to the House Commerce Committee during its hearings.*

Notes from the Director

By Kevin Elsenheimer, Director, WCA

When I came on board as Director, I received some sage advice from a longtime comp lawyer. "The practice of workers' comp is unlike anything you've ever seen," he said. "We have our own ways of doing things, but it works."

My advisor was right on both counts, but one element of the work comp litigation culture does concern me. The cultural practice of ex parte communication needs to change.

I get calls every two or three weeks from lawyers complaining about opposing counsel or opponents, or railing on about how the spirit of the Act is being violated, and asking me what I'm going to do about it. I can't help but ask myself whether a circuit judge would ever receive a call like that. In speaking with other administrative hearing officers, I know I'm not alone.

Our attorneys need to remember that while Magistrates and the Director may be administrative (versus judicial) hearing officers, all attorneys must conform their professional behavior to our Michigan Rules of Professional Conduct. Rule 3.5 states that a lawyer shall not:

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; [or]

(b) communicate ex parte with such a person concerning a pending matter, unless authorized to do so by law or court order[.]

The rule is clear, and it applies to practice involving the Workers' Compensation Agency and the Michigan Administrative Hearing System. While the practice of law in workers' compensation may be unique, its uniqueness does not equate to a pass on the Rules of Professional Conduct. If you are going to call me or any other hearing officer regarding a pending matter, have your opposing counsel on the line. 🛠

Board of Magistrates Update

By Lisa Klaeren, Magistrate

On August 8, 2011 the Board welcomed a new magistrate, Robert C. Timmons. Magistrate Timmons has taken the place of Jay Quist with a term ending January 26, 2013. He comes to the Board from private practice in Grand Rapids and has served as a special assistant attorney general in the defense of State Funds Administration. Magistrate Timmons will be handling dockets in Traverse City, Gaylord and Dimondale.

With the appointment of Magistrate Timmons, the Board of Magistrates is operating with a full staff of seventeen. No reappointments/appointments are expected until January 2013, when nine of the seventeen magistrates' terms expire.

As I indicated in the Summer 2011 Newsletter, the Board has (and continues) to make great strides in improving productivity. The average time for an Opinion to be issued following trial is vastly improved, and efforts continue to shorten the number of days the record is open for greater than thirty days. All of this information will soon be available on the Agency website.

Magistrates are continuing to focus on minimizing the number of aged cases on their dockets. Each magistrate handles their docket individually and with this goal in mind. The Section members should be aware of the need to resolve these cases and prepare accordingly.

The Board of Magistrates will be meeting in mid-October to review our status and to set goals for the future. Comments or suggestions from attorneys are always welcome and can be sent to me at: klaerenl@michigan.gov. 🛠

But Did You Know...

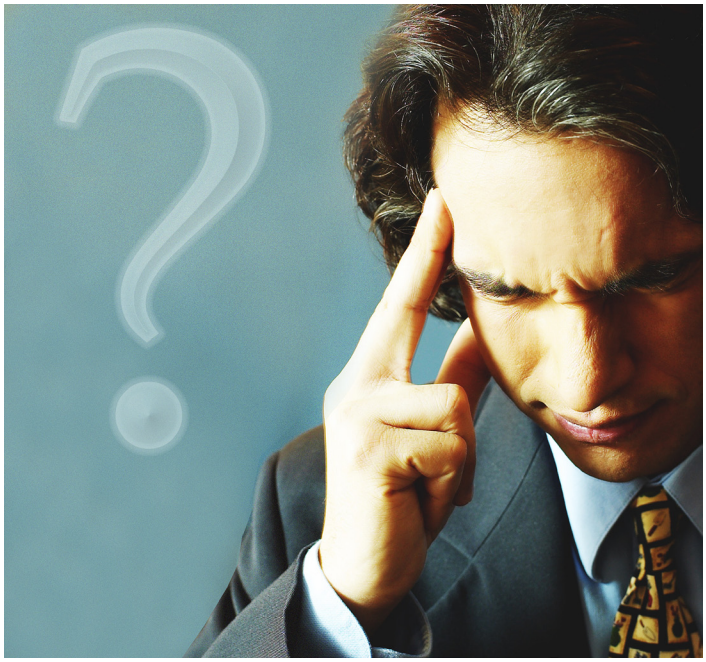
By Martin L. Critchell

Most, if not all, practitioners are familiar with the statute in the workers' compensation act that allows settling a claim for workers' compensation by saying that, "After 6 months' time has elapsed from the date of a personal injury, any liability from the personal injury may be redeemed by the payment of a lump sum by agreement of the parties, subject to the approval of a workers' compensation magistrate." MCL 418.835(1). But did you know that there are two other statutes that describe alternatives for concluding a claim to compensation.

MCL 418.655(a) and (b) say that,

> "Any employer against whom liability may exist for compensation under this act, with the approval of the director, may be relieved therefrom by:
>
> (a) Depositing the present value of the total unpaid compensation for which such liability exists, assuming interest at 3% per annum, with a trust company of this state designated by the employee, or by his dependents, in case of his death and such liability exists in their favor, or in default of such designation, after 10 days notice in writing from the employer, with a trust company of this state designated by the director.
>
> (b) Purchasing an annuity, within the limitations provided by law, in any insurance company granting annuities and licensed in this state, which may be designated by the employee, his dependents or the director, as provided in subdivision (a)."

These laws can apply whether a claim was previously paid voluntarily or never paid at all because in each situation "liability *may* exist." These may be most appropriate in a claim by the survivors of an employee who has died because of an injury at work because the amount and the duration of any liability is more definite than



with an injured employee who may or may not recover or may or may not need expensive medical care.

While the discount is not substantial at three percent, it is just that which may appeal to both claimants and employers. The discount is just about the same as the prevailing rate of the ten year Treasury note. A claimant has a nominal return that is just about the same as the return in the open market for capital with about the same security as the debt of the U.S. And an employer avoids the cost of either prolonged or declining rates.

Section 655(a) and (b) have none of the limitations of redemption under § 835(1) and MCL 418.836(1)-(4). There is no time before using § 655(1) (a) or (b) as there is for redemption under § 836(1)-(4). Indeed, the agreement of a claimant does not appear to be necessary because both § 655(a) and (b) only require the approval of the director of the workers' compensation agency and then only about the particular institution to which the deposit occurs.

Caselaw Update

By Martin L. Critchell

Supreme Court

The Michigan supreme court released two orders just before the end of the 2010-2011 Term on July 31, 2011. *Umphrey v Gen Motors Corp*.[1] *Vrooman v Ford Motor Co*.[2] In each, the Court said that the amount of weekly compensation depends on the extent of the disability experienced by an employee at any given time after an injury at work and not the amount that an injured employee actually earned at later work on the authority of *Lofton v AutoZone, Inc*,[3] in which the Court had said that, "If it is found that [the injured employee] is disabled under MCL 418.301(4), but that the limitation of wage-earning capacity is only partial, the [board of magistrates] shall compute wage-loss benefits under MCL 418.361(1) on the basis of what the [injured employee] remains capable of earning." In the case of *Umphrey*, the Court relied on the pronouncement in *Lofton* by saying that, "The [workers' compensation appellate commission] erred in summarily rejecting [the employer's] contention that an evaluation was required pursuant to *Lofton v AutoZone, Inc*, 482 Mich 1005 [756 NW2d 85] (2008). If it is determined that the [injured employee] is only partially disabled, then a calculation of wage loss benefits must be made pursuant to MCL 418.361(1) . . ." And in the case of *Vrooman*, the Court again relied on *Lofton* by saying that, ". . . we remand this case to the Board of Magistrates for additional findings of fact and conclusions of law, for the reasons stated in the [workers' compensation appellate commission] dissenting opinion. See *Harder v Castle Bluff Apartments*, 489 Mich 951 [- NW2d -] (2011); *Lofton v AutoZone, Inc*, 482 Mich 1005 [756 NW2d 85] (2008)."

These orders should end any questions about the authority of *Lofton*. The Court was nearly unanimous in deciding *Umphrey* and *Vrooman* on the basis of *Lofton*. Only Justice HATHAWAY disagreed with the peremptory disposition and offered no direct criticism of *Lofton*. She only thought that the problem warranted plenary consideration. Indeed, the reason for the pronouncement by the Court may have been the realization that the commission and board had deliberately denied the earlier pronouncement of the case of *Lofton* as having no binding effect or as an outlier as the commission had said in deciding *Umphrey*.[4] ("As we have said before, we do not believe that the *Lofton* order is binding in other cases. The Michigan Supreme Court issued a number of orders following its decision in *Stokes* and only *Lofton* mentioned the § 361(1) issue [about partial compensation for partial disability]. We do not know why. Perhaps *Lofton* was unique . . .") But after the immediate and near-unanimous decrees by the Court in *Vrooman* and *Umphrey*, it should be clear to the commission and magistrates that *Lofton* **is** binding.

The Court has not released an order or opinion deciding a compensation case since the beginning of the 2011-2012 Term on August 1, 2011.

Court of Appeals

The Michigan court of appeals decided the case of *Morgan v Gen Motors Corp*[5] on July 26, 2011. The problem involved the specificity of the claim for compensation because of a disease, cancer. Joshua Morgan said in the application for mediation or hearing that he had cancer from his exposure to chemicals at work from his first day until his last day of work at GM. The last day of work was determined to be no date of injury because Morgan "did not contract cancer on May 9, 2005, as he had been diagnosed prior to that." *Morgan*.[6] But last day of *exposure* was allowed over the objection that the particular day had not been stated in the application. The court of appeals reasoned that GM had not been misled as required under the first sentence of MCL 418.383. ("a claim for compensation . . . shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead, and the employer or the carrier was in fact misled.") *Morgan*.[7] ("[The] application for hearing or mediation [sic] was sufficient to inform [GM] that [Morgan] was claiming an injury based on continuous exposure . . .")

continued on the next page

Caselaw Update ... Continued from page 5

Morgan is important because it represents one of the few decisions about the specificity required for a claim under § 383.

Workers' compensation cases since the last newsletter

Compensation appellate commission

Hurt v City of Oak Park[8] was issued by the compensation appellate commission on August 23, 2011. It is noteworthy only as the first decision since the reorganization of the system for the administrative review of compensation cases. The issues in the case—the adequacy of the evidence for the decisions of fact and the addition of a fee in addition to the cost of medical care—are not remarkable.

Endnotes

1 489 Mich 978; - NW2d - (2011).

2 489 Mich 978; - NW2d - (2011).

3 482 Mich 1005; 756 NW2d 85 (2008).

4 2010 Mich ACO 85 at 2.

5 Unpublished opinion of the Court of Appeals, issued on July 26, 2011 (Docket no. 298278).

6 *Id.* at 2.

7 *Id.*

8 2011 Mich ACO 104.

Practice EZ Shortcuts from the State Bar of Michigan Practice Management Resource Center

Navigate your **documents** easier with these shortcuts. Keep them by your computer along with our resource center information to help manage your practice.

Command Name	Shortcut Keys
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Center	CTRL+E
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Cut	CTRL+X
Delete Back Word	CTRL+BACKSPACE
Delete Word	CTRL+DELETE
Dictionary	ALT+SHIFT+F7
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Font change	CTRL+D
Hyperlink	CTRL+K
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Save As	F12
Select All	CTRL+A
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Web Go Back	ALT+LEFT
Web Go Forward	ALT+RIGHT